Dallas Bar Association

HEADNOTES

September 2020 | Volume 45 | Number 9 | Focus | Family Law

Jerry Alexander and Leon Carter

The Alexanders and Carters: Six Feet Apart, but Together for DVAP

BY MICHELLE M. ALDEN

In a year of unprecedented change, disruption and division, **Jerry** and **Sherri Alexander** have joined forces with **E. Leon** and **Debra Carter** to support the Dallas Volunteer Attorney Program's (DVAP) Equal Access to Justice (EAJ) Campaign with major gifts of $25,500 per family. These leaders in law and philanthropy agreed to match each other's contributions, leading to a very impactful joint donation of $51,000 in total! The Carters and the Alexanders are mindful of the extra challenges facing DVAP this year.

Not only are they conscious of the financial challenges, but also of the unique divisions that our country seems to be in at this time. The act of two families of different races, who respect and love each other, coming together to stand up for the same ideals—helping those who need it. That says it all.

"Not only do Leon and I love each other, but we love the same thing—DVAP and the equality and inclusion it has always stood for," said Jerry. "There are good organizations and ideals that transcend the times, and just need to keep on keeping on. DVAP is one of those."

"Because I have so much love and respect for Jerry, I jumped at the opportunity to be a part of this with him," added Leon. "Even though there are many things going on this year, including a pandemic and major protests, the needs of DVAP and the people it serves have not gone away, but have deepened. Having equal access to justice is one way we can achieve social justice."

Jerry agreed. "Any contribution to DVAP this year is especially important. Contributions this year are based on generosity and not on abundance. Everyone, it seems, is having a 'bad year' business-wise, so donations will undoubtedly be down. However, we must remember that the people who need the assistance of attorneys but cannot afford them are also having a bad year, not only in their business or employment, but in additional ways that have caused their need."

The pandemic crisis, sheltering, and lock downs have exacerbated the challenge that Dallas County and DVAP already faced by increasing the population at or below the poverty line. And those already in need were placed into an ever-worsening situation. The low-income population served by DVAP currently faces increased threats and needs assistance, especially in the areas of employment, landlord-tenant, domestic violence, and family law.

In order to address the increasing needs, DVAP has set up Virtual Legal Clinics to replace its traditional in-person clinics, and has held a general intake clinic each Thursday since mid-April. The applicant completes an online form to start their application, using either a desktop computer or a smartphone, and then is informed to expect a call from a volunteer attorney on the day of the clinic. The attorney's notes from the interview are returned to DVAP, where the staff evaluates the case and attempts to place it with a volunteer for full representation.

Recently, DVAP has moved its Wills Clinics and Driver's License Restoration Clinics to the virtual realm, with the Veterans Clinic ramping up to go virtual this month. As the era of social distancing appears to be the new normal for the foreseeable future, DVAP continues to develop alternatives to meet the needs of low-income Dallasites.

As Jerry stated, "Everyone who enters the legal system needs representation in that system. If a lawyer believes otherwise, they hold a belief that is contrary to the very existence of the profession we are all a part of."

"Debra and I truly believe that equal justice is not only an ideal worth pursuing, but it is a spiritual mandate imposed

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Contractual Protections for Postponed Nuptials

BY LAURA H. CASTON

The outbreak of the Novel Coronavirus, COVID-19, and the global response to the pandemic, has had a significant impact on important life events—including the 2020 wedding season. While many brides are preoccupied with whether they need to change their seasonal color scheme or the best way to store a wedding dress until the big day, a far more important consideration is the legal and financial impact of postponing (or indefinitely cancelling) a wedding.

What is a Cohabitation Agreement?

A cohabitation agreement is a contract between unmarried persons that outlines what constitutes a marriage between unmarried persons, and how jointly acquired assets and liabilities will be divided in case of a pre-marriage break-up. While a premarital agreement (agreement on division of property entered in to before marriage) may already be contemplated, a premarital agreement is only effective upon divorce following a marriage. On the other hand, a cohabitation agreement can go into effect immediately and is a nice security blanket just in case the dream wedding just does not happen.

Common Provisions for a Cohabitation Agreement:

While each cohabitation agreement will be specifically tailored to the parties' unique needs, below are a few common provisions to consider including in a

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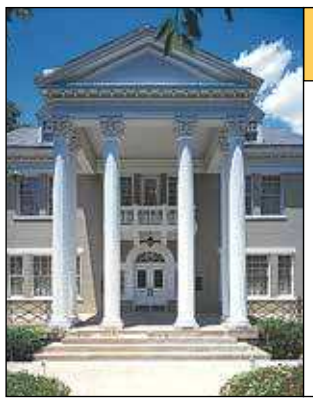

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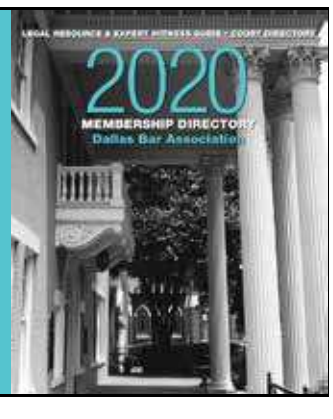


All meetings and events subject to change in connection with the ongoing coronavirus situation. Please check www.dallasbar.org and DBA Online enewsletter for current notices.

DBA COVID-19 RESOURCE CENTER

The DBA has formed a Coronavirus Task Force, which will provide members with up-to-date information in one location about legal ramifications of COVID-19, including CLE, legal research, and Dallas courts' COVID-19-related orders and procedures. Go to www.dallasbar.org/COVID19Resources to see the DBA's webpage on COVID-19.

Announcements

American Bar Association Resources

Community Outreach

Court Closures, Announcements, and Orders

Dallas Law Firm COVID-19 Websites

Government Resources

Legal and Community Resources

State Bar of Texas Resources

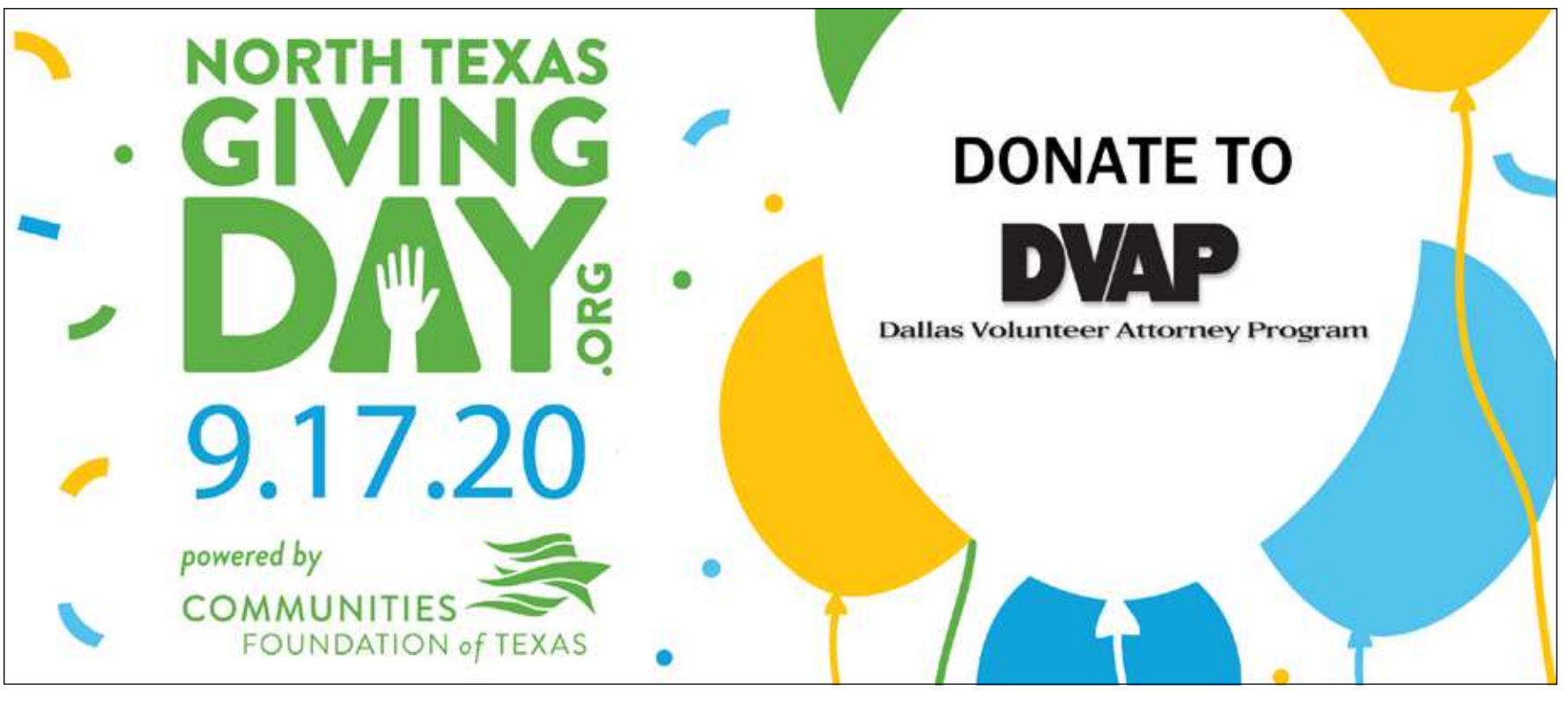
TEXAS LAWYERS' ASSISTANCE PROGRAM
Confidential. Respectful. Voluntary.

Texas Lawyer Assistance Program

DBA Webinars/Zoom Conferences

White Papers & Articles

Additional Resources



If special arrangements are required for a person with disabilities to attend a particular seminar, please contact Alicia Hernandez at (214) 220-7401 as soon as possible and no later than two business days before the seminar.

All Continuing Legal Education Programs Co-Sponsored by the DALLAS BAR FOUNDATION.

For confirmation of State Bar of Texas MCLE approval, please call Grecia Alfaro at the DBA office at (214) 220-7447.
For information on the location of this month's North Dallas Friday Clinic, contact yhinojos@dallasbar.org.

President's Column

Unplugging—We All Need to Do It!

BY ROBERT TOBEY

This column originally was slated for the April edition of *Headnotes*. Then the pandemic hit. Our mental health is under assault now more than ever with lawyers largely working from home and dealing not only with financial and job pressure, but also with educating kids, cooking, and cleaning. Even with all of these factors and added responsibilities, lawyers still are expected to be on call at all times and working efficiently and profitably. This existence is exhausting, frustrating, and very stressful. With all of these stresses, I want to focus on one that predominates in both before and during the pandemic—the inability to unplug.

To contrast our current work environment whether in the office or at home, when I began practicing law back in the Stone Age (1980), written communications between lawyers went like this:

- I would open the mail and read a letter;
- I would dictate a response on my Dictaphone (yes, we had those in 1980);
- My legal assistant would type the letter and give it back to me;
- I would revise the letter;
- My legal assistant would type the revisions; and
- I would proof the letter again before sending it to opposing counsel.

Several days later, I would receive a response and the process would repeat itself.

In the late 1990s, email became our primary mode of communication. Now, the entire process took just minutes—sometimes seconds.

The next innovation was the Blackberry—a device that meant lawyers always were on call. Lawyers became addicted; the Blackberry became known as the Crackberry. Although iPhones and Androids eventually vanquished the Blackberry, this concept of always being on call remains with us today.

Before the Blackberry, when lawyers really were off the clock when they went home. Their evenings were spent with family or non-legal activities. Lawyers could recharge their batteries in preparation for the next day at the office.

As part of our Project 2020 strategic planning process, we surveyed our members and received 550 responses. Two of the questions were: "**What are the three most significant challenges you face in your practice-setting?"** and "**What are the most significant challenges facing Dallas-area lawyers?"** By far the largest number of responses complained about a lack of a work-life balance. Here are a few examples:

1. "Always expected to be available."
2. "No time for anything."
3. "Balancing work/life-making time for myself."
4. "When I am at work, I think about home; when I am home, I worry about work."
5. "Need it now mentality of today's world."
6. "Finding enough hours in the day."
7. "The myth of work-life balance."
8. "STRESS."

Lawyers have told me that they sleep with their phones! They truly feel they are expected to be on call 24/7/365. Otherwise, they will be replaced. Facing these pressures, it is no wonder lawyers burn out, quit the practice of law, or perhaps even develop substance-abuse problems.

The statistics about substance abuse and suicide rates among lawyers are alarming. A 2016 ABA study reported that 21 percent of licensed attorneys are problem drinkers and 28 percent struggle with depression. And these problems increasingly afflict the youngest members of our profession. Of lawyers in their first 10 years of practice, 32 percent are problem drinkers, 46 percent suffer from depression, and 11 percent have suicidal thoughts. These are much higher rates than in the general public.

So, what can we do? We asked Jillian Jones Hill—a lawyer and a clinician with the Brain Performance Institute—for tips to help lawyers unplug. Here are her suggestions:

Designate times to deal with email. Too often, we get stuck in a cycle of checking and responding to emails as they come in—even for lower-priority emails that do not require an immediate response. Designate chunks of time throughout your day to deal with emails (for example, designate the last 10 minutes of each hour to email maintenance).

Block off time for single-tasking. Toggling between multiple tasks simultaneously results in shallow thinking. And multitasking triggers the release of the hormone cortisol, contributing to chronic stress. Select a specific objective that can be accomplished within a designated window of time with focused effort. Even with limited chunks of distraction-free work, you will accomplish more than you would have in longer periods of toggling.

Take brain breaks. Attorneys have a unique relationship with the "just push through" mentality. Many attorneys engage in a game of one-upmanship in which they wear as a badge of honor how many 14-hour days they have worked in a row, how few vacations they have taken, and how little sleep they get every night. But these practices are toxic to brain health and inhibit reasoning, problem-solving, and integration/application of information necessary to the practice of law. Proactively build in cognitive down-time throughout the day. Start with a practice called the **5x5**—five minutes, five times throughout your day of cognitive down-time when you are not actively pushing your brain toward any one task and are not taking in more information. This means no technology! Take a walk around the office, get some fresh air, or sit quietly in your office with dimmed lights. Stop whatever task you are doing at least five minutes before a meeting to let your brain recharge. Drive home in silence to allow your brain to cycle through racing thoughts.

Practice digital detox in other areas. If you simply cannot unplug without stressing, start looking for ways to reduce your digital connectedness.

Down-select the amount of information coming in. Do not click on every link, watch every video, read every article.

Reduce environmental distractors in the workplace. Turn off TV/music while working.

To enhance focus and improve single-tasking, close extra windows/tabs on your screen when working on a specific task. Minimize your email screen and silence your notifications.

Set aside designated times to check social media or engage with apps and games. Avoid the temptation to immediately engage with technology during free time. Use those activities as a reward you engage in at certain intervals throughout your day.

Adopt a healthy lifestyle, including plenty of exercise, proper nutrition, enough sleep, practicing mindfulness, and finding a sense of purpose.

In time, the growing mountain of research on how constant connectivity, immediate responsiveness, and the idea that "more is more" negatively impact our cognitive performance and mental health should resonate with law firms. Until then, each of us must take charge of our own health and commit to adopting brain-healthy habits to build the resilience needed to cope with the demands and pressures of the legal industry.

If you or someone you know is having problems, there are wonderful resources available through the Texas Lawyers Assistance Program (www.TLAPhelps.org) and the DBA Peer Assistance Committee. TLAP is anonymous, so please help someone who needs it. You could save a life by doing so!

Robert

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Focus | *Family Law*

Nonparent Standing and Custody: Where Are We Now?

BY MICHELLE MAY O'NEIL AND KARRI L. BERTRAND

The right of a nonparent to conservatorship and possession of a child has been a hot topic in Texas family law for many years. The United States Supreme Court, the Texas Supreme Court, and several courts of appeals have recently issued significant opinions defining nonparent rights.

Every lawsuit begins with an analysis of who has standing to sue. In Texas, the universe of nonparents who have a right to sue is limited to those listed in the statutes found in the Texas Family Code under §102.003, the general standing statute, and §102.004, which specifically applies to grandparents. Frequently used, §102.003(a)(9) allows standing for a person, other than a foster parent, who has had actual care, control, and possession a child for at least six months ending not more than 90 days preceding the date of the filing of the petition. The accepted definitions of the terms "actual care" and "possession" have remained relatively consistent, but the term "control" has been a topic of debate. The *H.S.* decision ended that debate when the Texas Supreme Court determined that the standing statute does not require that a nonparent have *exclusive* control of the child to the exclusion of a parent. Rather, the Court held that if the nonparent (1) shares a principal residence with the child, (2) provides for the child's daily physical and psychological needs, and (3) exercises guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children, then that individual has standing to bring a lawsuit. *In Interest of H.S.*, 550 S.W.3d 151 (Tex. 2018).

Most recently, the Texas high court moved beyond nonparent standing to address the burden borne by a nonparent on the ultimate merits of access to a child over the objection of a "fit parent." The Court in *In re C.J.C.* (No. 19-0694, 2020 WL 3477006 (Tex. June 26, 2020) reversed a significant number of appellate decisions and distinguished its own prior decisions in *In re V.L.K.* (24 S.W.3d 338 (Tex. 2000)) and *Holley v. Adams* (544 S.W.2d 367 (Tex. 1976)) (arguably reversing both of these long-standing authorities) and redefined the best interest of the child standard to prioritize a fit parent's decision to allow access by a nonparent. A court may substitute its own judgment to allow nonparent access only if the parent is found to be unfit.

In 2015, the U.S. Supreme Court in *Obergefell* unequivocally extended to same-sex couples the same rights as different-sex couples, including the right to marry. *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).While much debate has ensued as to how to apply the ruling, in 2017, *Pavan* broadened *Obergefell*'s reach to specific ancillary benefits of marriage including parents' rights to conservatorship of their children, as well as the very basic right of being listed as a parent on a child's birth certificate. *Pavan v. Smith*, 137 S. Ct. 2075, 198 L. Ed. 2d 636 (2017).

In *Treto*, the San Antonio Court of Appeals applied *Pavan* to the paternity presumption under the Texas Uniform Parentage Act and determined that a female, non-biological spouse in a same-sex marriage was the presumed parent of a child born during the parties' marriage. *Treto v. Treto*, No. 13-18-00219-CV, 2020 WL 373063 (Tex. App. Jan. 23, 2020)Texas Family Code § 160.106 provides that any determination of paternity applies also to a determination of maternity. A father who is married to the gestational mother of a child where the child is born during the marriage enjoys a presumption of parentage; likewise, a non-gestational mother should enjoy a presumption of parentage to a child born during her marriage to the gestational mother. The parental presumption should be applied neutrally as to gender under both *Pavan* and *Obergefell*.

So, what is next for nonparents? The analysis may begin shifting to gender identity and gender expression as it relates to conservatorship. In its recent groundbreaking opinion in *Bostock*, the U.S. Supreme Court elevated sexual orientation, gender identity, and gender expression to a protected status. *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1826 (2020). Justice Gorsuch, writing on behalf of the majority, analyzed the term "sex" under Title VII of the federal anti-discrimination laws, concluding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.*, at 1741.

Historically, Texas courts have inconsistently applied the paternity presumption to maternity in same-sex marriages, while the state legislature has continued to resist adopting gender-neutral language in its Uniform Parentage Act. However, many family law scholars now believe that applying *Bostock* means that judges hearing child custody suits should not be able to base their rulings on a party's sexual orientation, gender identity, or gender expression. *Bostock* stands for the proposition that a judge cannot deny or restrict a party's custody or access based on any protected class, and that sexual orientation, gender identity, and gender expression should not form the basis of a best interest analysis under current law. **HN**

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The Alexanders and Carters: Six Feet Apart, but Together for DVAP

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on each of us", added Leon. "For that reason, it is paramount that access to justice is available to everyone. Being dispassionate or disinterested in the cause of justice not only has a dramatic effect on certain portions of our population, but our entire community as well. That is why we will continue to support DVAP's EAJ Campaign."

The commitment of Dallas attorneys and the DBA to the Equal Access to Justice Campaign is impressive. Since 1997, the DBA and Legal Aid have joined forces to raise money for the program, with Dallas lawyers donating almost $15 million.

DVAP is a joint pro bono program of the DBA and Legal Aid of NorthWest Texas. The program is the only one of its kind in Texas and brings together the volunteer resources of a major metropolitan bar association with the legal aid expertise of the largest and oldest civil legal aid program in North Texas.

For more information, or to donate, visit www.dallasvolunteerattorneyprogram.org. In conclusion, the Carters and the Alexanders encourage all of you to remain six feet apart against Covid-19, but always together for DVAP! Make a donation. Make a difference. **HN**

Michelle Alden is the Director of the Dallas Volunteer Attorney Program. She can be reached at aldenm@lanwt.org.

Focus | Family Law

Where Am I Protected? Interstate Enforceability of Protective Orders

BY ANDREW S. KERNS

According to the Texas Office of Court Administration, protective-order cases in 2019 increased by 10 percent over the previous year and an astonishing 23 percent over the last five years, the greatest percentage increase of any type of family law case category. Those numbers are expected to be even higher in 2020 given the COVID-19 pandemic.

A family law protective order carries with it real consequences. In addition to the social stigma, this order can adversely affect most areas of one's life, including employment, child custody, owning firearms, and freedom of movement. It can also lead to incarceration for somebody that violates one.

In Texas, the application for a protective order must be filed in the county in which the applicant resides, the county in which the respondent resides, or the county in which the family violence is alleged to have occurred. However, the definition of "resides" can be vague, and this venue requirement is not true for every state. California, for example, has no venue language at all in its family code for protective orders. That means that an individual alleging domestic violence that occurred in Texas, while both parties resided in Texas, can travel to California and immediately initiate an action there for a protective order.

This interstate issue becomes even more important when you consider that different states have different standards for granting protective orders. In Texas, a protective order requires a finding that the applicant has *committed family violence and is likely to commit family violence in the future*. The term "family violence" encompasses "an act … that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the [family] member in fear of imminent physical harm, bodily injury, assault, or sexual assault…." While there is no requirement under Texas law for actual physical violence to have occurred for the court to issue a protective order, there still must be an actual threat of physical harm, bodily injury, or assault.

In California, however, protective orders only require "reasonable proof of a past act or acts of abuse." California's definition of "abuse" does not require any threats of violence at all. Under the California Family Code, "abuse" is extremely broad and includes such acts as "falsely impersonating" and "disturbing the peace of the other party." For example, one California court found that conduct involving the dissemination of information can "disturb the peace" of a party irrespective of the truth or falsehood of the information that is distributed. This result is another great example of how knowing where to file can mean all the difference for your client.

Despite the different standards for protective orders that apply in different states, a valid protective order issued in any state is enforceable in every state. This is for good reason. Victims of domestic violence often move from state to state for safety reasons. Historically, every move required application for a new protection order, which was too burdensome and dangerous. As a result, Congress included a full faith and credit provision in the Violence Against Women Act (18 USC § 2265). This provision requires all states to enforce a valid civil or criminal protective order issued by a foreign jurisdiction as if it were the order of the enforcing state.

In Texas, this full faith and credit provision is included in Texas Family Code Chapter 88, entitled the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. This Act requires a Texas court to enforce the terms of a foreign protective order, including relief that a Texas court would not have power to provide otherwise. For judicial enforcement, the proponent of the protective order should register the foreign protective order here in Texas in accordance with the Family Code.

However, practically speaking, if your client has a foreign protective order, he or she may need immediate non-judicial enforcement of that order here in Texas. Under the Texas Family Code, "a law enforcement officer of this state, on determining that there is probable cause to believe that a valid foreign protective order exists and that the order has been violated, shall enforce the foreign protective order as if it were an order of a tribunal of this state." Also, for additional encouragement, law enforcement officers and prosecuting attorneys in Texas have immunity for good faith enforcement of foreign protective orders, including detention and arrest of a person alleged to have violated the foreign Order.

Similarly, if you have a client that obtained a protective order in Texas and has now moved to another state, that state will undoubtedly have a similar statute to assist him or her to enforce that order. **HN**

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Focus | *Family Law*

The Silver Lining: an Optimistic Perspective of the Zoom Courtroom

BY BRYCE HOPSON

The spread of COVID 19 has taken a toll on our nation, our state, our communities, and unfortunately in some instances, the lives of our loved ones and friends. People across the world have been impacted in some way by the monumental shift these circumstances have created in almost every aspect of our lives. From the tragic loss of life, to skyrocketing unemployment, to the different ways we interact with each other, the world we live in now feels very different from the one before March. Our legal system has not been immune to these shifts, and we have watched the valiant effort to fast-track a transition to an electronic, online judiciary. If we are being honest here, most judges and lawyers are notoriously averse to change in the "process," especially when it comes to technology. We are keen to hold on to the "if it ain't broke don't fix it" proverb and affix ourselves to the greatest principle of all: KISS—keep it simple stupid! There are plenty of good reasons for cautious restraint when it comes to the use of technology in our legal system as it has far-reaching implications on things like confidentiality, security, and consistency. For centuries, judges, jurists, and jurors have believed in the notion that determining fact from fiction requires physically looking a witness in the eye and observing their body language—even our procedural rules presume a certain level of corporeality.

Like it or not, adjustments have been made and will continue to be made. As with any change, there should be a healthy discourse about how we are conducting court online, questioning witnesses via Zoom, and submitting evidence via email. But for now, let us play the optimist and look at some of the positive aspects of these new remote courtrooms and online hearings:

Comfort

Few individuals ever become truly comfortable in the courtroom. The reality is that most people have increased levels of stress and anxiety when they walk into a courtroom. Our courtrooms are intentionally designed to exude and bolster a perception of authority, from the waist-high wooden bar that separates spectators from participants, to the elevated bench of the judge. Now that the courtroom comes to us through our screens, we can participate in a comfortable, familiar environment—sometimes a living room, or even on the back patio next to lunch cooking on the grill. Increased comfort hopefully results in decreased stress and anxiety, which in turn will hopefully promote greater accessibility and application of justice.

Interaction

While it might seem like online hearings create more distractions, think about all the distractions that happen in an open courtroom. We frequently hear clients comment on how often the judge looks down or at their computer screen and wonder just how much of the judge's attention they really had (on that note, most judges are like teachers—they might have their back turned to the blackboard, but they still see every bit of mischief going on in the back of the classroom). Conversely, a Zoom hearing somehow feels more personal, and the participants feel more connected and attentive as well. There is an unconscious psychological impact we experience when we are put in front of a camera lens. Whether we perceive it or not, we become more perceptive of our appearance and how we are being perceived, which creates a greater sense of engagement than one might otherwise get in a courtroom.

Efficiency

One of the most daunting tasks for judges is managing their docket and case load. We have become accustomed to motion and discovery hearings being stacked on top of each other, assuming—and praying—that some will settle or disappear and make space for the rest. More frequent is the hearing that should only take "ten minutes your honor" but ends up lasting an hour and a half. Clients and attorneys can be left sitting in a courtroom, waiting their turn for hours when these situations occur. After fighting traffic, navigating the bowels of the George Allen parking garage, and racing up the stairs to arrive ten minutes before your 8:30 a.m. hearing, it can be especially frustrating and stressful when you do not start your hearing until 11:53 a.m. and get seven minutes before the judge's noon docket starts. But if your remote hearing time runs late, you at least avoid rush-hour traffic and get to wait things out in the comfort of your home environment.

It is likely that these online courtroom experiences will continue to be a part of the "new normal," so let's take the optimistic route and approach these changes with a glass-half-full mentality, because we truly are all in this together, even remotely. **HN**

Bryce Hopson is a family law attorney at Hance Law Group. He can be reached at bhopson@hancelaw.com.

Focus | Family Law

Noteworthy Evidentiary Issues in Divorce Cases

BY KATHRYN MURPHY

Before any hearing or trial, you should know what evidence you will need to introduce, prepare the predicates necessary to get that evidence admitted, and possibly prepare a brief on the law for important evidentiary issues. It is also good practice to review the rules of evidence before every hearing or trial. The hard work you put in before getting to the courthouse helps you think quickly on your feet.

Generally, to be admissible, evidence must be relevant, not be hearsay (or meet a hearsay exception), be authentic, have probative value that is not outweighed by its unfair prejudice, and not be subject to privilege. The same rules of evidence apply to electronic evidence.

Evidentiary issues that may come up in a divorce case include hearsay, an owner spouse testifying regarding the value of property, the litigation exception to the physician-patient or mental health privilege, and the privilege against self-incrimination.

Hearsay

If you think your evidence will be met with a hearsay objection, and it does not qualify as a statement that is not hearsay, such as an opposing party's statement, you should first argue that it is **not offered to show the truth of the matter asserted**. The key to successfully making this argument is to argue what the statement is offered to prove, such as to show notice or information acted on. If it cannot be shown that you are offering the statement for some purpose other than the truth of the matter asserted, then argue which hearsay exception might apply.

If you know in advance there is critical testimony or evidence that the judge should exclude on a hearsay objection, **prepare in advance**. Just because evidence or testimony makes it past the hearsay hurdle does not mean there are not other rules of evidence you can use to exclude the evidence, such as relevance, prejudice, authenticity, or improper opinion testimony.

There are several ways to attempt to get around the hearsay rule to admit into evidence the **statement of a child**. These include the following exceptions to the hearsay rule: present sense impression, excited utterance, state of mind, and statements made for medical diagnosis or treatment. Additionally, a statement made by a child twelve years of age or younger that describes alleged child abuse against the child is generally admissible if the court finds the statement is reliable.

Property Owner Rule

The Property Owner Rule provides that a property owner is generally qualified to testify to the value of their property even if the owner would not be qualified to testify to the value of the property as an expert witness. The Property Owner Rule requires that the owner be personally familiar with the property and its fair market value.

The Texas Supreme Court has held that a witness is not required to be designated as an expert to testify as to the market value of property as a property owner under Texas Rule of Evidence 701 pursuant to the Property Owner Rule.

Litigation Exception to Patient Privileges

In a civil case, a patient has a privilege to refuse to disclose confidential communications with his physician or mental health professional, including medical or mental health records. The **litigation exception** to the physician-patient privilege applies if any party relies on the patient's physical, mental, or emotional condition as a part of the party's claim or defense, and the communication or record is relevant to that condition. Both parts of the test must be satisfied.

The litigation exception to these privileges is not absolute in custody proceedings and a general request for primary custody is not enough for the litigation exception to apply. The issue of the emotional or mental condition of the parent must be included in a party's pleadings and linked to the issue of custody in a meaningful way.

Privilege Against Self Incrimination

A party in a divorce case can assert the privilege against self-incrimination if they reasonably fear their answers would lead to criminal prosecution. The witness cannot refuse to testify; the privilege must be asserted in response to each specific question.

A witness's decision to invoke the privilege against self-incrimination is not absolute. The trial court may determine whether assertion of the privilege is based on the good faith of the witness and is justifiable under all the circumstances.

If a party asserts the privilege, the court has the discretion to permit an **adverse inference** if there is other evidence to support the claim. Attorneys should advise their clients of the benefits and disadvantages of invoking the Fifth Amendment before they take the stand. **HN**

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Focus | *Family Law*

Addiction, Divorce, and Child Custody

BY CHRIS MEUSE

Addiction is everywhere and nowhere, write Diane Rae Davis and Katherine Wormer (*Addiction Treatment*). It is everywhere because addiction is among rich and poor, in all regions, all ethnic and social groups, and certainly in divorce and child custody suits. But it is also nowhere, as so many continue to hide these issues from public view, due to shame and stigma.

In this article, we focus on consumptive addiction—the physiological and psychological dependence on substances, such as alcohol or drugs—which millions of Americans misuse. According to a 2018 U.S. Substance Abuse and Mental Health Services Administration study, nearly eight percent of the U.S. population 18 and over have a substance use disorder (19.3 million people), with 14.4 million having an alcohol use disorder. Out of those identified with substance use disorders, about 9.2 million have both a substance abuse disorder and mental illness. These Americans suffer, but they also have families who suffer the often-serious consequences of living with these illnesses.

Severe substance-use disorder, generally called addiction, is a common cause for marital problems and dissolution. Excessive drinking and drug use adversely affect marital satisfaction and stability, especially in couples with differing views on or patterns of substance use. With alcohol use, specifically, there is also a dramatic increase in antisocial behavior and domestic violence. And a parents' alcohol or drug problems not only predict higher marital conflict, but that higher marital conflict is associated with more ineffective parenting, which in turn is associated with higher child behavior problems.

Being able to identify characteristics of substance use disorder in clients and opposing parties can allow for a swifter response in addressing the family addiction. Substance use disorders have four main categories or identifiers: (1) impaired control: craving or strong urge to use the substance and a desire or failed attempts to cut down or control use; (2) social problems: substance use causes failure to complete tasks at work, school, or home, and social, work, or leisure activities are given up because of use; (3) risky use: substance use in risky settings and continued use despite known problems; and (4) effect/tolerance: need for larger amounts to get the same effect and withdrawal symptoms.

While treatment options have become more available, only a fraction of people with substance use disorders receive the help they need. Many suffering from addiction require early, focused treatment to detoxify and acquire skills to initiate their path to recovery. However, focused treatment is only a short-term solution. For many, long-term recovery requires ongoing work and peer support.

Knowing successful recovery requires long-term maintenance, family law practitioners should approach cases involving addiction with a mindset towards lifetime recovery, instead of punishment. Attorneys should encourage families to build court orders and parenting plans that address the immediate needs of the addict and safety concerns of the family, while looking prospectively at continuing recovery goals and expansions of family roles as recovery progresses.

Jurisdictions around the country have developed specialty courts to address these issues. The first of such was developed in Miami, Florida in the late 1980s. Due to its effectiveness in reducing recidivism and recovery success rate, these specialty courts caught on, with Texas instituting its first in 1993. In Dallas County, the Legacy Family Specialty Court, presided over by Judge **Jean Lee**, has been established to address, in a non-adversarial way, a parent's addiction issues. The Court provides a voluntary 18-month program involving an intensive, collaborative effort to support families with their recovery process.

Outside of the specialty courts, practitioners have a myriad of tools to address a litigant's substance use disorder. In cases involving children, attorneys should try to design parenting plans that maintain parental contact, while protecting the child against any potential negative effects of the addiction. Orders should be tailored to the specific disorder, length of time needed for recovery and include fail-safes to address relapses (e.g., reversion to supervised possession, if a failed drug test occurs). Such plans could include regular drug and alcohol testing and evaluations, utilization of a monitoring device, supervised or limited access to the child, counseling, Alcoholics Anonymous attendance, etc. While a child's safety and best interests are always paramount, parenting plans should offer identifiable goals for the parent with a substance use disorder to progress toward more normalized contact with their child if the stated recovery goals are met.

Because addiction is a family disease, lawyers should also encourage those affected by the addict to seek recovery help too. Al-Anon Family Groups, Nar-Anon, Alateen or Adult Children of Alcoholics provide group support for those affected by a loved one's addiction. These programs can and should be considered a part of any plan addressing substance use disorders in family law.

Recovery requires long-term work by the addict. Knowing this, family lawyers should be sure to address not just the immediate needs of the family disease of addiction but the lifelong recovery process. **HN**

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Meet the Dallas Bar Association Staff

The Dallas Bar Association's purpose is to serve and support the legal profession in Dallas and to promote good relations among lawyers, the judiciary, and the community. Meet the team behind all of the Webinars, CLEs, Special Programs, and all on-goings of your Association.

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Want to help your favorite charity from home? The Dallas Bar Association Community Involvement Committee is pleased to announce its Charity Madness 2020 initiative. In lieu of our annual in-person Project Community initiative, formerly known as the Day of Service, we will be hosting an online March Madness style charity bracket. Sixteen top charities will make the bracket and it will be up to you, our members, to choose the final two charities. Donations will go to each of the winning charities. Stay tuned for more information!

Meet the Dallas Bar Association Staff

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Meet the staff of the Dallas Volunteer Attorney Program in October.

Focus | Family Law

Perpetual Access: Drafting Family Law Orders Post-COVID

BY ALEXANDRA GECZI AND JAMES ESH

While the Texas Judiciary has provided guidance on how to interpret existing family law orders, what about orders going forward? How will family law attorneys address provisions about school, vacations, holidays, travel, family gatherings, and other previously boilerplate language in our "new normal"? This article explores potential issues family lawyers should be aware of in the coming months and years post-COVID and recommends suggestions and tips for drafting orders.

Issues to Consider

One of the biggest challenges for family law attorneys when drafting orders is how to be both specific enough to enforce something while still being flexible enough to allow for wiggle room when needed. When COVID-19 shut things down earlier this year, many of the provisions we thought were clear and established were proven otherwise. In particular, the provision regarding Spring Break and the lack of provisions around the transmission and prevention of disease proved to be so unclear that the Texas Supreme Court had to step in and issue emergency orders.

While we cannot see into a crystal ball, COVID-19 has presented an opportunity for us to examine family law issues in a different light. Below are a few specific examples of issues that family law practitioners should be mindful of when drafting orders going forward.

1. Definition of school: With the increase in homeschooling and other creative schooling options, what school calendar and policies should apply? What if the calendar or policies change mid-semester? What if parents change schooling options mid-year as the situation evolves?

2. Possession schedule: Should we clarify the meaning of when school is "dismissed" or "resumes"?

3. Cross-border travel: Should we include language about complying with the laws of other jurisdictions, tracking a child's exposure, allowing a child into countries that currently ban American citizens or states that require quarantine? Should we quarantine after travel, for how long, and in whose care?

4. Diagnosis of COVID-19: What is the plan if a child, a parent, or a member of the household is diagnosed with Coronavirus or some other infectious disease? Should there be a duty to notify? What if a parent fails to notify the other parent? Does a parent forfeit visitation if he or she tests positive? For how long?

5. Essential workers: How can we ensure that essential workers are taking precautions to limit spread of the disease while still protecting their parental rights? If they have to travel for extended periods of time, should they have makeup time with children?

6. Childcare: Who will be watching the child if one or both parents has to work? Who will pay for childcare that may not have been previously needed? What qualifications should a childcare provider meet to ensure the safety and wellbeing of the family? Should child support be adjusted to compensate the parent who may be taking on the greater burden?

7. Disagreements: Should orders include provisions to guide parties in the event the courts shut down again or are unable to hear their disagreements promptly?

Drafting Tips

While the family law practitioner may rely on the Texas Family Code and other resources when drafting, it is important to recognize that much of the boiler plate language provided in those resources is not mandatory. In family law, we can often get creative to suit the individual needs of the clients we serve. However, when going "off script", it is important to keep several things in mind.

First, it is important to open a dialogue with clients and opposing counsel about these issues. It is impossible for a family law practitioner to draft something that accounts for all possibilities. However, by having a conversation and focusing in on the things that are important, the family law practitioner can help minimize the likelihood of future disputes.

Second, language should be specific when possible to assist the parties and the court in interpreting the language in the future. Lawyers should also consider whether to include more general provisions setting forth the parties' intent and overall goals on important matters in case the language in the order is not specific enough. Lastly, family law attorneys should consider including clear remedies that do not require court intervention when a party fails to comply with a provision or in the event of disagreements that need to be addressed quickly.

This article only highlights a few of the key concepts that family law attorneys should consider in drafting orders and other documents in today's "new normal". As the situation evolves, the Texas Judiciary will provide clearer guidance and parties will present attorneys with more creative challenges and solutions. As such, we encourage all family law practitioners to come together and share their collective knowledge so that we can keep up with the changes and continue to serve our clients to the best of our abilities. **HN**

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Focus | *Family Law*

COVID-19's Impact on Children in Special Education

BY ROB MCANGUS

The COVID-19 pandemic has had a significant effect reaching far and wide. As it surfaced and began to spread, its severity triggered the demand for revision to the most common daily routines, procedures, and life as a whole. In particular, the realm of education has been turned upside down and left in a tailspin without specific guidance or a clear plan of action. In what feels like an ever so slow transition from the point of impact to picking up the pieces, a harsh reality of the repercussions on learning has begun to surface. This realization has educators searching for innovative techniques, methods, and programs to mitigate the learning decline that has occurred and looking for ways to close gaps that further widened, especially for struggling learners and students receiving special education services.

As the upcoming school year approaches, consideration must be given to the shelter-in-place order and how it has impacted the delivery and quality of the instruction over the past few months. A specific analysis in regard to special education should be considered as the expeditious transition to online learning demanded prompt development and implementation of alternative methodologies to provide access to curriculum and services through equally effective alternate means, which could also have negative impacts on learning. Along those same lines, there should be an even deeper awareness of the impact on special education students who go between homes due to divorce, as these children oftentimes have even bigger obstacles to overcome and maneuver on a day-to-day basis. Throughout the shelter-in-place order, these children were required to assimilate to a whole new online learning platform, as well as the delivery of their Individualized Educational Plan (IEP) methodologies and academic supports. At the same time, these children were also required to adapt to the routines and expectations of their two different home environments with varying degrees of at home learning expectations. Now more than ever, it is imperative for ex-spouses to maintain a healthy co-parenting relationship to successfully navigate this new environment with their child.

In an effort to minimize the potential negative impacts, divorced parents should try their best to cooperate and create a plan of action to best serve their child's educational needs. This plan of action will look different for every family. For example, one parent may have more time or be better equipped to administer and oversee their child's IEP than the other. In that case, it would be wise to consider a temporary arrangement in which the more equipped parent acts as a primary caregiver during this time, and the other parent is offered additional possession sometime in the near future to cure any imbalances in their current possession schedule.

Divorced parents may also have a tough time agreeing on what they think is the proper COVID 19 safety protocol for their child. Recommendations from experts are constantly changing and evolving, and it would help to continually review these recommendations with your ex-spouse to provide stability for your child between their two homes. If one co-parent is feeling particularly anxious about the pandemic, it is important to display compassion and understanding, and eventually try to come to a compromise regarding appropriate daily activities. Parents should work together to find safe recreational activities for their child that complement and enhance their at-home learning experience.

With the rise of mental health concerns related to COVID 19, it is necessary to include the focus of relationships as an equally important aspect in an effort to reduce anxiety and ease the level of frustration that many students may feel. Divorced parents should keep this emotional aspect in mind and look for ways to provide reassurance as their child learns to maneuver the unforeseen events of the upcoming school year. It is equally important for families to keep the lines of communication open with teachers, as well as with each other so that everyone is on the same page. Teamwork and consistency will provide the most valuable foundation and ensure their child has the most optimal learning opportunities and additional learning gaps do not occur due to the likelihood of increased inconsistency.

Overcoming these obstacles and ensuring success in the upcoming school year will take a team effort from educators, students, and parents. Since many regulations are still fluctuating based on COVID 19 updates, the most effective approach will be to focus on specific areas that yield positive results and remain constant, such as implementing consistent routines and processes at school and home, providing your child with reassurance and ongoing support, effective collaboration between all parties, and developing a clear and effective plan for transitions that might occur throughout the year. **HN**

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Focus | *Family Law*

Child Custody Evaluations: What You Need to Know

BY MARIANNE HOWLAND AND GEORGE SHAKE

A "Child Custody Evaluation" is a process through which a licensed and trained professional gathers information and provides opinions, recommendations, and answers to specific questions asked by a court regarding children in a divorce or custody modification.

A Child Custody Evaluation can help the court determine conservatorship, possession, and rights and duties from a trained and neutral expert. The evaluator reviews medical records, education records, and conducts home visits. Additionally, because evaluators observe and interview the children in a case, this is a way for a child's concerns and desires to be presented to the court.

However, it cannot be overstressed that a Child Custody Evaluation is not a good choice for every case. They can be weighted very heavily by the court. As with all experts, the evaluator may be biased or incompetent in numerous ways. These evaluations are rarely completed within four months and typically take more than a year. Additionally, they can be costly, ranging from $2,500 to $20,000 per side. That does not include legal fees related to the evaluation and the possible fees of a consulting expert or a rebuttal expert.

If you decide that a Child Custody Evaluation is a good idea for your client, you will need a court order. Review the relevant section of Chapter 107 of the Texas Family Code to ensure that your order is compliant. You and the other attorney should attempt to agree on the evaluator. This is a crucial decision. Ask attorneys you trust for their recommendations.

You should prepare your client for the evaluation. Being a "good parent" is not nearly enough. Your client's home, appearance, communication skills, family and friends, relationships with the children's doctors and teachers, and many other aspects of their lives will be scrutinized. One effective way to prepare your client is to hire a consulting expert to walk your client through each step.

During this evaluation process, your client should present *current* and *relevant* evidence to the evaluator. You should review all evidence that is being produced to the evaluator. It is important that anything of concern in any records be properly explained to the evaluator. Also, if records support your client's contentions, you should be sure to point those out.

The evaluator will collect information from numerous sources. The other party is likely to make allegations against your client and you should ensure your client has a chance to address any allegations before the evaluator finalizes the report.

The Child Custody Evaluation process concludes with the evaluator preparing a written report and providing it to the attorneys. The Child Custody Evaluation report cannot be submitted to the court absent a stipulation or in accordance with the rules of evidence at trial.

If you are dissatisfied with the Child Custody Evaluation report, one of your first tasks is to request the evaluator's entire file, including all communications involving the evaluator. Another common strategy is to hire a rebuttal expert to provide a detailed analysis of the report. If that is too costly, you should go through each requirement in Chapter 107 of the Texas Family Code that pertains to Child Custody Evaluations and ensure the evaluator met every requirement. Ensure that the report complies with every aspect of the court's order. Review the evaluator's rules of practice under their license and their Curriculum Vitae (CV) to ensure the evaluator has not gone astray of those rules.

Determine if the report includes all the relevant information that your client provided the evaluator. Review the evaluator's invoices to determine who in the evaluator's office did what work on the evaluation and if the evaluator complied with the requirement to conduct balanced interviews with the parties.

This expert operates under very specific rules that do not pertain to other experts. For example, this evaluator is required to disclose all substantive communications between the evaluator and an attorney of record. Therefore, preparing this expert for testifying is not typical. However, these experts are just like others in that they cannot testify as to hearsay. They can only *rely* on hearsay when giving their opinions.

Some cases have been won or lost based on a custody evaluation. Although results are not always that dramatic, a custody evaluation can inform the court on numerous issues and do so in a way that you and your client cannot. However, the cost and length of time it takes to complete a custody evaluation makes it an impossible option in some cases. Additionally, your client's conduct, parenting skills, co-parenting skills, and the skills of the evaluator could all negatively impact your case. When deciding whether your case needs a custody evaluation, analyze the issues outlined above to be sure it is the best decision. **HN**

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DBA Recap: Virtual Town Hall on Race Relations and Policing

BY LESLIE CHAGGARIS

On July 31 the DBA Public Forum/Media Relations Committee hosted a virtual town hall to discuss race relations and policing in Dallas. City of Dallas Police Chief **Renee Hall**, City of Dallas Police Monitor **Tonya McClary**, Pastor **Richie Butler**, **Rob Crain**, and **Amy M. Stewart** answered questions from the audience—none of them shying away from difficult or often divisive topics.

New to Dallas, Tonya McClary was hired in January 2020 by the City of Dallas to serve as the City's first Police Oversight Monitor and to work with the Community Police Oversight Board. Ms. McClary described her role in Dallas as the civilian version of internal affairs to help the Police Department with policy and training. Ms. McClary explained that she has access to disciplinary and internal affairs records for the Dallas Police Department and will be conducting a review for patterns of prior excessive force and complaints.

Additionally, Ms. McClary and the Community Police Oversight Board will be conducting ongoing reviews of critical incidents—shootings or death-in-custody cases—to closely examine the records of the officers involved.

The panel discussed the reality that must be confronted, according to Pastor Butler, when trying to repair and build trust between the community and law enforcement. For example, according to the Pew Research Center, "the majorities of both black and white Americans say black people are treated less fairly than whites in dealing with police and by the criminal justice system as a whole." Pew Research Center, April 2019, *Race in America 2019*. Additionally, "black adults are about five times as likely as whites to say they've been unfairly stopped by police because of their race or ethnicity." *Id.* Pastor Butler explained that, in addition to confronting this realty, there is a need for educating law enforcement and the community about the "rules of engagement" for interactions with each other and building relationships during times of calm instead of times of crisis, when individuals most often interact with police.

Over the last 60 days, Chief Hall has implemented at least three new policies in Dallas to address the issues of police brutality and community distrust including issuing general orders regarding (1) an officer's duty to intervene, (2) the use of "less-lethal ammunition for crowd control," and (3) the release of body camera footage within 72 hours of critical incidents. Chief Hall said the killing of George Floyd forced police departments across the country to do some self-reflection regarding their policies.

Finally, the town hall marked the first public comments from Chief Hall regarding the controversial "Defund the Police" movement. In Dallas, the majority of its City Council has supported steps to reallocate resources from the police department's $542 million budget. Chief Hall agreed that police are not the solution to all of a community's problems including homelessness and mental health. She explained when an officer shows up to a mental health call, the tools on their tool belt are less-than-lethal, pepper spray, taser, and a gun. If that is not the outcome that the community wants for individuals then we need to be asking why are we sending police officers. She agreed with the need to "re-imagine" the police department's role in addressing the needs of the community and how they can work with other city services better suited to address varying needs. But she was adamant that cutting funds was not the answer when 88 percent of the department's budget goes to salaries of the officers.

The Dallas Bar Association's Public Forum and Media Relations Committee is working on continuing this important dialogue with a series of upcoming virtual events this fall. **HN**

Leslie Chaggaris is a Partner at Reese Marketos LLP and Co-Chair of Dallas Bar Association's Public Forum and Media Relations Committee.

Shifting Gifting: Launching the DBA's "Charity Madness" Bracket

BY ADAM M. SWARTZ

Your Community Involvement Committee (CIC)'s purpose is to organize, support, and provide opportunities for community projects and organizations, and improve attorney involvement and reputation in North Texas.

With 2020 turning out to not be the ideal time for in-person charity events (to say the least), the DBA and your CIC have launched a creative alternative for its annual "Project Community" (formerly "Day of Service") event—a virtual "March Madness" style charity bracket!

With the increasing spread of coronavirus cases in the Dallas area (and the increasing likelihood that the majority of both individuals and the charities themselves would be unwilling to attend or host in-person volunteer events), it appeared as though the DBA may have to entirely cancel its annual in-person, citywide Day-of-Service event where Dallas area attorneys along with their families, friends, and associates spend the day volunteering with Dallas-area charity locations. Rather than have its event canceled, the CIC crafted a creative, interactive alternative for local charities to get recognition, and ultimately some funds and donations they greatly need, during these unprecedented times.

Here're the Basics:

- The Madness begins with an Open Voting Period that began in August. The focus is on your favorite DFW-area/local charities (or the Dallas branches), which can be nominated by any DBA member attorneys to the Charity Madness bracket;
- An eBlast will ask members to submit their favorite charity. Submissions will be tally-marked and the 16 highest vote-getters will make it onto the bracket.
- After the initial submission period, spaced out voting rounds will advance the charities with the highest number of votes from the Supreme 16 to the Great 8, then De Facto 4, and then to the final winning charities to be announced in October 2020;
- The CIC has formed a Warm Follow Up Call Team that will reach out to each of the bracketed charities to make sure they know about the Charity Madness bracket, push participation and provide a blurb to promote what they are all about, etc.
- For the inaugural outing, given time constraints, we decided to add direct donation buttons for the final 4 charities remaining on the bracket to help maximize potential help for the amazing organizations that advance there.
- The CIC will work with the two (2) winning charities to identify needs that can be met virtually via a local supply drive and donation options.

CIC Needs YOU

The CIC wants your participation and feedback! Whether you have filled out a Madness bracket for some other not-to-be-named-directly organization in the past, or have zero clue that this originated as a homage to American college basketball's seminal tournament that sucks in millions and millions of viewers for *weeks* and is one of the flat-out greatest tournaments in the world, your "Charity Madness" participation and opinions are paramount in helping us tweak what we can and shape this event into an annual staple that helps us do the most good!

Why This Matters

This is an opportunity for all of us this year to better serve so many of the communities of which we are part. We can come together and create a program that put eyes on at least 16 different charities, encourages interaction between them and Dallas attorneys in the most positive possible light, and strengthens everyone's networks and future opportunities in earnest.

Your heartfelt participation ensures a successful first outing, incentivizes, recognizes, and rewards Dallas-area charities who proactively participate in our communities, and gives us all a chance to exemplify ourselves as the community champions each of us aims to ultimately be.

We each aim to be an invaluable asset to the community, to help build a lasting legacy that reminds us of our best selves. Let us shine a light on the best our Dallas attorneys have to offer.

See Y'all in the Madness

Let's Bracket Up! I wonder whose favorites will win? The DBA's Community Involvement Committee needs YOU! We are brainstorming and barnstorming—someone with your skills would be absolutely welcome! Join the CIC, let your left brain run wild for a sec, and get involved in new ways in the new days to come.

For more info on the DBA's "Charity Madness," please email Brenda A. Hard-Wilson at bhard-wilson@higierallen.com or visit: www.dallasbar.org/dbadayofservice.

For more info on joining your DBA Community Involvement Committee (at no cost), please email Staff Liaison Grecia Alfaro at galfaro@dallasbar.org and we will invite you to the next meeting! **HN**

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Column | Ethics

Client Confidentiality: Limits and Qualifications in Litigation

BY LARRY PRAEGER

Clients often enter a law office with the assumption that anything discussed in that office is absolutely confidential. Texas Disciplinary Rule of Professional Conduct 1.05 regarding confidentiality is broad and generally covers everything the lawyer learns from or about the client as a result of the representation. However, confidentiality is not absolute. It is limited by various legal duties that are found in the Family and Probate Codes such as reporting child or elder abuse. There are also qualifiers in the Texas ethics rules that require lawyers to balance their obligation to protect client confidences with a duty to preserve the integrity of the litigation process.

The intersection of client confidentiality and the duty to protect the integrity of the litigation process is primarily addressed in Rules 3.03, regarding "Candor to the Tribunal," and 1.02(c) and 1.05(c)(g), which prohibit a lawyer from participating or assisting in the commission of fraud. When it comes to candor to the tribunal, the rule forbids a lawyer from knowingly making a false statement of law or material fact, offering or using evidence that the lawyer knows to be false, or failing to disclose to a tribunal a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act. Texas lawyers should review the comments to the rules to know when client confidences yield to candor to the tribunal. Discussing this at the beginning of representation could prevent a trip to the grievance committee.

Preventing or assisting fraud sounds simple enough, but practical application is not so clear. For example, the rule against fraud applies in litigation. There are circumstances in which a failure to make a material disclosure is the equivalent of an affirmative representation. Essentially, fraud by silence.

The rule speaks in terms of the tribunal. The tribunal is a judge, associate judge, special master, etc. Is a mediator considered part of the tribunal? What about a court-appointed one? Are we required to be as careful with a representation to a mediator as we are to a judge?

The discovery process also presents some interesting questions regarding Rule 3.03. Let's say you send a set of interrogatories and take deposition. Tex. R. Civ. P. 193.5(a)(2) presents a clear duty to supplement interrogatories. But if there were only depositions, there is no duty to supplement deposition testimony (with the limited exception for expert witnesses). *Titus Co Hospital District, Titus Co. Memorial Hospital v. Lucas, Lucas*, 988 S.W.2d 740 (Tex. 1998); *Collins v. Collins*, 923 S.W.2d 569 (Tex. 1996).

A recent question I received about disclosure put these abstract rules into a specific family law context. It involved evidence in modifying a possession order that required supervised access because of substance abuse. A modification was filed after three years of sobriety. Depositions were taken, but no interrogatories. A custody evaluation was ordered, completed, and filed three months before trial. The custody evaluation noted, among other factors, the client's continued sobriety and recommended unsupervised access. One week before trial, the lawyer received a call from the client saying he had been arrested in another state for public intoxication, paid a fine, and received pre-trial diversion with "no record." Was there a duty to disclose?

Rule 3.03 requires disclosure if the evidence is material and failure to disclose would assist in the commission of fraud. Is it less material if the custody evaluation recommendation is based on many factors instead of just sobriety? It is not a good idea to use as your best grievance defense that your failure to disclose was based on your belief that the fact was not material.

Rule 3.305(5) also contemplates a situation in which a lawyer is aware the court is about to consider evidence the lawyer knows to be false. At the time the custody evaluation was filed it was accurate, but now it is not. Rule 3.03, as noted in the comments, requires the lawyer to refuse to offer evidence the lawyer reasonably believes is untrustworthy and imposes a duty to take remedial measures.

Always remember that the judiciary is required under Rule 8.03 to report violations, and a possible violation is not extinguished when a final order is entered.

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Do You Trust Yourself with Trust Accounting?

BY JORDAN TURK

When you graduate from law school, your primary focus is usually on passing the bar and, if successful, practicing law. No one in law school tells you that, in addition to being an attorney, you will also need to be a salesman, a bill collector, and a de facto accountant.

It then comes as no surprise that, as you start your legal career, you sometimes feel in over your head with all of the added administrative pressures. What is a trust account? What does "aged AR" actually mean? How do I reconcile an account? Don't just brush these questions off because you plan on outsourcing everything—understanding how the moving parts fit together in your firm is important for your revenue stream and your status with the State Bar of Texas.

Properly maintaining a trust account is integral to your practice, and could affect your law license! If you are accepting advance payments from your clients, or receiving money on their behalf, you will need to maintain a trust account. What is more, you will need to maintain a *compliant* trust account.

State bars, especially Texas, are not shy about enforcing their rules concerning trust account violations; it is not difficult to find examples in *The Texas Bar Journal* of attorneys who have been formally disciplined or even disbarred due to such violations—it is usually the first section I flip to when the *Journal* arrives in my mailbox. If one of your goals is to keep your name away from the "Disciplinary Actions" section of the TBJ (I would hope so), it is imperative that you properly manage your trust account in compliance with the Texas Bar.

A huge problem with trust account violations is that you might not even *realize* you are in sanctions territory. You need to reconcile your trust account *every month*, which means you need to be reviewing bank statements every month and reconciling them with your check register.

Many attorneys get into trouble when they start "borrowing" small amounts of money from their trust account to pay for firm expenses. For example, Attorney Smith just signed a client yesterday and said client paid $5,000 for a retainer, which is deposited into the Attorney's trust account. Attorney Smith suddenly realizes his electricity bill is due for his office space, but does not have the funds to pay it. Attorney Smith knows he is eventually going to bill against the new client's retainer for future work, so he goes and takes $400 from the client's retainer and moves it into his operating account and pays his electricity bill. Attorney Smith works his new case, and the client is billed at the end of the month having no idea about this $400 payment.

Attorney Smith just subjected himself to possible sanctions from the Texas Bar (see Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct). Until you have actually *earned* those fees in your trust account, you cannot move any of those retainer funds. Most every attorney knows of someone who has played around with their trust account funds, and most every attorney knows of someone who has been featured in the back of the TBJ. Moral of the story: do not play with your client's trust account funds.

Trust account compliance is more than just something you learned in your Professional Responsibility class or a topic you studied for the MPRE—it is serious business, and you need to be able to navigate and master it.

All of this might sound a little scary, but do not panic—there are tools available to help you and to ease you into trust accounting. Practicing attorneys and soon-to-be-attorneys alike might have some concept of what a trust account is, and that they need one, but how the heck do you actually go about setting one up? How do you go about reconciling accounts? The e-book, A Complete Guide to Trust Accounts, from TrustBooks and LawPay, provides you with a complete step-by-step outline of what you need to do to open and operate your own trust account, from choosing a bank to developing proper trust account management procedures. Download the e-book for free at lawpay.com/trustebook.

Whether it is questions on trust account recordkeeping or deposits and payment, this e-book has you covered. You went to law school, you passed the bar, you dove head first into the actual practice of law—don't let trust accounting throw you off your game. You can do this! **HN**

Jordan Turk is an attorney and LawPay's Legal Content and Compliance Manager.

Contractual Protections for Postponed Nuptials

CONTINUED FROM PAGE 1

cohabitation agreement.

1. What constitutes a marriage?

A cohabitation agreement may serve to protect against an unintentional finding of common law marriage. A claim of common law marriage may operate to establish a marriage when none was intended, or it may lengthen an existing marriage to expand the community estate.

In the eyes of the law, you and your fiancé may unintentionally become informally married, even if your carefully planned nuptials are cancelled. Texas law provides that two people can be common law married—even without a ceremony or marriage license—if at the same time, they (1) agree to be married, and, after the agreement, (2) they live together in Texas as spouses, and (3) in Texas, represent themselves to others that they are married. This is a fact-specific determination, relying on a broad range of evidence as formal as tax returns and as informal as Instagram hashtags.

The reason a party may wish to take steps to preclude a common law marriage is that Texas law still requires a "legal" divorce for a couple who is only informally married. In the case of divorce under the theory of common law marriage, a Texas court would be required to find: (1) the existence of an informal marriage, and (2) a date the informal marriage began.

2. Who gets the house (and other jointly acquired assets/debts)?

Many couples aim to start their lives by their blessed wedding date. They may already live together, or they have planned to move in together shortly after their wedding and have already started the process of closing on a house or signing a lease as a married couple. (It is not uncommon for couples who come in for a premarital agreement, to have already purchased a home together that lists both parties on the title, even though one party did not contribute financially to the purchase, resulting in a partial gift of the real property to the other spouse.) Protections for the party who made the financial contribution can be written into a premarital agreement or cohabitation agreement to prevent an unfair and unintended consequence if the parties ever file for divorce.

3. Pets. Among other jointly acquired assets and liabilities, jointly acquired pets are also often a source of contention in case of a break-up. A cohabitation agreement may include terms providing for who keeps the pets following a break-up.

4. Who foots the bill for cancelled wedding costs?

Unreimbursed deposits for the wedding cancellation may also result in a disproportionate debt-load on one party. Ensuring these costs are appropriately divided by agreement may offer some reprieve to the party who put the flowers and reception food on a tab in his or her sole name.

Disclaimer: Unlike more commonly-known agreements in the context of family law, like a premarital agreement or a partition or exchange agreement (agreement on division of property entered in to after marriage but before divorce), cohabitation agreements are not mentioned in the Texas Family Code and Texas courts have offered little guidance on the enforceability and contents of a cohabitation agreement. Anyone contemplating a cohabitation agreement should first consult with counsel—a family law attorney, and depending on the issues, a corporate or business attorney—to ensure they are fully informed of the risks associated with entering into such an agreement. **HN**

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Focus | *Family Law*

Top 6 Things to Know About Spousal Maintenance

BY GEORGANNA SIMPSON AND SPENCER PAGE

Spousal maintenance is Texas's alimony analog and the product of a relatively straightforward statutory scheme. However, there are certain nuances—both as a result of the statutory scheme and courts' interpretation of same—of which many attorneys are unaware.

First, you are not entitled to spousal maintenance unless you properly plead for it. While this requirement may seem elementary on its face, even a request for temporary spousal support, stating that your client has insufficient income for support and requesting the other spouse to provide payments for the support of your client until a decree is signed, fails to provide the other side with adequate notice to uphold a subsequent award of spousal maintenance on a final basis. Likewise, a prayer for general relief will not be your saving grace.

Second, an award of spousal maintenance requires, *inter alia*, that the spouse seeking the award lacks "sufficient property" to provide for that spouse's minimum reasonable needs. However, what constitutes "sufficient property" may be more than you think. By way of example, courts have held that (1) an award of $250,000 in gold, (2) $290,000 in *mostly* illiquid assets such as life insurance policies and retirement accounts, and (3) the marital residence and $327,000 in retirement accounts did not constitute "sufficient property" to preclude a court from awarding spousal maintenance. It is worth noting, however, that each of the examples cited above turned on the illiquid or taxable nature of the assets awarded to the spouse seeking spousal maintenance. One can infer that the same result may not occur if one were awarded an equal amount in cash.

Third, the spouse seeking spousal maintenance must provide sufficiently detailed evidence to establish that spouse's minimum reasonable needs. On appeal, courts have overturned spousal maintenance awards where the spouse seeking maintenance: (1) simply testified that he was unable to pay his bills; (2) put on evidence of a standard of living before the divorce suit, not current minimum reasonable needs; and (3) testified that she had a monthly mortgage payment of an undisclosed amount, dental expenses, and was taking three courses at $94 apiece without presenting evidence of any other monthly expenses. While no bright-line rule exists for what constitutes sufficiently detailed evidence of a spouse's minimum reasonable needs, it appears that it would behoove the spouse seeking spousal maintenance to admit into evidence, at a minimum, an itemized list of that spouse's monthly expenses.

Fourth, spousal maintenance is almost never a lifetime commitment. To begin with, Texas Family Code Chapter 8 sets forth explicit durations for spousal maintenance awards based upon the grounds relied upon in granting the award. The only durations that are not explicitly limited to a term of years are awards based on either a spouse's disability or a child of the marriage's disability and, even then, those awards endure only for as long as the disability persists. Furthermore, courts are required to limit the duration of a spousal maintenance award to the shortest reasonable period that allows the recipient to earn sufficient income to provide for their minimum reasonable needs. Given this statutory scheme, there are very few circumstances—only those involving lifelong disabilities—where spousal maintenance might be a lifetime commitment.

Fifth, spousal maintenance awards are modifiable—the paying party may seek a reduction of the spousal maintenance if that party makes a proper showing of a material and substantial change in circumstances. However, the obligee receiving spousal maintenance based on an incapacitating disability may seek to extend the term of the maintenance, rather than a modification, without having to prove a change in circumstances.

Sixth, appeals do not render spousal maintenance awards unenforceable in the interim. During the pendency of an appeal, the trial court that issued the spousal maintenance award retains jurisdiction to enforce that award by contempt, provided the award has not yet been superseded. While not specifically set forth in Chapter 8 of the Texas Family Code, the Supreme Court of Texas has held that the Legislature's failure to include the authority in the statutory scheme does not preclude trial courts from exercising this authority. A trial court's contempt power is not the product of statutory authority, but, rather, is an inherent power that is "essential to judicial independence and authority." **HN**

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