

# DBA Family Law Section Newsletter

## January 2022

Section caselaw updates and monthly CLE materials are available online at our website:

<https://www.dallasbar.org/?pg=Family>

### Register for FLS Bench Bar 2022:

<https://family-law-section.swoogo.com/benchbar2022>

**Registration ends  
February 10 at 5:00 p.m.**

### Upcoming Section Meetings and Events:

#### Next meetings:

February 11 – Bench Bar (virtual)

March 9 – noon

Topic: HIPAA

Speakers: Katie Lewis and Sarah Darnell

April 13 – noon

May 11 – noon

There will be a case law update with each Section meeting.

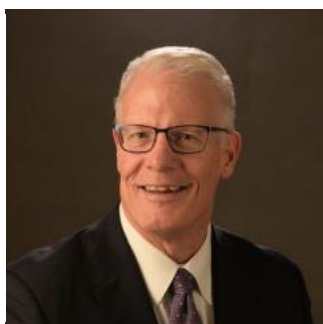
We are continuing to assess whether to go back to in-person meetings, or offer hybrid meetings, and will keep Section members posted.

## 2022 SECTION OFFICERS



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# **“That’s Entertainment! From Bench & Bar to Broadway”**

**Family Law Section Bench Bar Conference**

**February 11, 2022 – 9:00 a.m. – 5:00 p.m. – Virtual  
7.25 hours (2.25 ethics) MCLE approved**

**Register here by February 10 at 5:00 p.m.:**

**<https://family-law-section.swoogo.com/benchbar2022>**

## **Presentations Include:**

(specific times of each presentation are available on conference site)

- **Case Law Update and "All That Jazz"**
  - **[Georganna Simpson and Spencer Page](#)**
- **"Fences" - Brain and Bias in Family Law**
  - **[Hon. Audrey Moorehead](#)**
- **"The Greatest Showman" - Top Programs and Apps You Should be Using**
  - **[Aimee Key and Kevin Segler](#)**
- **"The Room Where it Happened" - Views from the Higher Bench**
  - **[Hon. Dennise Garcia](#)**
- **"Les Misérables" - Motion Practice Tips and Outside-the-Box Solutions**
  - **[Abby Gregory and Kala Arevalo](#)**
- **Creative Mediations with Child Custody - a "West Side Story"**
  - **[Kris Hayes and Mellannise Henderson-Love](#)**
- **"Mamma Mia – Here I go again, My, my, how can I assist you?" – Day-to-Day Practices and Document Management**
  - **[Kay Redburn and Pam Faris, CFE, MAFF](#)**
- **"Grease Lightning" - Using MSJs in Family Law Proceedings**
  - **[Mark Scroggins and Stephen DePaul](#)**
- **"And I am Telling You I'm Not Going" - Resist Refuse Dynamics**
  - **[Christy Bradshaw Schmidt, MA, LPC and Susan Fletcher, Ph.D.](#)**
- **“The Lion King: Be Prepared”**
  - **[the Associate Judges](#)**
- **"Don't Cry for Me Argentina:" - Understanding and Creative Uses of Mandamus**
  - **[Clint Westhoff](#)**
- **"Climb Ev'ry Mountain" - Working with Amicus Attorneys**
  - **[Hon. Scott Beauchamp, Susan Duesler, Rachel Li](#)**
- **"Mean Girls" - Dealing with Difficult Clients**
  - **[Sally Pretorius and Jenny Gomez](#)**
- **"If Only You Would Listen"**
  - **[a presentation by the District Judges](#)**

# Flipping Custody in Temporary Orders

By: **Beth M. Johnson**

When modifying an order affecting the parent-child relationship, one parent often wants to seek to become the person with the exclusive right to designate the child's primary residence instead of the other parent. While it can be tempting to ask the trial court to grant that relief in temporary orders, you can only be granted that relief in temporary orders if you can satisfy the requirements of Texas Family Code Section 156.006(b).



Section 156.006(b) prohibits a trial court from rendering a temporary order that changes the person with the right to designate the child's primary residence or change, add, or remove any geographical restriction unless the order is in the best interest of the child and:

- (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
- (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or
- (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.

To determine if temporary orders effectively change the person with the exclusive right to designate primary residence, the courts examine the temporary orders in relation to the prior final order. See *In re Ostrofsky*, 112 S.W.3d 925, 929 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). This determination does not turn on the trial court's characterization of its ruling, but on the substance of the temporary orders. *In re Davila*, 510 S.W.3d 455, 458 (Tex. App.—San Antonio 2013, orig. proceeding). When the temporary orders deprive a custodial parent of any discretion inherent in the right to determine the child's primary residence, they have the effect of changing the designation of the person with the exclusive right to designate a child's primary residence. *In re Levay*, 179 S.W.3d 93, 96 (Tex. App.—San Antonio 2005, orig. proceeding). An order that violates Section 156.006(b) is subject to mandamus relief. See *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding) (per curiam).

At least one court has held that this requirement applies to requests for ex parte temporary restraining orders. *In re Browning*, No. 01-21-00248-CV, 2021 WL 2096658, at \*3 (Tex. App.—Houston [1st Dist.] 2021, orig. proceeding) (mem. op.). The appellate court held that the evidence could not have supported the ex parte temporary order having the effect of changing the parent with the exclusive right to designate the children's primary residence because the trial court did not hold a hearing, so no evidence was presented. *Id.* ("there is no provision in section 156.006 that permits 'an order that has the effect of ... changing the designation of the person who has the exclusive right to designate the primary residence of the child' to be issued ex parte.").

The "significant impairment" requirement of Section 156.006(b)(1) is a high standard. *In re Serio*, No. 03-14-00786-CV, 2014 WL 7458735, at \*1 (Tex. App.—Austin 2014, orig. proceeding) (mem. op.). It requires the movant to present evidence of "serious acts or omissions" that suggest that, if the child

was to remain in present circumstances, his physical health or emotional development would be significantly impaired. *Id.* at \*2. “Serious acts or omissions committed against the child” are acts “more grave than violation of a divorce decree or alienation of a child from a parent.” *Id.*; see also *In re Odo*, No. 11-21-00227-CV, 2021 WL 4782976 (Tex. App.—Eastland 2021, orig. proceeding) (mem. op.). The use of corporal punishment may support a temporary change of the person with the exclusive right to designate a child’s primary residence. *In re Morehead*, No. 06-21-00052-CV, 2021 WL 3669607, at \*2 (Tex. App.—Texarkana 2021, orig. proceeding) (mem. op.). However, a mere difference in parenting styles is insufficient to meet the standard set by Section 156.006(b)(1). See e.g., *In re Escamilla*, No. 04-02-00258-CV, 2002 WL 1022945, at \*2 (Tex. App.—San Antonio 2002, orig. proceeding) (mem. op.).

In *Odo*, the evidence supported temporarily changing the person with the exclusive right to designate the child’s primary residence, where the child had been severely bullied and had prepared a list of “mean people” and a plan to “destroy” those people. 2021 WL 4782976, at \*2. The mother had primary care of the child at that time, and despite a counselor testifying that the child’s behavior was a “very serious issue” and “very concerning,” the mother did not appear to believe that a problem existed. *Id.* Given the mother’s apparent lack of control and the child’s behaviors, the temporary order was justified. *Id.*

When asserting that a temporary order is necessary because the child’s circumstances support the order, the focus must be on the child’s *present* circumstances and cannot rely on mere speculation. *In re Barker*, No. 03-21-00036-CV, 2021 WL 833970 (Tex. App.—Austin 2021, orig. proceeding) (mem. op.). In *Barker*, the father testified as to behavior he observed in the children in the past, but he offered no evidence of any present risk. *Id.* at \*8. The father’s concerns about the mother’s allegedly poor parenting skills were no more than speculation. *Id.* Thus, the evidence was insufficient to meet Section 156.006(b)(1)’s standard, and the trial court erred in temporarily changing the person with the exclusive right to designate the children’s primary residence. *Id.* at \*6.

When getting ready for your temporary orders hearing, if you want to flip custody, be sure that you have evidence that focuses on (1) the *child’s* circumstances; (2) *present* circumstances; and (3) that high standard of *significant* impairment. Contrarily, if you oppose the flip, and that evidence was not offered, you may have a good case for a mandamus.

*Beth M. Johnson focuses on family law appeals and can be reached at [beth@bethmjohnson.com](mailto:beth@bethmjohnson.com).*

**Any suggestions of content  
you’d like to see in future  
newsletters? Do you have an  
article or picture to contribute?**

**Please email Tamika –  
[Tamika.Abendroth@dallascounty.org](mailto:Tamika.Abendroth@dallascounty.org)**

## **MARK YOUR CALENDARS!**

**SECTION MEETINGS ARE AT NOON ON  
2ND WEDNESDAY OF EACH MONTH  
(except February, August and December)**

**EACH INCLUDE 1.0 HOUR OF CLE AND  
CASE LAW UPDATE**

# Proportionate Discovery

**By: Larry Praeger**

The joining of computerized word processing with document assembly programs has resulted in occasionally being served with a discovery package that may not be tailored to your case.

Discovery levels defined by the Texas Rules of Civil Procedure attempt to ensure that the scope and amount of discovery is appropriate to each case, which is a worthy goal but sometimes difficult to implement. Discovery is very broad. Information sought in discovery need not be admissible; it need only lead to admissible relevant evidence. Some cases, by definition, require a broader scope than others.

Texas Rule of Civil Procedure 192.4(b) allows a court to modify discovery procedures to fit the circumstances of a case. In 2017, the Texas Supreme Court outlined the test the trial court should use in applying this rule (see *State Farm v. Lloyds*, 520 S.W.3d 595). The trial court must determine whether discovery in a particular case is proportional to the needs of the case. Discovery will be considered proportional if the burden or expense of the requested discovery is justified when weighed against the following factors: a) the likely benefit of the requested discovery; b) the needs of the case; c) the amount in controversy; d) the parties' resources; e) the importance of the issues at stake in the litigation; f) the importance of the proposed discovery in resolving the litigation; and g) any other factor addressing jurisprudential concerns.

Upon receiving a request that you believe is not proportional to your case, the best procedure would be to request—as soon as possible—a discovery control plan tailored to the needs of your case. With the new required disclosures, a judge should be able to get a preliminary idea soon after the case is filed of the appropriate proportional discovery plan to address the issues raised. Interestingly, Rule 192.4(b) allows the judge on its own motion to limit discovery.

Tailoring a proportional request should not be difficult. For example, in a family law context, a common issue is an allegation of the hiding of assets. Family-law clients must complete a court-required monthly financial information statement that includes the client's income and expenses. After a review of a client's financial information statement, the parties can assess whether it is worth the time and expense of obtaining greater detail about the finances, whether funds appear to be missing, and whether an expert may be required to complete this task.

We want to be thorough and make sure we have all of the information required to properly litigate a case. But this must be limited by the proportionality analysis. As a new-age client of mine once said, "Your vices are your virtues magnified." At some point, thoroughness becomes burdensome.

When dealing with clients who may not be thinking clearly because of the situation that brought them to an attorney, explain there are different strategies to be employed depending on the facts of each case. Sometimes maximizing a client's recovery may be indirectly proportional to the time and money trying to seek out every scrap of admissible relevant evidence. A wise practitioner, as well as an experienced judge, should require proportionality in the management of each case.

*Larry Praeger is board certified in Family Law and is a credentialed mediator. He may be reached at [lpdraeger@praegerlaw.com](mailto:lpdraeger@praegerlaw.com).*

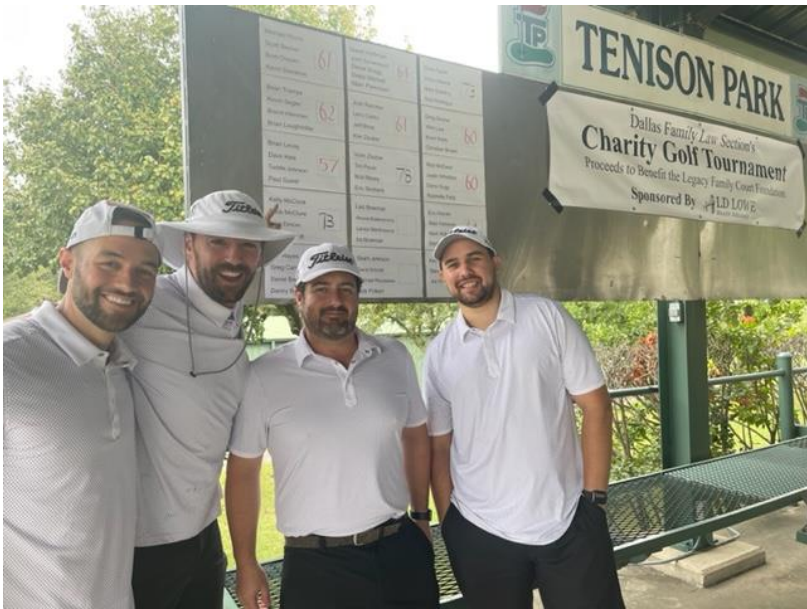




# Recap: FLS Golf Tournament – October 15, 2021











Proceeds from the FLS golf tournament benefit the Legacy Family Court Foundation. Thank you to L.D. Lowe Wealth Advisory for sponsoring the tournament and to Wendy Ward Roberts for sponsoring the drink cart.



# Take a case through DVAP!

The Dallas Volunteer Attorney Program is in need of volunteers who are willing to take contested family law cases involving children and/or property.



Benefits for volunteers include:

- Free malpractice Insurance
- Free continuing legal education training programs
- Mentor attorneys who assist volunteers by providing forms, answering questions, and reviewing pleadings
- Available office space for use when meeting a pro bono client
- Obtain "billable hours for your soul" by providing legal help to those in need
- And more!

If you are willing to accept a case for full representation, please contact Whitney Breheny at [brehenyw@lanwt.org](mailto:brehenyw@lanwt.org) or 214-243-2238.

## DALLAS COUNTY FAMILY COURT COORDINATORS

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