CASE LAW UPDATE: PROPERTY

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CHAPTER 2

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Practiced family law with Ausley, Algert, Robertson & Flores, L.L.P. since August, 1995 and became a partner in December, 2001.
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AUTHOR and LECTURER

"Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 17, 2003.

"Post Trial Basics & Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 8, 2004.

"Effective Use of ADR in Family Law Cases," 2005 Poverty Law Conference, Texas Lawyers Care, March 30 - April 1, 2005.

"Closing the Friendly and Unfriendly File," Advanced Family Law Drafting Course, State Bar of Texas, December 8-9, 2005.

"Traveling Light: Collaborative Law Without Paralegals or Assistants," Collaborative Law Spring Conference 2008, State Bar of Texas, February 28-29, 2008.

"Collaborative Law," Alternative Dispute Resolution Course, University of Texas Law School, Professor Cynthia Bryant, March 6th, 2008.

"Child Support (What Do Judges Do in Various Counties) Above & Below the Guidelines, the High Income Earners (Death of the Obligor)," Marriage Dissolution Institute, State Bar of Texas and Family Law Section, April 17-18, 2008.

"Closing the File," Summer School - State Bar College, State Bar of Texas, July 17-19, 2008.

"Closing Documents Other than QDROs," Advanced Family Law Drafting Course, State Bar of Texas, December 4-5, 2008.

"Putting Agreements on Paper," Collaborative Law Course 2010, State Bar of Texas and Collaborative Law Institute of Texas, March 4-5, 2010.

"Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 9-10, 2010.

"We're Done! (Or are we?) - Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 5-6, 2013.

"Closing the File 101," Marriage Dissolution 101 Course, State Bar of Texas, April 23, 2014.

"Closing the File 101 – The Long Good-Bye," Marriage Dissolution 101 Course, State Bar of Texas, April 8, 2015.

"Proving Significant Impairment," Advanced Family Law Seminar, State Bar of Texas, August 1-4, 2016.

LECTURER

"Creative Discovery," Family Law Essentials, Family Law Council, Nacogdoches, Texas, June 4, 2004.

"Post Trial Basics & Closing a File," State Bar Convention - Boot Camp, June 25, 2004.

"Closing Out Your File," Williamson County Family Law Seminar, October 29, 2004.

"How to Study for and Pass the Board Certification Exam," Advanced Family Law Course, State Bar of Texas, August 10, 2005.

"Trends in Family Law," 2009 Statewide Assistant Attorneys General Conference, Austin, Texas, July 10, 2009.

"Changes in SAPCR Issues and Trends for the Future," 35th Annual Advanced Family Law Course, State Bar of Texas, August 3-6, 2009.

"Collaborative Law," Travis County Family Law Section Luncheon, January 6, 2010.

"The Paradigm Shift," Nuts & Bolts of the Collaborative Process Course, State Bar of Texas and the Collaborative Law Institute of Texas, March 3, 2010.

"Characterization & Tracing: An Overview," Advanced Family Law Course, State Bar of Texas, August 4, 2011.

"Know When to Hold Them, Know When to Fold Them: Settlement Agreements, Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements," Author: Jimmy Vaught, Marriage Dissolution, State Bar of Texas, April 19, 2013.

"Know When to Hold 'Em, Know When to Fold 'Em, Accepting and Firing Clients," The Austin Bar Family Law Section Spring CLE, May 13, 2016.

COURSE DIRECTOR/PLANNING COMMITTEES:

Planning Committee - Collaborative Law Course 2010
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CASE LAW UPDATE: PROPERTY

I. MARITAL AGREEMENTS

A. *In re I.C. & Q,* 2018 Tex. LEXIS 650 (Tex. Supreme Court June 29, 2018) (Cause No. 16-0770)

Husband (hereinafter "H" throughout the article) and Wife (hereinafter "W" throughout the article) entered into a premarital agreement which provided a $5M payment to W upon divorce. The agreement further provided that if W sought to invalidate the agreement, whether all or part, or sought to recover property at variance with the terms of the agreement, W forfeited the $5M payment. H filed for divorce and sought to enforce the premarital agreement. W filed a counter petition seeking the same relief. Subsequently, H fell behind in some of his payment obligations and W filed motions in the trial court to compel payment which were granted. Thereafter W filed an amended counter petition and as alternative relief sought to rescind the premarital agreement and place the parties in the status quo that existed before the agreement based on H's breach of its terms. Both parties filed Motions for Summary Judgments (MSJ) on various issues, and W specifically sought summary judgment on her rescission claims. H sought declaratory relief that W's claims triggered her forfeiture of the $5M payment. This issue went to a jury who decided in H's favor that W's actions triggered forfeiture but found that her actions were excused because of H's breach. H filed a Motion for New Trial (MNT) which was granted. Thereafter the trial court granted H's MSJ on the declaratory judgment claim, concluding that W had forfeited her right to the payment by seeking rescission of the agreement. W appealed and the COA affirmed. W petitioned for review. The Supreme Court (SCt) likewise affirms holding that the premarital agreement was a clear and unambiguous contract. The SCt notes that W's efforts to rescind that contract resulted in her efforts to obtain property at variance with the agreement because her efforts to set aside the agreement would have resulted in a community estate which the premarital agreement expressly stated would not exist. Further, W admitted within her pleadings at the trial court level that her right to a division of the community estate might entitle her to a greater recovery than the terms of the premarital agreement. W claimed that her pleadings for rescission were only in the alternative. However the SCt stated that if all of W's actions did not qualify as an attempt to recovery property at variance with the agreement, it would be difficult to imagine what could. W argued that contracts should be construed so as to avoid "forfeiture." However the SCt noted that forfeiture in this case was expressly agreed to by the parties and although the law does not favor it, nothing prohibits the parties from agreeing to it. W further claimed that she had no choice but to seek rescission because of H's breach and therefore she asked the court to make a "just-cause" exception to the forfeiture clause of the premarital agreement. The SCt noted that W had other options, including claims for breach of contract which sought only the recovery of damages or requests for temporary orders. In fact the court recognized that in spite of W actually obtaining an order to compel H's compliance from the trial court she continued to press forward on her rescission claims. The SCt found that TRC 4.006 permits a court to set aside a premarital agreement when it is determined to be unconscionable but the court was unwilling to judicially expand the statute to include a "just-cause" exception which allows a party to escape enforcement of their agreement. The court found that there was no evidence that the agreement was unconscionable and thus it should be enforced and the forfeiture clause upheld. In a concurring opinion, Justice Lehrmann notes that TFC 4.006 expressly provides the exclusive remedies for invalidating a premarital agreement. Although W argued that she was not claiming the agreement to be invalid, she simply wanted to rescind it, Justice Lehrmann states that there is no meaningful difference between these two positions which both seek to restore the parties' status before any contract was ever signed. Justice Lehrmann concludes therefore that "rescission" of a premarital agreement, as a remedy, is not allowed under TFC 4.006.

B. *Haynes v. Haynes,* 2017 Tex. App. LEXIS 4934 (Tex. App. – San Antonio May 31, 2017) (mem. opinion) (Cause No. 04-15-00107-CV)

A year after marriage H and W executed a post-marital agreement (PA) which identified their separate property, established that there would be no community estate, waived reimbursement claims, but agreed to indemnify the other in the event the separate property debt of one was paid off with the separate property funds of the other. The parties each owned residences as their respective separate property (s/p) and H's schedule of liabilities identified several outstanding notes. In 2012 W filed for divorce and requested a division of property. H sought enforcement of the PA and W challenged its validity. The trial court found it to be valid in summary judgment proceedings. Thereafter W asserted claims valued at $611k for breach of contract and indemnity. The trial court accepted W's damage model detailing her claims that H's s/p debt had been paid off with her s/p funds, which included her share of proceeds from the sale of a residence. After several modifications, the trial court signed a final decree awarding W indemnity of $450K with credit to H for temporary spousal support paid. The final decree also awarded W $150K in attorney fees and contingent appellate fees. H appealed. In his first issue H sought a new trial because 51 exhibits went missing from the reporter's record. The COA abated and the trial court held a hearing in which the

court reporter was able to reproduce all missing exhibits. Because all proper procedures were followed under the applicable rules, H's first issue was overruled. Regarding the indemnity award, H claimed that the trial court had erred because the trial court incorrectly concluded that one of H's debts had been paid with W's s/p funds. During marriage, the parties re-financed H's s/p residence and both signed the new note. When this house was eventually sold the proceeds were deposited into a joint account and the next day one of H's s/p loans was paid off. W claimed that ½ of the sales proceeds from the residence were her s/p based on the refinance and the trial court agreed. The COA held that "re-financing" does not change the character of property, but may only create a claim for reimbursement. W also argued that H had "gifted" her a share of the property but the COA determined there was no evidence supporting this claim. The COA found that none of W's s/p was used to pay off two of the H's s/p debts (one for $131K and one for $100K), thus W was not entitled to indemnity for these amounts. The COA affirmed the balance of the indemnity findings within the W's damage model. H challenged the award of attorneys fees to W because they included fees incurred to unsuccessfully challenge the PA and further there had been no segregation. Because H was successful in identifying error in the property division requiring remand, the COA likewise reversed the fee award for redetermination by the trial court. The COA reversed two of the indemnity claims and rendered a take nothing judgment on them, modifying and affirming the indemnity awards on the other claims.

C. *In re D.Y.,* 2018 Tex. App. LEXIS 5352 (Tex. App. – Dallas July 16, 2018) (mem. op.) (Cause No. 05-16-01412-CV)

H & W married in December 2010. The parties executed a pre-nup which included terms providing that property acquired solely in the name of one party would be their separate property regardless of the source for purchase. W had two adopted daughters. Together H & W had twin boys in 2012. W filed for divorce in May 2015. In October 2016, W amended her pleadings and sought an annulment and further raised claims of fraud and theft against H. At trial, W testified that prior to marriage, H had misrepresented various things to her regarding his background, claiming he was only married once before (actually twice), he had been a career marine (only served a few months because he was underage), he had not served in the army (he actually had but was discharged for admitted homosexuality), he had two college degrees (he had none), he taught math at a local college (he did not) and his average annual earnings were always between $100K and $225K (SS wage info showed only one year over $100K). W testified that had she known of all these misrepresentations she never would have married H. Evidence further established that during marriage W's company issued a check to purchase a trust for $45K and H titled the truck solely in his name and thereafter sold it and kept the proceeds. The trial court annulled the marriage and awarded W damages against H for the $45K. H appealed. The COA found that there was sufficient evidence to support W's claim that H fraudulently induced the marriage. H and W both testified and the trial court was allowed to determine their credibility. In addition, a psychologist who performed a custody evaluation testified and his report was admitted in evidence. Through the psychologist H admitted to many of the false facts and the psychologist felt that had there been more honesty the marriage likely would not have occurred. The COA found that the evidence was sufficient to grant an annulment based on fraud and affirmed the judgment. As to the damage award, H claimed that because the truck was titled in his name it was his separate property under the pre-nup and he had an absolute right to sell it. However the COA found that because the pre-nup became valid upon marriage, and further because the marriage was annulled, there was in effect no marriage and the terms of the pre-nup were unenforceable. Further, W testified that her company provided the funds, it was to be company truck and she did not consent to title in H's name, so she wanted to be reimbursed for the purchase price. The COA affirmed the damage award.

II. MEDIATED SETTLEMENT AGREEMENTS

A. *Wiegrefe v. Wiegrefe,* 2017 Tex. App. LEXIS 8218 (Tex. App. – Austin August 29, 2017) (mem. opinion) (Cause No. 03-16-00665-CV)

H and W entered into an MSA dividing their property. The MSA tasked H's counsel to draft the decree. In the decree, H's lawyer awarded an Edward Jones account ($160K) to H under his property division section despite the fact that the MSA specifically awarded this account to W. Both parties and their lawyers signed and approved the decree as to form and substance without discovering the mistake. The decree contained a merger clause which specified that the MSA merged into the decree, which controlled. H and his lawyer went to court and proved up the divorce on March 28, 2016 and the decree was signed. The next day the clerk of the court sent notice to all counsel that the decree had been signed. W's attorney requested a copy from H's counsel several times but no copy was ever sent. The trial court's plenary power expired on April 27. On May 16, W went to the courthouse herself and obtained a copy of the final decree. On June 29, W met with her financial planner and discovered the error for the first time. W requested H to transfer the funds to her as provided by the MSA but H refused. H advised W that she could recover the amount from her attorney's malpractice insurance. On June 30 W filed a motion for judgment nunc pro tunc and thereafter filed an action for

bill of review. W asserted that the mistake was mutual and accidental, not intentional. In the alternative W asserted that H and his counsel had committed fraud or a wrongful act by failing to provide her counsel with a copy of the decree as is custom and practice when you are the attorney proving up the divorce. The trial court heard the case on September 1 and granted bill of review, determining that the drafting error was a mutual mistake by all and that the failure to H's counsel to provide a copy to W's counsel prevented W from filing a timely post-judgment motion. The trial court found the decree to be void and entered a new decree awarding the Edward Jones account to W. H appealed. The COA determined that to prevail on a bill of review, the plaintiff must establish that the resulting effects of a mistake or wrongful act must be unmixed with their own fault or negligence. Here the COA found that although the mistake may have supported a meritorious defense finding, W could not prove a lack of negligence or fault on her own part. The evidence indicated that the clerk sent notice of the decree being signed the day after. Nothing prevented W or her counsel from obtaining a copy of the decree from the court during plenary power. Further, even when W obtained it, it took another month before she discovered the mistake. In addition, as to W's alternative claim of fraud by the erroneous drafting and failure to provide a copy of the decree to W's counsel, the COA noted that the fraud must be "extrinsic" to support a bill of review. Drafting issues of the final judgment itself, even if intentional, would have been only "intrinsic" and could not support bill of review relief. The COA recognized that although the result was inequitable, this alone cannot support a bill of review. Judgment reversed, new decree set aside and prior, but erroneous, decree reinstated. In a dissent, Justice Bourland argues that any negligence or fault on the part of W or her counsel should be considered in the time frame of the court's plenary power, not thereafter, suggesting that the error in the decree was one line, buried among many other account listings with many account numbers, that understandably could have been missed. Further, because the case had settled and there would be no appeal, it was not reasonable to expect W or her counsel to use due diligence to secure a copy of the decree during plenary power and there was no evidence in the record to even suggest that if they had obtained it in time that the mistake would have reasonably been discovered before plenary power ran out. The dissenting justice would have relied on the trial court's findings and conclusions regarding the reasonableness and timing of the parties' actions and relied upon the trial court's discretion in resolving the parties' factual disputes surrounding the events leading up to and following entry of the erroneous decree, affirming the bill of review.

B. *Highsmith v. Highsmith,* 2017 Tex. App. LEXIS 9213 (Tex. App. – Amarillo September 28, 2017) (mem. opinion) (Cause No. 07-15-00407-CV)

H and W married in 2004 and thereafter had two children. Contemplating a divorce, the parties entered into pre-suit settlement discussions and in February 2015 signed an agreement entitled "Mediated Settlement Agreement" which included terms dividing real and personal property and containing a parenting plan. The document and attached exhibits provided that W would file for divorce and would appear in court to present evidence to obtain rendition of judgment on the parties' agreement after May 1. The agreement further provided language in several places that is was not subject to revocation. Shortly after the agreement was signed, H filed suit for divorce. W initially signed a waiver of citation (but did not waive notice of hearing or making of a record). Later W filed an original answer. On May 1 H appeared in court without notice to W and obtained rendition of a divorce and approval of the settlement agreement terms. W, through new counsel, filed a motion to set aside the rendition and to revoke the settlement agreement. Ultimately the trial court denied W's motions and signed a final decree. W appealed. The COA determined that the agreement did not comply with Family Code provisions governing mediated settlement agreements because the agreement in this case was executed prior to suit ever being filed. Both TFC 6.602 and 153.0071 contemplate enforcement of MSA's which are executed in conformity with the statute in a pending suit, not just those that may be signed to resolve a dispute. As a result, the agreement, while not enforceable as an MSA, might have been enforceable as a contract but this would also subject it to contract defenses and further subject it to revocation. Further the COA held that because W did not waive notice of hearings and filed an original answer, she had a fundamental right to notice of any setting. There was no dispute that W did not receive notice of H's court appearance on May 1. This error was not harmless because it was likely that W would have voiced her objection to the entry of judgment (based on her actions actually revoking the agreement) and she was denied the opportunity to do so. Reversed and remanded for a new trial.

III. CHARACTERIZATION

A. *Maldanado v. Maldanado,* 2018 Tex. App. LEXIS 5582 (Tex. App. – Houston [1st Dist.] July 24, 2018) (Cause No. 01-16-00747-CV)

H and W married in 1988. In 1990 the parties formed Document Services of Texas, Inc. (DST) and W was named as the sole owner of all the stock. The company provided litigation support services such as copying documents and retrieving medical records. H began working for the company in the 1990s and from 2005 to 2013 H handled the finances. In 2008 the parties

formed ESBEC LLC which purchased a building where DST did business. W spent long hours working for the business but H complained consistently that they had no money and he claimed it was because people were not paying their invoices. W became suspicious and begin searching for information on the business finances and discovered that large sums of money had been withdrawn from both business and personal accounts. W confronted H and he told her she would never find the money. The parties continued to argue over the funds and after one particularly heated argument witnessed by employees, H wrote a letter to W and stated in the letter that he was giving her all of the savings and checking accounts they held together and giving her both businesses DST and ESBEC. W filed for divorce. W filed a MSJ claiming both DST and ESBEC as her separate property based on the gifts from H. Regarding DST, W offered evidence of their incorporation, stock certificates held solely in her name and H's letter. Regarding ESBEC she relied solely on H's letter. H responded and claimed that he was under duress when he signed the letter and that he did not intend to make a gift. The trial court granted the MSJ and found both to be W's separate property. At trial, H asked the court to reconsider the MSJ but this was denied. However at trial the court did permit some evidence regarding the disputed facts surrounding H's claim that he did not intend to make a gift. The trial court however concluded that both businesses were W's separate property. H appealed. The COA found that the summary judgment evidence was sufficient to establish that DST was W's separate property. (See comment/concern below) H argued that he never delivered the property to W which was an element of gift because he continued to work there and manage the finances after he wrote the letter. The COA found however that all of the stock was always in W's sole name and that H only owned his community interest in the stock held in her name and thus no actual transfer and delivery of the stock was required. Further, H's continued use and authority over the accounts did not affect his delivery of the gift. As to the duress claim, the COA found that H did not suffer from extreme pressure in writing the letter because there was no evidence that W threatened him in any manner. As to ESBEC, the COA found that W's reliance solely on H's letter, without more, was insufficient to establish that H delivered the gift of his interest to her. Because the mischaracterization of ESBEC affected the overall division, it was necessary for the COA to reverse and remand the entire property division. **Comment:** The opinion clearly indicates that DST was incorporated during marriage and that all stock was simply placed in W's name. The opinion further recognizes that the H's letter only gifted the H's community property interest in the stock. Although there is no discussion or facts within the opinion which establish why or how W's interest in the stock (of a company established during marriage) could be her separate property, the trial court found all of DST to be W's separate property (her own interest and the H's interest as gifted to her) and the COA affirmed that ruling. It is curious how the COA determined that H's interest in DST was community property prior to his gift but W's was interest in the same stock was not. Perhaps this will be further considered on remand.

B. *Rivers v. Rivers*, 2018 WL 6626718 (Tex. App. – Austin December 19, 2018)

The trial court found that when Husband and Wife bought some real property and put it in their joint names each intended a gift to the other of the separate property cash they put up. They both contributed separate property cash to the purchase in unequal amounts and borrowed money for the rest. Wife claimed she rebutted the presumption of a gift by her testimony. The appeals court affirmed the trial court's decision. Nothing real surprising here, but the whole gift presumption for real estate taken jointly seems to come up pretty often so I wanted to share the opinion.

C. *In re Marriage of Stegall,* 2017 Tex. App. LEXIS 4397 (Tex. App. – Amarillo May 12, 2017) (Cause No. 07-15-00392-CV)

H and W married in 2004. Prior to marriage H owned and operated a cattle trading business. By his own admission he did not keep good records and he was unsure how many head of cattle he brought into the marriage. Upon trial of the divorce in 2015, H testified that he had owned at least 163 cows at the time of marriage and that he owned 191 cows now. The Court ultimately characterized all existing cattle on the ground and those in gestation as H's separate property and confirmed them to him along with the majority of supplies and equipment associated with his cattle trading business. The court divided the community estate and W appealed arguing that H had not properly traced his s/p, making the court's findings and division of property an abuse of discretion. On appeal, H argued that the "minimum sum balance" tracing method could be correctly applied to his separate property cattle claims and that at the very least the trial court was correct in confirming a majority of the cattle as his s/p because the total number of cows existing at divorce had never dropped below the number he originally brought into the marriage. The COA notes however that this tracing method cannot apply to cattle in the same way that it applies to cash because cattle are not fungible. Determining that H's tracing theory failed to acknowledge that there had been a significant number of cattle born during the marriage, all of which were community property, which were then commingled with his s/p cattle, the COA found this circumstance defied segregation and thus the community presumption

applied. Because H failed to clearly trace which cows were brought into the marriage and distinguish those from the community property cows, his tracing failed and the court erred in confirming all cattle as his s/p. Because the cattle comprised the largest portion of the community estate, the mischaracterization resulted in an erroneous division, warranting reversal and remand.

D. *Waring v. Waring,* 2017 Tex. App. LEXIS 8948 (Tex. App. – Beaumont September 21, 2017) (mem. opinion) (Cause No. 09-16-00030-CV)

H and W married in 2012. Almost a year before marriage, H purchased a tractor in his name and financed $26,000 of the purchase price over 5 years. The tractor was delivered to a farm owned by W's father where the parties were remodeling a house where they would live. H paid all installments on the note both before and after the parties' marriage. W filed for divorce in 2014 and both parties claimed separate property. The primary issue at trial involved characterization of the tractor, which W claimed H gave to her as a gift around Christmas of 2011 before they married. She also claimed that he gifted her some portion of a bonus H received from his employer However H claimed that a portion of the bonus was earned prior to marriage. At trial W testified that H gave her the tractor around Christmas. W's mother testified that H told her it was a Christmas gift for W which she (her mother) thought was unusual but that eventually decided W would probably like the tractor because she liked to farm. A man hired to build fences on the property also testified that H had told him he purchased the tractor for W as a gift. H denied these claims stating he would never give W something so expensive prior to their marriage and that he had given her a ring and bracelet wrapped as a gift that Christmas. H also stated that he used the tractor on the property. H claimed that if it was found to be a gift, the gift failed because the property was encumbered and thus H had no right to gift of assign the property to W. H requested that if the tractor was found to be W's s/p that the W should be awarded the balance of the debt and further W should be required to reimburse H for the amounts he had already paid on the note. As to his bonus, H provided his own calculation requesting that a portion of an employee bonus be characterized as s/p because he had worked for his employer for a period prior to marriage. The trial court characterized the tractor as W's s/p and characterized the debt on the tractor as H's s/p debt, awarding/allocating them to each respectively. The court characterized the bonus as community property and divided the parties' estate. H appealed. The COA found that although there was conflicting evidence of H's intent regarding the tractor, the court could have inferred that H intended a gift because he never used or possessed the tractor outside of W's father's farm and used it only to improve that property. The COA rejected H's argument that the gift failed because the property was encumbered, noting that there was no evidence that H gave the gift with the intent that W assume the liability or that W agreed to assume it. The COA further found that H had fully paid every instalment on the note at all times, indicating he never intended for W to make these payments. Further the COA rejected the argument of reimbursement finding that in considering the equitable nature of reimbursement, a gift from one marital estate to another is generally not a proper basis for reimbursement. As to H's challenge regarding his bonus, the COA found that H offered no evidence (other than his own calculation) that the employer intended some portion of the bonus to compensate H for efforts prior to marriage and that absent such evidence the court was entitled to apply the c/p presumption. Judgment affirmed.

E. *Allen v. Allen,* 2018 Tex. App. LEXIS 733 (Tex. App. – Fort Worth January 25, 2018) (mem. opinion) (Cause No. 02-17--00031-CV)

In April 2009, W purchased a residence. In May she married H. In early 2012, W executed a general warranty deed conveying to H an undivided one-half interest in the residence which stated consideration was "love of and affection for H" Several years later, W filed for divorce. In her pleadings, W claimed that H had secured the transfer by fraud, claiming that when she was struggling to pay property taxes on the residence, H had advised her that she should convey an interest to him because the VA would pay for the property taxes. Relying on this representation, W stated she conveyed the interest. Ultimately the trial court found that the parties each owned an undivided interest in the residence as their separate property, ordered the property sold and appointed a receiver to administer the sale. W appealed. On appeal, W argued that the trial court should have determined that the transferred interest in the residence should have been characterized as community property. W argued that the trial court erred in not placing an equitable trust on H's interest in the residence. W further argued that the trial court had no authority to appoint a receiver over her separate property. The COA first notes that the relief W seeks regarding the character of the transferred interest is not supported by her pleadings and the issue was not tried by consent. W's petition did not claim the transferred interest as community property under any theory. Further, the COA noted that the trial court could not have characterized it as such as a matter of law, noting that the only way to convert separate property into community property is by a proper conversion agreement under TFC 4.202 and that the general warranty deed did not meet the statutory requirements. As to the equitable trust claim, again the COA noted that this relief was not requested in W's pleadings. Further, the COA found that the trial court properly determined

H did not commit fraud in connection with the deed transaction. H testified that what he told W was that they could get an exemption on property taxes from the County since he was a disabled vet, not that the VA would pay the taxes. Further, W was not damaged even if she relied on H's statements to induce the deed because they had received the exemption and saved several thousand dollars on property taxes over the years. Finally, the COA determined that because the parties' owned the property jointly as separate property they were tenants in common and since the property could not be divided in kind, the trial court was authorized to partition the property and appoint a receiver for sale. Judgment affirmed.

F. *Knowlton v. Knowlton,* 2018 Tex. App. LEXIS 3408 (Tex. App. – San Antonio May 16, 2018) (mem. opinion) (Cause No. 04-17-00257-CV)

H and W lived on a 5 acre tract of land in a mobile home during their marriage. In 2013, H and W tried to obtain an equity loan to make repairs on the property. H's mother, Jesse, signed a quitclaim deed for the property only to H which had been printed off the computer by W. According to W, Jesse signed the deed to assist the parties' in obtaining the equity loan. During the application process the bank would not recognize the deed because it failed to contain a description of the property. So, Jesse then executed a general warranty deed to both H and W. Thereafter an attorney filed a statutory correction deed regarding the legal description. According to W, this was done so that H and W could both own the property. At some point during the process, H also signed an affidavit stating that the property was community. When a divorce followed, H claimed the property was separate by virtue of the quitclaim deed gifting it to him from his mother. W claimed the property was community. The trial court characterized the property as community, ordered it sold with the proceeds to pay off the home equity loan and then divided 50/50 between the parties. H appealed. First, the COA examined the nature of a gift, stating that the burden is on the party claiming gift. However, the COA notes that a presumption arises when a parent makes a gift to a child that the gift was intended for the child but this presumption can be rebutted by clear and convincing evidence. The COA found that the quitclaim deed did create a presumption of gift that W had to overcome by clear and convincing evidence. The COA notes that in addition to the evidence regarding the purpose of the transactions, the quitclaim deed itself recited that it was made for "$10 and other good and valuable consideration." Further the general warranty deed recited that it was made for "cash and other consideration." The COA concluded that on their face, neither deed supported a finding of gift and determined that W overcame the presumption. Division affirmed.

G. *Scott v. Scott,* 2018 Tex. App. LEXIS 4027 (Tex. App. – San Antonio June 6, 2018) (mem. opinion) (Cause No. 04-17-00155-CV)

H and W married in 1992 and had no children. W filed for divorce in 2013 and H was ordered to pay $6K to W for temporary spousal support. W filed a motion for partial summary judgment regarding the character of two tracts of land acquired during marriage. The first was an 8.64 acre tract which W claimed was community property despite a gift deed conveying the property to both H and W from W's mother. The second was a 16.8 acre tract that W claimed was her separate property despite a general warranty deed from her mother which stated that it was being conveyed for $10 and other good and valuable consideration. The trial court denied the MSJ regarding the 8.64 acre tract but eventually awarded that tract to W as part of the division of the community estate. The trial court granted the MSJ as to the 16.8 acre tract. The trial court also ordered H to pay W spousal maintenance of $3K per month for 3 years. H appealed. The COA considered that both deeds (which were provided as SJ evidence) were to be construed based on the language of the deeds themselves if intent could be determined from those recitals. In these circumstances, parole evidence should not be admitted or considered. Here, W had attached her own affidavit which stated that as to the 16.8 acre tract, she had paid no consideration in spite of the deed recitals and her mother's estate planning lawyer also testified to that in his affidavit. As to the 8.64 acre tract, W testified at trial that she and H had paid her mother $1500 per acre for that land and that that her mother conveyed it by gift deed so they would not have any tax consequences. The COA found that none of this evidence was appropriate under the circumstances. As to the 8.64 acre tract, the COA found that this was ½ separate property of both H and W and not community property. The division which awarded all of the tract to W was error because it divested H of his s/p. Based on these determinations the property division was reversed and remanded with instructions to re-divide the estate in light of the correct character of the two tracts. The COA affirmed the award of spousal maintenance in light of sufficient evidence establishing that W met the requisites for support and H had sufficient resources to pay it. (NOTE: There was no discussion or raising of the s/p presumption of gift when property is conveyed/transferred to "the natural fruits of one's bounty—i.e. to a family member).

IV. ENFORCEMENT

A. *Moore v. Moore,* 2019 Tex. App. LEXIS 656 (Tex. App. – Eastland January 31, 2019) (Cause No. 11-16-00282-CV)

H and W divorced in 2005. In that proceeding, W was represented by counsel. H executed a waiver of service and did not appear at the final hearing. A final

decree was signed and included terms which divided "all oil, gas and other minerals standing in the name of the parties or either party" equally between H and W as part of a just and right division of the marital estate. The decree did not contain any listing of the oil and gas interests and did not confirm any separate property to either party. For unexplained reasons, H filed a motion for new trial which was denied but thereafter he did not pursue an appeal. In 2013, W discovered that H held certain oil and gas interests. W contacted the producers and demanded that they divert 50% of the royalty payments to her based on the decree terms. The producers issued division orders and notified H. H filed a motion to clarify the decree, requesting that the trial court confirm these interests to him as his separate property. W filed an answer asserting that the decree was clear. W further filed a motion to enforce claiming that H had fraudulently concealed the interests from her and requested the court to issue orders enforcing the property division by obligating H to executed deeds and pay over her share of royalties received. H asserted the affirmative defenses of statute of limitations, waiver, estoppel and laches and further claimed adverse possession interests in the minerals. After hearing the clarification request, the court denied it finding that the interests were clearly awarded 50/50 as community property. The trial court granted W's enforcement and ordered H to execute deeds, pay damages and awarded attorneys fees. H appealed. As to the statute of limitations claim, H asserted that W should have brought her claim for relief within 4 years because her claim was for execution of a lien on real property and/or for fraud. The COA determined W's claims were neither and held that under TFC Chapter 9, while the legislature has provided a time limit on the right to enforce interests in tangible personal property (2 years) there is no corresponding statute of limitations regarding interests in real property. Because oil and gas mineral interests are considered real property, W had the right to bring suit more than 10 years after the divorce became final. As to the defense of waiver and estoppel, the COA found that once W discovered the interests in 2013, she contacted producers, she hired counsel and she researched her claims, all evidence of her affirmative acts to protect her property interests instead of waiving them. Further, as to laches, the COA determined that after discovery, W did not substantially delay bringing suit. Finally, H claimed that he had "adversely possessed" the mineral interests for the requisite period since the divorce entitling him to ownership. The COA found the evidence insufficient to establish H's "possessory" interest in the minerals. Judgment affirmed.

B. *Land v. Land,* 2018 Tex. App. LEXIS 5511 (Tex. App. – Houston [14th Dist.] July 19, 2018) (Cause No. 14-17-00013-CV)

H and W divorced in 2014. As part of an AID and thereafter a final decree, W was awarded 53% of H's net 2013 end of year bonus as paid to H in 2014, if and when paid. H was awarded 47% of the net 2013 bonus award. In addition, H was ordered to return to W her diamond engagement and wedding ring. In February 2014, H received his 2013 year-end bonus. The pay stub reflected that the total amount of the bonus was $460K and identified two pre-tax deductions, one for $75,000 as a deferred annual bonus award and $6,000 for a personal savings contribution. Thereafter, approximately $108K was deduced for taxes leaving a net bonus of $270,289 of which H paid 53% to W. In 2015, W filed a petition to enforce and thereafter amended to seek her share of $81,000 in undivided property. The trial court granted a no evidence MSJ on the enforcement claims but did not address the undivided property claim. W amended and asserted breach of contract claims for failure to pay her share of the $81,000 deducted from the bonus as well as H's failure to deliver the rings. After trial, the court ordered H to pay over W's 53% of the $81,000, awarded W any insurance proceeds recovered by H for the rings and awarded fees to W for $30,500. H appealed arguing that any award of further amounts from his bonus was an impermissible modification of the property division. The COA determined that the AID was not ambiguous and that the AID divided only the "net amount" of the year end bonus paid but did not divide the pre-tax amounts deducted totaling $81,000 and those remained subject to division. Because the parties decree intended to effect a 53/47 split of property, the trial court did not err in awarding this amount to W. There was disputed testimony regarding the rings and who was the last to possess them, however the COA found that the trial court was allowed to believe W and that the evidence supported her breach of K claim. The COA reversed the award of attorneys fees because the amount awarded included charges by non-attorney staff and those amounts were not supported by evidence regarding the staff's qualifications or supervision. That issue was remanded for a new calculation of attorneys fees only.

C. *Ishee v. Ishee,* 2017 Tex. App. LEXIS 4761 (Tex. App. – Beaumont May 25, 2017) (mem. opinion) (Cause No. 09-15-00187-CV)

H and W were divorced in 2012. At the time of divorce, H owned a percentage interest in several closely held businesses, one of which was World Environmental (WE). As part of the division of property, W was awarded a percentage of H's interest in the businesses in which he held a membership interest. In 2013, W sued H, World Environmental and a majority owner for breach of fiduciary duty and breach

of contract. She alleged that H had never paid her the monies she was entitled to receive based on her percentage interest in the businesses. She further sued for declaratory judgment to determine the specific nature of her assigned interest. At trial, W testified that H never distributed any funds to her for her percentage interests, despite her claims that H had in fact received distributions from the businesses. H claimed he had never received any income or distributions and further asserted he did not own a controlling interest, thus had no ability to affect the decisions of the business regarding those matters. The business accountant testified that H did receive certain guaranteed payments from WE after the divorce but claimed these were in the nature of compensation. W argued that she was entitled to a percentage of these payments as well as a percentage of the value of all fringe benefits H received from the business including the value of a company car, cell phone and health insurance. The jury found that H breached his fiduciary duty by failing to make distributions to W and awarded actual and punitive damages in excess of $350K. The trial court awarded attorneys fees of $25K to W under the declaratory judgment action with H and WE jointly and severally liable. H appealed. First H argued that the trial court lacked jurisdiction because W's suit, based in part on remedies under TFC Chapter 9, was not filed in the divorce court. H claimed the divorce court had exclusive jurisdiction. The COA disagreed and held that venue for enforcement actions under Chapter 9 is permissive, not mandatory. Next H argued that he had no fiduciary duty to W as an assignee of his business interests. The COA noted that while there is no statutory fiduciary duty created under the TX Business Organizations Code for assignees, TFC 9.011 creates such a duty when a divorce decree obligates one spouse to remit property to the other spouse upon receipt, such as distributions from the business interest partially assigned to W in this case. Even so, the COA found that the damage award was excessive because the decree did not award W a percentage of all benefits H received and the jury had been wrongfully persuaded by the arguments of W's attorney to the contrary. In addition, the COA found that W's recovery effectively "double-dipped" because the jury awarded her identical damages under two separate claims (breach of fiduciary duty and disgorgement). The COA reversed the damage award and remanded the entire matter for a new trial on both the fiduciary duty and breach of contract claims. The COA modified the fee award against H only and affirmed the declaratory judgment, fees and sanctions.

D. *Aguirre v. Aguirre,* 2017 Tex. App. LEXIS 4580 (Tex. App. – Corpus Christi May 18, 2017) (mem. opinion) (Cause No. 13-16-00292-CV)

H and W were divorced in 2005. The parties were given an equal interest in the marital residence and H was ordered to pay for half of the property taxes, although W was allowed to remain in the residence with the children. H was ordered to pay child support. Presumably unable to get over his hurt feelings, in 2009, H shot W. He eventually pled guilty to aggravated assault and was sentenced to 15 years in prison, during which period of time his child support obligation fell into arrears and he did not pay his share of the property taxes. W brought an enforcement action in which H participated by phone. W calculated H's arrearages for child support and property taxes and asked that in lieu of a cumulative judgment that the court award W 100% interest in the marital residence (previously awarded to them both equally) and then offset the value of H's interest in that residence against the arrearage amount, giving her a judgment for the $8,000 plus the differential. The trial court ultimately granted W's requested relief and H appealed. (**OK … get ready … wait for it …)** H's sole issue on appeal is that the trial court erred in failing to award W the 6% interest on the arrearage judgment (which would obviously serve to increase the judgment against him) because the award of interest on child support arrearages under the Family Code is mandatory. Letting H down easy, the COA determines that H has waived his right to assert such error because he did not first raise it in the trial court. Judgment affirmed (luckily for H). **COMMENT:** Yep, H was pro se!

E. *Lancashire v. Lancashire,* 2017 Tex. App. LEXIS 6369 (Tex. App. – Dallas July 11, 2017) (mem. opinion) (Cause No. 05-16-00890-CV)

H and W divorced in 2012 based on the terms of an MSA. As part of the division of property, W was awarded a 50% undivided interest in shares of stock held in Bold Ventures, LLC in the name of H. The terms of the final decree provided that H would manage the shares and that H had the exclusive right "to possess, control, manage, and exercise all rights associated with" all of the Bold shares held in his name. The decree further provided that H would be a constructive trustee for the benefit of W with regard to the Bold shares to the extent of his payment obligations which required H to pay 50% of the sums he received for any sale or transfer of the Bold shares to W. Subsequent to the divorce W sought some assurances from H that the Bold shares were being properly maintained. When H did not respond, W filed suit for enforcement under TFC Chapter 9 and Property Code §113.151 (Demand for Accounting by beneficiary to trustee) and requested the appointment of a Rule 172 auditor. W sought an accounting dating back to 2011 and she sought production of tax returns, related K-1's and other business records. In support of her claims W asserted that as constructive trustee, H owed her both statutory and common law duties, including the duty to provide an accounting. H filed an answer and asserted

affirmative defenses and further sought declaratory relief that he did not owe W any additional rights other than what was clearly stated in the decree. H moved for traditional and no evidence SJ. The trial court heard these motions on the day of trial, took them under advisement, and then proceeded to trial. W was the only party to testify. H agreed to provide W only documentation showing any stock sales or transfers. Several months later the trial court granted a declaratory judgment providing that H would provide the limited documentation he agreed to and further granting H's SJ motions. W appealed. Initially the COA, on its own motion, examined the trial court's jurisdiction to grant declaratory relief, noting that while declaratory judgments may declare rights, status and other legal relations, they are not the proper vehicle to be used to interpret a prior judgment. The COA determined that H's request to declare that he had no further obligations to W other than as specified in the decree was equal to a request to construe or interpret the decree. To the extent the trial court had no subject matter jurisdiction to grant such relief through declaratory judgment, the order was reversed. The COA further examined H's obligations under the decree as a constructive trustee for W's benefit as it related to the Bold stock. The COA decided that the terms of the decree made it clear that H's obligations to W were limited to the payment of her 50% share of proceeds from any sale or transfer. The COA further held that H's designation as a "constructive trustee" did not extend his obligations to providing W with an accounting or documentation as she requested. Trial court's orders granting SJ on that issue were affirmed. **COMMENT**: This case demonstrates the importance of drafting decrees with precise language which imposes only those obligations as are necessary to accomplish the specific intent of the matters at issue. Using over-generalized language in this decree regarding H's appointment as a constructive trustee could have obligated him to provide W with unnecessary propriety information regarding the LLC which would have been wholly unwarranted to insure that W received her share in any stock sales.

V. REIMBURSEMENT

A. *In re Slagle,* 2018 Tex. App. LEXIS 3588 (Tex. App. – Houston [14th Dist.] May 22, 2018) (mem. opinion) (Cause No. 14-16-00113-CV)

H and W married in 2000. W filed for divorce in 2014. At the time of divorce, W was employed and earning a substantial salary. H was unemployed but admitted that he spent approximately 60 hours per week working on a litigation matter involving a company that he formed prior to the parties marriage called Graphic Creations. H also was heavily involved in day-trading but admitted losing at least $130K on that endeavor in one year. At trial, the evidence established that Graphic Creations existed at the time of marriage. It was developed as a vendor located in a Six Flags amusement park under an agreement whereby a certain percentage of its profits was paid back to the Six Flags corporation. The business grew and existed in several parks but eventually Six Flags increased the percentage agreement based on its own financial difficulties. H eventually had to shut down his business but he had sued Six Flags over the situation and this was the litigation that he devoted much of his time to. Throughout the marriage the couple loaned a total of $680K to Graphic Creations from W's salary. Further H paid himself a salary from the company at the end of each year and then loaned it back to the company. This amount totaled another $164,500. After trial, the court concluded that Graphic Creations was H's separate property and that the community was entitled to reimbursement of $681K, of which W was entitled to $340K. To satisfy this award the trial court awarded certain assets to W totaling $275K and obligated H to pay community debts amounting to the $65K balance. H appealed. Initially, H argued that there was insufficient evidence to establish that Graphic Creations was H's separate property because W offered no evidence on the issue. The COA determined however that H's admissions at trial alone were sufficiently clear and uncontradicted to support such a finding. H likewise challenged the trial court's division which the COA construed as a challenge to the trial court's treatment of W's reimbursement claim. The COA noted that the trial court has broad discretion in resolving a reimbursement claim and that no abuse was present where the trial court sought to offset the amount W was entitled to by awarding her various community assets and obligating H to pay certain debts, all together equaling the amount of the reimbursement claim. H's other issues were not preserved and judgment was affirmed. **COMMENT:** I included this case because I'm not clear how the reimbursement even harmed the H. The reimbursement was based on community monies expended to benefit H's separate estate. W was already entitled to an equitable division of the existing community estate, so when the trial court awarded existing community assets to her to satisfy the community's claim for reimbursement against H's separate estate, how does this even count as reimbursement? The COA does not address this but it seems to me that W is the party who should have challenged the manner in which the trial court decided to handle the reimbursement claim. Oh well?!

VI. FRAUD

A. *Willmore v. Alcover,* 2018 Tex. App. LEXIS 2044 (Tex. App. – Corpus Christi*, March 22, 2018) (mem. opinion) (Cause No. 13-16-00180-CV) (*transferred from Houston 1st District under a docket equalization order which gives case precedence in courts within Houston COA districts)

H and W divorced in 2015 pursuant to a final decree entered after a bench trial. H appealed primarily challenging the trial court's rulings excluding his inventory and appraisement and evidence contrary to W's inventory. H filed his I&A on the day of trial and W objected because it was due to be exchanged under Harris County local rules 10 days prior to trial. W argued that not only should H's inventory be excluded but likewise any evidence he sought to offer contrary to her I&A. The court specifically did not rule on W's objection. The issue resurfaced on the second day of trial when H sought to cross-examine W, challenging her testimony regarding certain property. W objected again and the trial court sustained the objection. Thereafter, H did not make an offer of proof or secure anymore specific ruling on W's motion to exclude his evidence based on his failure to timely file an I&A. H challenged the exclusion on appeal but the COA determined that H had not properly preserved the issue by failing to obtain a more precise ruling on W's motion and further by failing to make an offer of proof on what his evidence would have been. The COA's decision on preservation controlled most of H's other issues on appeal. Apart from this, H challenged the trial court's decision which denied his claims of fraud as against W. H alleged that W had secretly deposited all of her paychecks from her teaching job into a separate account for the entire duration of their seven-year marriage without his knowledge or consent. What makes this case interesting is the COA's delineation of the elements that H was required to establish in order to prevail. More often than not, family lawyers are faced with case law defining a six element common law actual fraud claim that can sometimes be hard to fit into a family law fact pattern. This opinion offers a very good 8 element fraud claim that seems more in line with what we face. The elements specified by the COA are (1) W failed to disclose the separate account; (2) W had a duty to disclose the separate account; (3) the separate account was material; (4) W knew that H was ignorant of the separate account and H did not have an equal opportunity to discover the separate account; (5) W was deliberately silent when she had a duty to speak; (6) by failing to disclose the separate account, W intended to induce H to take some action or refrain from acting; (7) H relied on W's nondisclosure; and (8) H was injured as a result of acting without that knowledge. On a procedural level, the COA ultimately found that H failed to meet his burden of proof in establishing fraud by W. The COA ruled that H attempted to shift the burden by alleging that there was no evidence indicating that he knew of the account instead of offering affirmative evidence that proved the elements of his case. Ultimately the COA affirmed the trial court's division of property.

B. *Miller v. Miller,* 2018 Tex. App. LEXIS 4787 (Tex. App. – Houston [14th Dist.]* June 28, 2018) (Cause No. 14017-00293-CV) *as transferred from Austin Court of Appeals

H and W married in 1969. H was a physician who established allergy clinics in several cities. W worked for one of the clinics briefly but otherwise was not employed during the marriage. Over the course of the parties' marriage, they heavily invested in real estate. Several of the clinics leased their office space from businesses crated and owned by the parties. Some of these real estate developments were owned partially by close friends and neighbors of the couple. In 2010, H had a stroke and was hospitalized and in rehabilitation for almost a year. W became his full-time caregiver and depended on managers of the clinics and business partners of H to assist with the day to day operations of their investments and business holdings. One of H's best friends and business partners was indicted for misappropriating funds from a prior employer but H continued to trust him to manage one of the real estate developments in which they were partners. W became overwhelmed trying to keep up with H's care and all of the other matters ongoing with the clinics and business operations and tried to commit suicide but called for help after taking an overdose of pills. Thereafter, W filed for divorce. During the divorce proceeding, H did not cooperate in completing discovery and failed to disclose all information regarding the parties' assets and debts. H did not secure appraisals on all of the parties' real estate holdings as ordered by the court. H did not pay all of the temporary spousal maintenance he was ordered to pay. W asserted claims for fraud against the community, claiming that H had access to substantial cash (some coming in from business interests) during the divorce proceedings which he spent without her consent or could not otherwise account for. The case was tried before the bench over a period of twelve days spanning over almost a year. In 2016, the court signed a final decree finding reconstitution owing to the community estate of $190K. The trial court valued the community estate at $7.6M and awarded W 49% and H 51%. The trial court issued findings that provided H was awarded all clinic assets and the real estate holdings where the clinics were located so that H and W would not have to negotiate leases with one another in the future. The court likewise awarded H all property with indebtedness. W was primarily awarded cash and retirement accounts. The court found that H had future earning potential whereas W did not and that H had

business experience to deal with the various real estate and business investments. The court further granted the divorce on no fault grounds. H filed a MNT which was denied and thereafter appealed. H's primary complaint related to the court's findings regarding fraud on the community. H challenged the legal and factual sufficiency of the evidence to support the claim, arguing that he clearly rebutted any presumption of fraud by showing that the disposition of property was fair. H also claimed that a constructive fraud claim was barred for actions occurring during a divorce because the fiduciary relationship has ended. Additionally, H asserted that W's lack of information regarding his activities was based on her personal choice and thus she could not recover and claimed that reconstitution was error since the community estate was monetarily whole. The COA found legally and factually sufficient evidence to support a finding of fraud, noting that H was unable to account for and explain some of his disposition of funds within his control, and finding that in light of H's conduct during the divorce proceedings, much of which caused delays, the trial court was able to judge his credibility and not believe many of his explanations for how funds had been expended. While H was able to explain where some of the funds had gone, the trial court expressly considered his expenses for medical care and preservation of the community in reducing W's fraud claim from $435K to $190K and thus H had not overcome everything that was found presumptively fraudulent. As to H's claim that fraud on the community alleged to have occurred during the divorce proceedings was barred, the COA found that although a spouse has the right to manage their special community property, they must still do so in a way that is fair to the other spouse. While the COA recognized that the fiduciary relationship of H and W ends upon the filing of divorce where both parties employ counsel, in the midst of the divorce H still had an obligation to provide complete disclosure in discovery which he did not. The COA noted that if fraud on the community was barred as a matter of law during divorce this would place the community at risk during a period where it was most vulnerable and the COA was unwilling to legitimize H's arguments. The COA found that while W was not fully informed as to the ongoing investments and matters relating to the community estate, she had a right to rely on the fiduciary relationship shared with H during marriage and Texas law does not require that she demonstrate any diligence to understand the innerworkings of the community estate. Finally, H argued that the community estate was monetarily whole, not having lost any value over the course of the divorce, and thus constructive fraud could not be found because he did not "dispose" of property but may have only made unwise investments. The COA relied on its earlier determination that the evidence was sufficient to support fraud where H failed to account for all of the funds at his disposal during divorce. H further argued that the trial court erred in ordering that $100K be paid to W from a clinic account when the clinic was not named as a party in the divorce. The COA determined that the clinic was not ordered to do anything but instead W was awarded funds held in a clinic account, and that the clinic was community property. Although H claimed that the record supported his prior complaints about this ruling, the COA could find no such record and determined that H failed to preserve error. Finally, H argued that although the court found a division in his favor, the values actually adopted by the court established a 51/49 division in W's favor and the findings of fact were inconsistent with the correct valuation. The COA determined that H failed to adequately brief the issue. Judgment affirmed.

VII. PROPERTY DIVISION

A. *Cantu v. Cantu,* 2018 Tex. App. LEXIS 5596 (Tex. App. – Houston [14th Dist.] July 24, 2018) (Cause No. 14-17-00175-CV)

H and W married in 1979 and were both working pharmacists. H encouraged W to attend medical school which she did and then opened her own ophthalmology practice. Over the course of the marriage, H acquired five pharmacies and two clinics which he managed and the parties accumulated substantial wealth. In 1985, W learned that H had an affair but she forgave him. In 2000, W filed for divorce but thereafter the parties reconciled. In 2013, W suspected H was cheating and hired a PI to confirm her suspicions. W again filed for divorce. Within the divorce proceeding W sought discovery, she sought an accounting from H's businesses, she secured orders for a forensic examiner to review H's business computers and learned that H ran scrubbing programs even after being requested to preserve evidence for the divorce. H hired an expert to review more than 30,000 pages of discovery. The expert issued a report claiming more than $7MM in fraud in a variety of categories which included deficiencies in pharmacy and clinic sales, money spent on girlfriends, unaccounted for withdrawals, business credit card expenditures deemed fraudulent for personal use and extramarital entertainment. Because many records were missing, the expert used an "extrapolation" methodology for several of these claims. For example, she determined a monthly average of discrepancies between pharmacy sales and pharmacy deposits and then she would use this average to add to the pharmacy fraud claim for each month in which she did not have records. The experts report was admitted at trial without objection. H testified to refute many of the claims and one of his employees testified likewise trying to explain how the pharmacy and clinic businesses operated. H also had his own expert who was critical of the W's expert, her methodologies and her conclusions. Ultimately, the trial court found that the community

estate should be reconstituted in the amount of $3.9 MM and thereafter awarded H the entirety of that claim along with some additional property determining that the award was a 55/45 split with the reconstitution claim. H appealed challenging the legal and factual sufficiency of the evidence supporting the fraud claims. The COA reviewed each of the 11 categories and determined that although some of the expert's calculations were erroneous (i.e. the expert included W's credit card charges and charges for the benefit of the parties' adult children as part of H's fraud), the COA assumed that the trial court did not include these in its conclusions. Overall, the COA determined that the evidence actually supported over $4.2MM in fraud and thus the trial court's reconstitution award of $3.9 MM was in the proper range. As to H's challenge to the methodology and reliability of W's expert, the COA found the error waived because H did not object to the methodologies in the trial court and did not object to the experts report when admitted into evidence. As to the overall division, H complained that the division was an 88/12 split when the reconstitution was not included. The COA found that there was more than sufficient evidence permitting a disproportionate division of property, including H's own admission that he had affairs over the life of the 30 year marriage and his failure to account for many of the wasting claims asserted against him. Judgment affirmed.

B. *Dalton v. Dalton,* 2018 Tex. LEXIS 655 (Tex. Sup. Ct. June 29, 2018) (Case No. 17-0155)

The parties were divorced in 2011. The final decree gave full faith and credit to an Order of Separate Maintenance (OSM) issued by the state of Oklahoma which resolved issues concerning child custody, child support, property division, debt division, spousal support, attorney's fees and costs. Under the OSM , H was to pay W "support alimony" in the amount of roughly $1.3 million in monthly installments of $6,060 beginning in 2007 until paid in full or until further order of the court. After the TX divorce wife began pursuing various remedies in TX to enforce the OSM as approved in the TX decree and obtained a withholding order for the OK support payments. W sought to hold H in contempt and she requested a QDRO which would cD.over amounts not withheld under other enforceable withholding orders. The court ultimately held H in contempt and sentenced him to 45 days in jail and issued a QDRO covering alimony arrearages and attorney's fees to be paid to W from H's retirement. H appealed. The COA affirmed, finding that the QDRO did not impermissibly modify the property division but instead enforced an obligation for support. The court further held that the assignment of his retirement benefits was not precluded by ERISA because QDRO's are exempted from such claims. H petitioned for review to the Supreme Court. In a unanimous decision, with Justice Lehrmann also concurring, the SCt reverses the COA judgment and renders the TX withholding orders and QDRO void. First, as to the withholding orders, the Supreme Court determines that the support alimony payments contained in the OSM as incorporated into the TX decree are not payments for spousal maintenance under Chapter 8. There was never a claim and never any evidence that W even qualified for spousal maintenance. W argued that TX was required to give full faith and credit to the OK order as registered in TX. The SCt notes however that while OK law (as the issuing state) controls the nature, extent, amount and duration of the payment obligation, when the OSM was registered in TX, TCPRC 35.003(c) provides that the judgment is subject to the same defenses and proceedings for enforcing the judgment as "a judgment of the court in which it was filed," meaning TX law regarding enforcement. Because the obligations were contractual alimony, under TX law that was enforceable only as a private contractual debt and withholding as authorized by Chp. 8 was not available as a remedy. As to the QDRO, the SCt agreed that QDRO's are exempted from ERISA which would otherwise prevent an assignment of H's retirement benefits to satisfy a debt obligation. However, the SCt holds that ERISA does not permit a state court to issue an order that state law does not authorize. The court notes that Chapter 8 allows for enforcement by any means available to enforce a judgment but it was already determined that H's obligation did not qualify as Chapter 8 maintenance. The court likewise notes that while QDRO's have been permitted to set aside property for the enforcement of child support under Chapters 154 and 159, the obligation here was not child support. This left only Chapter 9 as the potential authority for enforcement and Chapter 9 only permits a QDDRO for the enforcement of a property division. The support obligation under the OSM was not a property division. H's retirement benefits had already been divided under the OSM property division. The QDRO issued by the TX court to enforce the support obligation awarded W an additional interest in H's retirement benefits, effectively modifying the original property division which is not permitted under TX law. A court's authority under Chapter 9 is limited to enforcing, clarifying and aiding the implementation of a *prior division,* not issuing a QDRO which effectively orders a new division of property not previously divided, that being the portion of H's retirement benefits originally set aside to him in the 2011 divorce. COA decision reversed and the withholding orders and QDRO issued by the trial court were declared void.

C. *Lynch v. Lynch,* 2017 Tex. App. LEXIS 8744 (Tex. App. – Houston [1st Dist.] September 14, 2017) (Cause No. 01-16-00573-CV)

H and W married in 1988 and had no children of

their own. The parties separated in 2015 and H moved out of the residence into his own apartment. In early 2016, W filed for divorce on the basis of adultery and cruel treatment, requested a disproportionate division and sought temporary orders. H was served by a private process server but thereafter did not appear for the TO hearing. W put on evidence supporting her request for temporary spousal support and use of property and the trial court granted that relief. Several months later, W filed a motion for enforcement and H was again served with the motion by private process server but did not appear for the enforcement hearing. Trial took place in April and H did not appear, never having filed an answer in the suit. At trial, W put on evidence of the parties' estate through her inventory and appraisement which claimed known community property valued at approximately $3.3 million, identifying several financial and retirement accounts with values unknown. W further claimed that H owed her $111K based on his non-compliance with the temporary orders obligations for payment of support and various other tax and credit card liabilities that he was ordered to pay but which she had to cover. W testified that H had physically abused her frequently over the course of the marriage and offered evidence of several physical injuries she had suffered. She further testified to her discovery that H was an active member of a dating site called "Seeking Arrangements" which involved H meeting and dating women under various financial arrangements (i.e. sugar daddy). W obtained H's profile from the dating site in which he claimed his net worth to be $5million. W requested the court to order a disproportionate division awarding H one bank account of unknown value, two cars worth $30K and the liabilities owing to her of $111K, with the balance of the estate being awarded to W (resulting in the award of 100% of the known community estate value to W and a negative $81K to H). W also asked that H be obligated to pay federal income taxes for 2016 and appellate fees. The trial court signed a final decree in accordance with W's testimony and further included general language obligating the parties to indemnify the other in the event of future litigation brought by third parties. H filed a motion to set aside the default judgment and for new trial, alleging under the *Craddock* standards that his failure to answer was due to mistake and not intentional or due to conscious indifference. At the evidentiary hearing on H's MNT, he testified that he had previously been involved in litigation in LA and that he had received "informal" service but thereafter "formal" service by a uniformed officer. H claimed that he believed he had only been "informally notified" of the divorce proceedings because the private process servers who delivered the petition and enforcement citations were not dressed in uniform and did not require him to sign anything. He said he knew the papers involved a divorce and he acknowledged doing a Google search the W's attorney to see that she was with a reputable firm. He also testified that he had received an email from the attorney (which include a copy of the temporary orders) but claimed he had never opened it. He admitted that he did not read the first page of the citation warning against a default because he thought it was just a cover page and he skipped straight to the petition itself. He claimed his actions were a mistake of law and that the decree should be set aside. One of the process servers testified that she clearly identified herself and her purpose. The trial court ultimately denied the post-judgment motion and H appealed. The COA initially addressed H's challenge to the trial court's failure to grant his MNT, determining that based on all the evidence the trial court could have reasonably determined that H knew he had been served with divorce papers but did not care to act upon it, determining he acted with conscious indifference and there was no error in denying a new trial. Regarding the property division, the COA notes that H's challenge is limited to a very brief and narrow argument which asserts that under any circumstance a division of property which awards 100% to one spouse and a negative value to the other cannot be fair and equitable and must be reversed. H never argues that the evidence in the record does not support such a division, but instead argues solely that the amount of the award intrinsically makes it manifestly unjust requiring reversal. The COA cites to several other decisions affirming 100% awards based on evidence of fault and other issues, determining that H did not meet his burden to demonstrate error in the division based on the record. The COA also overruled H's issue challenging the allocation of prior FIT liability to him but the COA noted that this was a community obligation which the trial court had authority to assess, noting that W did not work and that H was the sole wage earning triggering those tax obligations. H further challenged the orders which effectively partitioned the parties' income for 2016 as separate property for tax filing purposes, but the COA determined that even if such mischaracterization was error, H failed to show how this characterization for the 4 months prior to divorce created any harm to him. The COA addressed H's challenge to the broad, general "indemnification" language included within the decree. (The language discussed in the opinion very clearly resembles that contained in the SBOT Family Law Practice manual.) The COA notes that there is indemnification language included in the specific terms which allocate community debts between the parties, but the separate and generalized indemnification language involves actions which could be brought by third parties and was not relief that W pled for or put on evidence to support. Finding that the judgment must be supported by pleadings the COA modified the decree to remove this language. Finally the COA agreed with H that W put on no evidence of appellate fees as awarded and reversed this provision and remanded it for further

hearing. The COA affirmed the balance of the judgment. **COMMENT:** It should be noted that the H's social media posting on the dating website claiming his worth to $5million even though W could only identify $3.3 million. To the extent the W had identified several financial accounts with unknown values, one of which was awarded to H, it is possible the trial court inferred that H had other assets unknown to W. In any event, this case surely suggests that when presenting a default, there is nothing that should really stop you from putting on all the evidence you can and requesting the most that you think you can get away with, even if that is 100%, because it just might get affirmed!

D. *Bradshaw v. Bradshaw,* 2018 Tex. LEXIS 660 (Tex. Supreme Court June 29, 2018) (Case No. 16-0328)

H and W married in 2010 and the parties lived together in a home owned by W along with W's three daughters. The house burned in 2012 and W used the proceeds to payoff the mortgage, then sold the house and purchased a new one for the family. In 2013, while visiting an aunt, all 3 of W's daughters revealed to the aunt that they were or had been sexually abused by H, their step-father. The aunt called the police and H was arrested, eventually tried, convicted and sentenced to 60 years in prison without the possibility of parole. In the midst of the criminal proceedings, W filed for divorce. H was not permitted to testify at the divorce trial but W and the daughters did. The trial court awarded W 100% of the community estate and found the residence to be W's separate property. H appealed and the COA reversed finding the evidence insufficient to support the trial court's order. While on remand, H's conviction was affirmed. In the second trial, W offered additional evidence surrounding H's continuing abuse. The court found the residence to be community property, awarded W 80% and H 20% and awarded the balance of the community estate to the party in possession. This time W appealed, arguing that based on H's behaviors, nothing shy of awarding W 100% of the residence could be considered just and right. The COA affirmed the trial court's ruling, finding that while fault in the break-up the marriage could be considered to support a disproportionate division, the court could not use a division to punish a spouse. The SCt granted review. In a 5-4 decision, the SCT reverses the division and remands the matter back to the trial court. Three of the justices (the plurality) make this determination by holding that an award of 20% of the specific residence to H was not just and right. Two of the justices base their vote to reverse and remand upon a finding that the trial court lacked sufficient evidence upon which to base any division. Four of the justices dissented. In the plurality opinion, the court states that the issue being decided is not whether H's actions contributed to fault in the break-up of the marriage which could be considered in the division, as the trial court apparently found. Further, the issue was not whether awarding 100% of the residence to W would constitute a punishment to H which is not allowed. Instead the SCt plurality frames the issue as deciding whether the award of any percentage of the very residence where H abused the children could under any circumstances be considered just and right as a matter of law, and holds that it cannot. The plurality limits its decision to the particular facts involved in this case and states that the occurrence of domestic violence and abuse in general does not deprive a guilty spouse of an interest in all or even a specific part of the community estate. Instead, the plurality holds that in this case where H repeatedly used the family residence to commit the repeated abuse for which he was convicted and severely punished, an award of any percentage of that residence to H was unjust and wrong as a matter of law requiring remand. Justice Devine, joined by Justice Guzman concurs in the result but finds that remand is required because the underlying trial court record did not include sufficient evidence regarding the value of the community estate which is required before a trial court can determine whether its division is just and right. Justice Boyd, writing for the dissent, argues that the plurality opinion ignores the broad discretion a trial court retains to divide property upon divorce. While Justice Boyd clearly and unequivocally denounces the H's actions in this case, he opines that the SCt view of what may be just and right is not relevant to the issue brought forth on appeal, that being whether the trial court abused its discretion in dividing the property. Justice Boyd states that the court is not being called upon to interpret what is meant by the words "just and right" in the statute and thus the plurality's conclusion that its interpretation is all that matters is incorrect. Justice Boyd is concerned that the plurality has created a new law which prevents a spouse who uses a residence to commit abuse from receiving an interest in that residence, and wonders how far this "new law" will go. He questions whether it would apply to other types of property such as a vehicle, whether it would apply to abuse that was something other than sexual abuse or whether it would apply if the victim was someone other than a child or step-child. He further questions whether it would apply if the criminal case was not yet concluded or any conviction remained on appeal. In short, Justice Boyd believes that the plurality has not announced a legal principle but instead announced its own application of the equitable just and right principle to the facts of this case. Taking it one step further Justice Boyd states that the plurality opinion is not the law because six justices disagree with it and thus the trial court could not have abused its discretion for failing to apply what was not and still is not the law. Justice Boyd notes that the law does not require the trial court to award 100% of the residence to the W in this case, even though he states maybe it should, while

recognizing that any change in the law would fall to the Legislature. As to the concurring opinion which reverses based on insufficient evidence grounds, the dissent argues that W failed to properly preserve this issue for appeal and thus also disagrees with reversal and remand on this basis. Justice Lehrmann, joins fully in Justice Boyd's dissent, but writes a separate dissent to reiterate that the Court's decision as precedent does not impose any specific limits on the size or amount of a community property division. Justice Lehrmann believes that the trial court's exercise of discretion in the division was not improper.

VIII. MISCELLANEOUS

A. Outsider Reverse Piercing the Corporate Veil[1]

***Yamin v. Carroll Wayne Conn, L.P.*, --- S.W.3d ---- (2018)**

This a creditor/debtor case, but involves issues regarding marital property liability and partition and exchange agreements. It also the first time Texas (except arguably in dicta in another case), recognizes outsider reverse piercing as a legitimate common law theory of recovery against corporate assets.

In 2006, Husband and Wife were insolvent and formed a "Black Iron, Inc." All shares were issued to Wife as her separate property and Husband and Wife did a Bill of Sale where Husband transferred to Wife all of his interest, including income, in and from Black Iron, Inc. as her separate property. The shares were issued for the typical $1,000 at formation and Wife testified the $1,000 came to her as a separate property gift from the parties' daughter. Husband essentially runs Black Iron, Inc. and pays all the parties personal expenses out of it including a yacht, homes, vacations, etc. Husband even has a signature stamp of Wife's signature that he uses at his discretion.

In 2010, Husband was sued after a default on a lease for a different company. He had guaranteed the lease personally. Judgment was entered against Husband for over $320,000.

In 2013, Husband and Wife entered into a Partition and Exchange agreement where thy stipulated that the 2006 Bill of Sale was a partition so the Black Iron, Inc. stock was Wife's separate property, but they also everything else the couple owned to the Wife as her separate property (except for Husband's clothes, watches, a television, two guns, a chair, and $4,800.

Husband's judgment creditor in the lease guarantee case sued Husband, Wife, and Black Iron, Inc. to recover its judgment against Husband. The creditor claimed:

a. The 2006 Bill of Sale was a void partition because it was intended to defraud a creditor;
b. The 2013 Partition and Exchange was a void agreement because it was intended to defraud a creditor;
c. If those two agreements were not void they could be set aside under the Texas Uniform Fraudulent Transfers Act;
d. They could execute against Black Iron, Inc.'s assets to recover their judgment on the theory of "outsider reverse piercing."

There was a jury trial which generally found for the judgment creditor and after trial the trial court disregarded some and entered judgment on some of the jury findings with the result being:

a. The $1,000 from Wife's daughter was not a gift so Wife did not acquire her stock with separate property;
b. The 2006 Bill of Sale was void under the Texas Family Code;
c. The 2013 Partition Agreement was void under the Family Code and avoided under the TUFTA;
d. Black Iron, Inc. was responsible for Husband's judgment debt under common law and statutory veil piercing theories (keep in mind Husband was not a shareholder or owner of the company); and
e. The trial court also awarded attorney fees against Husband, Wife, and Black Iron jointly and severally for over $215,000.

This is a complicated case and worth a read. Just as one example if the stock was Wife's separate property at the inception of title because she acquired it with money that was a gift from her daughter then it is outside the reach of Husband's creditors, but if it was her separate property as a result of a partition then it could be challenged as fraudulent under the Texas Family Code, and if it wasn't fraudulent under the family code it could still be avoided under the TUFTA if the transfer was to hinder, delay *or* defraud a creditor. The case discusses how to prove a partition agreement was intended to defraud a creditor under the family code and under the TUFTA by examining the "eleven badges of fraud" listed under TUFTA which can also be applicable under the family code.

There is also a discussion of "outsider reverse piercing". The court recognizes that this is solely a common law theory but since the legislature has only statutorily addressed traditional veil piercing, reverse

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veil-piercing is still an available remedy under common law theories. Wife and Black Iron also claimed that there had to be some evidence of fraud related to the transaction at issue for this type of piercing to apply and since the lease Husband guaranteed had nothing to do with Black Iron piercing could not apply. The court of appeals basically just dismissed this defense saying there was no requirement of a fraud showing related to the transaction at issue. There is a dissent that disagrees with this conclusory statement by the majority.

Wife also claimed that the company she owned could not be held liable for the debts of a non-shareholder. However, since the trial court found that the shares were not Wife's separate property at inception and the attempts to partition to shares to her as her separate property were fraudulent, Husband was a shareholder since the shares were community property. Therefore the creditor could go after the assets of the company for Husband's debts.

B. Acceptance of the Benefit" doctrine - Kramer v. Kastleman, 508 S.W.3d 211 (Tex. 2017).

In this case, the Supreme Court reconsiders and clarifies application of the "acceptance of benefits" doctrine (AOB) in divorce related cases for the first time since *Carle v. Carle,* 234 S.W.2d 1002 (Tex. 1950), decided in 1950. Since 1950, Texas appellate courts have considered the doctrine as asserted to deny an appealing party the right to appeal under circumstances where they are challenging a division of property while at the same time accepting the benefits of that division as awarded to them. Over this period of time, several exceptions to application of the doctrine have developed including (1) acceptance of cash payments which could be replaced upon remand; (2) acceptance of benefits because it was necessary to meet a party's reasonable minimum needs; and (3) acceptance of benefits which the opposing party would be bound to concede upon remand (i.e. separate property over which there was no dispute. The Court ultimately holds that the doctrine is "fact-dependent" and estoppel based and should focus on preventing unfair prejudice to the opposing party. In this case, H and W entered into a mediated settlement agreement which W later attempted to revoke based on a variety of claims, including fraud. The trial court ultimately enforced the MSA and entered a final judgment from which W appealed. H sought to dismiss W's appeal on the basis of "acceptance of benefits," claiming that a variety of actions by W should be considered "acceptance" outside of permitted exceptions. The 3rd COA ultimately granted H's motion to dismiss, avoiding a merits-based decision on all of W's appellate issues, including some that related to issues involving the parties' minor child. W filed a petition for review challenging dismissal of the appeal. Discussing the history of the doctrine and its treatment over the years, the Court identified a non-exclusive list of factors which should be considered when determining whether the acceptance of benefits in any given case justifies dismissal. Those factors include (1) whether AOB was voluntary or the product of financial duress; (2) whether the right to joint or individual possession and control of an asset allegedly accepted preceded the judgment or exists only because of it; (3) whether the assets accepted have been so depleted, wasted or converted as to prevent their recovery if the judgment is reversed or modified; (4) whether the appealing party is entitled to the benefit as a matter of right or based on the opposing party's concession; (5) whether the appeal, if successful, may result in a more favorable judgment but there is no risk of a less favorable one; (6) if a less favorable judgment is possible, whether there is no risk that the appealing party could receive an award that is less than the value of the assets dissipated, wasted or converted; (7) whether appellant affirmatively sought enforcement of rights or obligations that exist only because of the judgment; (8) whether the issues on appeal are severable from the benefits accepted; (9) the presence of actual or reasonably certain prejudice; and (10) whether any prejudice is curable. In applying these various factors to the specific circumstances present in this case, the Supreme Court determined that H was not so prejudiced by W's actions in accepting benefits under the decree so as to warrant dismissal. For example, some of the property accepted had been in W's sole control prior to the divorce. Further, W's efforts to refinance properties awarded to her was done in compliance with orders contained in the decree and her request to retrieve personal property located in a condominium being sold did not affirmatively seek to enforce the award but only sought to protect and preserve that property from loss or abandonment. Petition for review granted, COA judgment reversed and matters are remanded to the COA for further proceedings to determine the merits of W's appeal.

C. *Mills v. Mills,* 2017 Tex. App. LEXIS 9341 (Tex. App. – Dallas October 4, 2017) (mem. opinion) (Cause No. 05-16-01121-CV)

H and W married in 2008 but separated in 2009. H filed for divorce in 2012, and after 3-plus years of litigation the court signed an agreed divorce decree on October 22, 2015. Included within the decree was language partitioning the parties' income for federal income tax purposes, obligating them to file FIT in accordance with that agreement and indemnifying the other for any tax liability associated with the earning party's income. Immediately following the divorce, H issued 1099's to W for 2010 and 2011 for income allegedly earned from a corporation in which he was the sole shareholder. H advised W that the 1099 information had been provided to the appropriate fraud/crime unit for the IRS. W responded by filing a partial motion for new trial asserting that these 1099

were not produced in discovery, were fraudulent, were newly discovered evidence and something she did not contemplate in reaching a settlement. W sought to clarify the decree as to the parties' obligations and she asserted a breach of contract claim regarding H's creation of false 1099 to transfer liability to her and she sought fees. The trial court held a hearing on February 1 (102 days after judgment) and denied W's MNT the next day. Then on February 5 (106 days after judgment) the trial court issued a written memo with findings regarding H's conduct and thereafter ordered H to indemnify W for any tax liabilities she might incur as a direct result of the 1099's. The court order specified that the indemnification obligations were intended to directly address H's behavior which the court had found it had authority to do based on its inherent authority to sanction. W moved for entry of an order and H objected that the court had lost plenary power. The trial court stated that it was only "clarifying" the prior order and signed a written order on February 25. In July the court signed another order which added language denying W's breach of contract claim and request for fees. H appealed. The COA found that the trial court's order was in fact a "sanction" order and not a clarification order, noting the court's findings which expressly stated it was seeking to address H's conduct under its inherent authority to sanction. Further the order did not mention clarification and altered no terms in the original decree. The COA found that when post-judgment conduct is tied to the proceeding in which the sanctionable conduct occurred, the trial court loses its plenary power to grant sanctions when it loses plenary power over that proceeding. Here the trial court issued its sanction order more than 105 days after the judgment was signed and therefore the order was void. **COMMENT:** Unrelated to the decision, the COA mentions in a footnote that H also sent a 1099 to W's.