SECTION REPORT
FAMILY LAW

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Message from the Chair

We have now passed the midpoint of our Council year – my, how time flies when you are having so much fun! We chose not to have a Fall Council meeting this year in conjunction with any December CLE event. Nevertheless, many of our committees have been extremely busy this fall, working on their tasks. This includes the “Big Three” committees: Formbook, Legislative, and Pro Bono. I really need to mention another committee to make it the “Big Four” now with our new Section Report committee, or Board of Editors. It, too, has been working diligently to bring you all the up-to-date information you need to be on the cutting edge of Family Law. I am really so proud of all of our committees and the work they have done up to this point in the year. I am also very proud to be able to serve as the Chair of such a great section. As always, I encourage all section members to contact me or any other Council member if you have questions, ideas, suggestions, or comments about section activities.

Don’t forget the Texas Academy of Family Law Specialists’ Annual Trial Institute, which will be in Santa Fe, New Mexico in January 2008. It will be outstanding, as usual. Details are provided on the Section and TAFLS websites.

I wish everyone very Happy Holidays!

----------Sally Emerson, Chair

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2. What Duties Does the Obligee Have Once the Obligee Receives the Accelerated Child Support and, What Claims, if any, does the Child Have? Finally, TFC § 154.015 does not address the duties of the obligee with respect to any funds received as "constructive trustee for the benefit of the child" from the estate. *See* TFC § 154.015. Under Texas Trust Code Section 111.003, a "trust" is an express trust only and does not include a constructive trust or a resulting trust. TEX. TRUST CODE § 111.003. Will principles of equity require the constructive trustee to segregate and invest these funds and to make periodic "child support" payments to herself or himself? Can the constructive trustee be required, in a subsequent SAPCR order, to turn these constructive funds over to a new obligee? Which court would make this determination – the probate court or the family court that has continuing, exclusive jurisdiction over the children? Does the child, upon reaching majority, have a cause of action against the constructive trustee for an equitable accounting or for misuse of the funds? Again, if so, where is suit filed? What if there are multiple obligees and multiple children? What if the money is gone? What if the obligee dies after receiving the money? Since there is nothing in the statute that mandates an accounting of the monies received from the obligor's estate, is the obligee free to bequeath these monies to a third party leaving the child with only the right to pursue a family allowance for one year in the probate court?

If the obligor makes the child a beneficiary of the obligor's estate, TFC § 154.015 puts the child's interest in direct conflict with the obligee's interest. The obligee's claim would necessarily decrease the child's inheritance from the obligor. In this case, must the court appoint a guardian ad litem to protect the child's interest? Does the child have the right to an independent cause of action against the obligee to protect the child's interest in the obligor's estate? Should the child's claim be filed in the court of continuing jurisdiction or in the probate court?

What happens if the child dies before reaching the age of 18 or enlists in the military or has his or her disabilities removed? Does the obligee have to return any monies to the obligor's estate? Does the obligee have to give the money to the child?

E. Conclusion.

In conclusion, although the Legislature may have had the best of intentions, these new statutes raise numerous questions and issues that will undoubtedly lead to litigation that may have the effect of leaving even less to support the child and lead to lengthy and costly litigation that may tie up the obligor's estate for years. Accordingly, until a statute is drafted that addresses the numerous questions and issues raised above, the Legislature should seriously consider repealing the above statutes in its next session.

Family Law Appeals Distinguished

by

Michelle May O'Neil*

Although family law is considered a civil case and is covered under the civil rules generally, there are several distinctions between a family law appeal and a standard civil appeal.

Findings of Fact

Most requests for findings of fact in a family law case fall under the civil rules generally. However, some of the specific findings have shorter deadlines. Failure to comply with these deadlines may result in difficulty presenting error to the court of appeals on that issue.

Child Support

Generally, findings of fact must be requested within 20 days after the date the final judgment is *signed.* Tex. R. Civ. P. 296. However, if a party wishes to have the court make findings regarding a child support order, the party must either make an oral request for the findings made in open court during the hearing[1] or file a written request for the child support findings within 10 days of the date of the *hearing*. TFC §154.130(a). If the trial court devi-

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[1] It goes without saying that the request for findings made in open court should be on the record. Otherwise, there is no proof that the findings were requested.

ates from the child support guidelines, then the trial court *must* make the findings, regardless of whether a party requests them. *Id*. The required child support findings are set out in the statute. TFC §154.130(b).

Possession Order

Where the possession times by each parent are contested, and the court's order varies from the standard possession schedule set out in the Texas Family Code, findings must be requested orally in open court or not later than 10 days after the date of the *hearing*.[2]

Division of Property

The deadline for requesting findings of fact regarding characterization, valuation, or division of property, or any other order not specifically mentioned is the same as for civil cases generally. TFC §6.711.

Standards of Review

The purpose of the standard of review at the appellate level is similar to the burden of proof at the trial court level. It provides the height of the hurdle to be jumped before the appellate court starts listening. Evaluating the standard of review in a family law case can be confusing. Where the trial judge renders a decision, the standard of review is generally abuse of discretion. However, if there is a jury trial, there will be certain issues that the jury decides and certain issues that will remain within the province of the judge. In such a scenario, there may be multiple standards of review to be evaluated, depending on the error alleged.

Abuse of Discretion Standard

The general standard of review in a family law case when reviewing a bench trial decided on the merits is abuse of discretion. This standard applies to most substantive decisions made by a trial judge on issues like property division, conservatorship, possession and access, maintenance, or child support. *See Norris v. Norris*, 56 S.W.3d 333, 337 (Tex. App. – El Paso 2001, no pet.); *see also Lopez v. Lopez*, 55 S.W.3d 194, 198 (Tex. App. – Corpus Christi 2001, no pet.).

In order to find an abuse of discretion, the appellate court must find that the trial court's decision was arbitrary and unreasonable. In reviewing a judge's decision on the merits, most of the courts of appeals agree that sufficiency of the evidence is not a separate ground for error, but is a part of the analysis of abuse of discretion when reviewing a trial court's decision on the merits. *Crawford v. Hope*, 898 S.W.2d 937, 940-41 (Tex. App. – Amarillo 1995, writ denied); *In re C.R.O.*, 96 S.W.3d 442, 447 (Tex App. – Amarillo 2002, no pet.).

Justice Ann McClure of the El Paso Court of Appeals applies a hybrid analysis to the abuse of discretion standard, which includes analysis of the grounds of sufficiency of the evidence.

> In applying the abuse of discretion standard, an appellate court must engage in a two-pronged inquiry:
> (1) whether the trial court had sufficient evidence upon which to exercise its discretion; and,
> (2) whether the trial court erred in applying its discretion.

Lindsey v. Lindsey, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.); *C.R.O.*, 96 S.W.3d at 447.

Commentators perceive a difference between the general rule that sufficiency of the evidence is a part of the abuse of discretion standard of review and Justice McClure's methodical approach. *See* James W. Paulsen, *Family Law: Parent and Child*, 52 SMU Law Rev. 1197, 1223-24 (1999). Justice McClure's analysis has been accepted by the Houston 14th, Austin, Amarillo, and Eastland courts of appeals. *Evans v. Evans*, 14 S.W.3d 343 (Tex. App. – Houston [14th Dist.] 2000, no pet.); *Schlafly v. Schlafly*, 333 S.W.3d 863 (Tex. App. – Houston [14th Dist.] 2000, pet denied); *Zeifman v. Michels,212 S.W.3d 582, 587-88 (Tex, App. – Austin 2006, pet. denied); Echols v. Olivarez*, 85 S.W.3d 475, 477-78 (Tex. App. – Austin 2002, no pet.); *C.R.O.*, 96 S.W.3d at 447; *In re B.A.S.*, 2007 WL 2674815 (Tex. App. – Eastland 2007, no pet.) (not designated for publication). To the contrary, the Corpus Christi Court of Appeals has specifically declined to apply this method of analysis. *Zorilla v. Wahid*, 83 S.W.3d 247, 252 fn. 1 (Tex. App. – Corpus Christi 2002, no pet.).

Interestingly, Justice Priscilla Owen has opined that factual sufficiency may not exist under an abuse of discretion standard:

> Under an abuse of discretion standard, courts of appeals do not have the option of remanding a case if the trial court's decision was supported by some evidence but was against the great weight and preponderance of the evidence [factual sufficiency standard]. An appellate court may not attempt to reconcile disputed factual matters under an abuse of discretion standard. Under that standard, a reviewing court must defer to

[2] See footnote 1.

> the trial court's resolution of factual issues, and may not set aside the trial court's finding unless the record makes it clear that the trial court could reach only one decision [legal sufficiency standard].

In Re Doe 2, 19 S.W.3d 278, 289 (Tex. 2000) (Owen, J., concurring) (citations omitted). Thus, following Justice Owen's logic, only legal sufficiency is considered in reviewing the evidence for an abuse of discretion. Regardless, courts of appeals continue to conduct the factual sufficiency analysis in abuse of discretion reviews.

Sufficiency of the Evidence Standard

A jury's decision on the merits of a family law case is reviewed on a straight sufficiency of the evidence challenge. In applying the sufficiency of the evidence to the abuse of discretion standard, the sufficiency analysis is the same. In that situation, a judge's findings of fact are given the same weight as a jury's decision. *Lindsey*, 965 S.W.2d at 591. Legal sufficiency issues assert a complete lack of evidence on an issue. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App. – Amarillo 1988, writ denied). The remedy for legally insufficient evidence is to render judgment. *Vista Chevrolet, Inc. v. Lewis*, 709 S.W.2d 176, 176-77 (Tex. 1996); *Buzbee v. Buzbee*, 870 S.W.2d 335, 340 (Tex. App. – Waco 1994, no writ). Factual sufficiency complains that evidence is so slight, or counterveiling evidence is so strong, that the finding is clearly wrong and manifestly unjust; or, that the finding is against the great weight and preponderance of the evidence. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). The remedy for factually insufficient evidence is to remand the case to the trial court for a new trial. *Prather v. Brandt*, 981 S.W.2d 801, 807 (Tex. App. – Houston [1st Dist.] 1998, pet. denied).

Special Family Law Issues

Although family law is similar in many ways to other civil cases, there are aspects of family law that make it unique. Some of these unique areas have special considerations on appeal.

Temporary Orders and Injunctions

Family law temporary orders, temporary restraining orders, and temporary injunctions are not subject to interlocutory appeal. TFC §§ 6.507 and 105.001(e). The appropriate remedy is mandamus. *Dancy v. Daggett*, 815 S.W.2d 548 (Tex. 1991); *In re Lemons*, 47 S.W.3d 202, 203-204 (Tex. App. – Beaumont 2001, orig. proceeding).

At first glance, there appears to be a conflict between the Civil Practice and Remedies Code provisions regarding interlocutory appeal of an order granting temporary injunction and the Family Code provisions prohibiting interlocutory appeals in such instances. However, the interpretation has been that the specific statute in the Family Code trumps the general provisions of the Civil Practice and Remedies Code, which makes interlocutory appeal unavailable. *Cook v. Cook*, 886 S.W.2d 838 (Tex. App. – Waco 1994, orig. proceeding). Further, even where the injunctive relief granted varies from the standardized orders allowed in the Family Code, it appears that the Family Code will prohibit interlocutory appeals. *See Moreno v. Ruiz*, 1997 WL 214831 (Tex. App. – San Antonio 1997, no pet.) (not designated for publication).

Protective Orders

There is a split between the courts of appeals regarding whether a protective order is appealable through direct appeal or only mandamus. A majority of the appellate courts considering the issue have concluded that a protective order is akin to a permanent injunction, and is, therefore, appealable if it disposes of all parties and issues. *Smith v. Smith,* 2005 WL 608190, *1 (Tex. App. – Eastland 2007, no pet.)(not designated for publication); *Vongontard v. Tippit,* 137 S.W.3d 109, 110 (Tex. App. – Houston [1st Dist.] 2004, no pet.); *Ulmer v. Ulmer,* 130 S.W.3d 294 (Tex. App. – Houston [14th Dist.] 2004, no pet.); *Kelt v. Kelt,* 67 S.W.3d 364, 366 (Tex. App. – Waco 2001, no pet.); *Cooke v. Cooke,* 65 S.W.3d 785, 787-88 (Tex .App. – Dallas 2001, no pet.); *Striedel v. Striedel,* 15 S.W.3d 163, 164- 65 (Tex. App. – Corpus Christi 2000, no pet.); *In re Cummings,* 13 S.W.3d 472, 475 (Tex. App. – Corpus Christi 2000, no pet.); *Winsett v. Edgar,* 22 S.W.3d 509, 510 (Tex. App. – Fort Worth 1999, no pet.); *James v. Hubbard,* 985 S.W.2d 516, 518 (Tex. App. – San Antonio 1998, no pet.). Further, the Austin Court clarified that family-violence protective orders that dispose of all parties and issues are final and appealable despite the trial court's continuing jurisdiction to modify the order. *B.C. v. Rhodes,* 116 S.W.3d 878, 882 (Tex. App. – Austin 2003, no pet.).

On the other hand, several courts of appeals rely on the distinction of whether the protective order is granted during the pendency of a divorce, or whether the protective order is an independent cause of action. The El Paso court concluded that a protective order granted during the pendency of a divorce is not a final judgment and is, therefore, an unappealable interlocutory order. *Ruiz v. Ruiz*, 946 S.W.2d 123, 124 (Tex. App. – El Paso 1997, no pet.). The Tyler court of appeals adopted the same

conclusion. *In re K.S.L.-C*, 109 S.W.3d 577, 579 (Tex. App. – Tyler 2003, no pet.) The Austin court also agreed with the El Paso court and denounced the *James*, *Kelt*, and *Cooke* reasoning. *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 281(Tex. App. – Austin 2002, no pet.). The Austin court adopted the reasoning of the *Ruiz* opinion and concluded that "any protective order rendered during the pendency of a divorce is not a final judgment for purposes of appellate jurisdiction." *Id.* Further, mandamus is the proper appellate procedure to review complaints about a protective order issued during a divorce. *Id.*

The clear and convincing burden of proof

Issues that require proof by clear and convincing evidence at trial have a higher standard of review on appeal in certain circumstances. Clear and convincing evidence means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. TFC § 101.007. The following issues require proof by clear and convincing evidence at the trial court level:

a. Termination of parental rights. TFC § 161.001.
b. Proof of or denial of parentage. *In Re Marriage of M.C.*, 65 S.W.3d 188 (Tex. App. – Amarillo 2001, no pet.).
c. Rebutting the community property presumption. TFC §3.003(b).
d. Reimbursement claims involving an allegation of separate property. TFC §3.003(b). *See also Nurse v. Nurse*, 2002 WL 1289898 (Tex. App. – Corpus Christi 2002, no pet.) (not designated for publication).

When addressing legal and factual sufficiency where the issue is subject to the clear and convincing evidence burden of proof, the sufficiency of the evidence standard applies. The Texas Supreme Court set forth standards for both legal and factual sufficiency of the evidence, recognizing the elevated burden of proof at trial.

When determining legal sufficiency on appeal, the court reviews "all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002); *In re A.A.A.*, __ S.W.3d ___, 2007 WL 4099346, *3 (Tex. App. – Houston [1st Dist.] 2007, no pet. h.). To give appropriate deference to the factfinder's conclusions, the court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. *Id.* The court of appeals disregards all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. *Id.* This does not mean that the court must disregard all evidence that does not support the finding. *Id.* Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.*

When the burden of proof at trial is by clear and convincing evidence, the factual standard for review on appeal is whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the allegations sought to be established. *In re C.H.*, 89 S.W.3d 17, 25 (Tex. 2002); *A.A.A.*, 2007 WL at *3. The Court reasoned that this provides a standard that focuses on whether a reasonable jury could form a firm conviction or belief, yet retains the deference an appellate court must have for the factfinder's role. *C.H.*, 89 S.W.3d at 26; *In re B.S.W.*, 87 S.W.3d, 766, 769 (Tex. App. – Texarkana 2002, pet. denied). If, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited in favor of the finding is so significant that a factfinder could not reasonably have formed a firm belief or conviction, then the evidence is factually insufficient. *J.F.C.*, 96 S.W.3d at 266; *A.A.A.*, 2007 WL at *3.

Jurisdiction

The type of review of a trial court's determination of a jurisdiction question in a family law case depends on the trial court's ruling. If a trial court *grants* a challenge to the jurisdiction, then typically the case will be dismissed. Thus, the remedy is by direct appeal. *Goodenbour v. Goodenbour*, 64 S.W.3d 69, 75 (Tex. App. – Austin 2001, pet. denied). If the trial court *denies* a challenge to the jurisdiction, the remedy is by mandamus. *In re Calderon-Garza*, 81 S.W.3d 899, 902 (Tex. App. – El Paso 2002, orig. proceeding). However, due to the "unique and compelling circumstances" involved in questions regarding child custody jurisdiction, it is not necessary to show that the petitioner has no adequate remedy at law. *In re McCoy*, 52 S.W.3d 297, 301 (Tex. App. – Corpus Christi 2001, orig. proceeding).

Contempt

An order granting a motion for contempt is not appealable through regular appellate procedures. *McCoy v. McCoy*, 908 S.W.2d 42, 43 (Tex. App. – Houston [1st Dist.] 1995, no writ). The only review by an appellate court available to a contemnor is by a petition for writ of habeas corpus. *Smith v. Holder*, 756 S.W.2d 9, 10-11 (Tex. App. – El Paso 1988, no writ). The habeas jurisdiction is limited to

situations where a person is restrained in his liberty, and may include probation if the terms of probation include some type of tangible restraint of liberty. *Ex Parte Urbanowicz*, 653 S.W.2d 355, 355-56 (Tex. App. – San Antonio 1983, orig. proceeding); *Ex Parte Hughey*, 932 S.W.2d 308, 310 (Tex. App. – Tyler 1996, orig. proceeding). The Supreme Court recently clarified that issue of contempt punishable by imprisonment for failure to pay contractual alimony, holding that the failure to pay a private alimony debt, even one referenced in a court order, is not contempt punishable by imprisonment. *In re Green*, 221 S.W.3d 645, 647 (Tex. 2007).

The only ground for relief in a habeas corpus appeal is that the judgment of contempt is void. Some of the most common reasons for declaring a judgment void include lack of jurisdiction, inadequate notice, impossibility of performance, opportunity to obtain counsel, or failure of the contempt order to comply with statutory or common-law requirements. If the order is erroneous rather than void, the court of appeals may reform the erroneous order instead of releasing the relator. *Ex Parte Balderas*, 804 S.W.2d 261, 263-64 (Tex. App. – Houston [1st Dist.] 1991, orig. proceeding).

Review of Grant or Denial of Habeas Corpus

The granting or denial of a petition for writ of habeas corpus in the trial court is not subject to appeal. *Gray v. Rankin*, 594 S.W.2d 409 (Tex. 1980). Even if it is clearly erroneous, mandamus is the appropriate remedy. *Zeissig v. Zeissig*, 600 S.W.2d 353, 357 (Tex. Civ. App. – Houston [1st Dist.] 1980, no writ). However, an order awarding attorney's fees and costs in a habeas proceeding may be subject to direct appeal. *Miericke v. Lemoine*, 786 S.W.2d 810, 811 (Tex. App. – Dallas 1990, no writ).

Since a mandamus proceeding is a request for equitable relief, the petitioner must show that it has no adequate remedy at law. *Broyles v. Ashworth*, 782 S.W.2d 31, 34 (Tex. App. – Fort Worth 1989, orig. proceeding). The reviewing court will only grant the mandamus petition if the trial court committed a clear abuse of discretion that was so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *M.R.J. v. Vick*, 753 S.W.2d at 528.

Motions to Transfer Venue

Transfer of a case to a county where the child has resided for more than six months is a mandatory, ministerial duty. TFC § 155.201. Remedy by appeal is inadequate to protect the rights of parents and children. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987). Thus, mandamus is the available remedy to compel mandatory transfer in suits affecting the parent-child relationship.

Conclusion

In conclusion, although family law cases fall under the civil rules generally, there are many specific considerations unique to this area of law that must be kept in mind when pursuing an appeal. From the preservation of error, to the available appellate remedy, to the standard of review, family law is unique, with its own peculiarities.

Do You Know the New Law on A.J. Appeals?

by

Michelle May O'Neil

As of September 1, 2007, there are two laws that apply to appeals from an Associate Judge's recommendation. Yes, *two*!! The "old" law remains in effect for all cases pending as of September 1, 2007, with its requirement that an appeal be filed within three (3) days of the receipt of the Associate Judge's ruling.

The "new" law is effective only for cases *filed* on or after September 1, 2007. The "new" law provides that a party may request a de novo hearing of an Associate Judge's recommendations by filing with the clerk a written request not later than the *seventh working day* after the date the party receives notice of the report. TFC § 201.015(a). The written request must specify the specific issues that will be presented to the referring court. TFC § 201.015(b). If one side files a request for de novo appeal, then the other party may file their request for a de novo hearing within seven working days after the date of the initial request for the hearing was filed. TFC § 201.15(e).