COLLIN COUNTY BAR ASSOCIATION
FAMILY LAW CASE LAW UPDATE

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September 2016 Case Law Update

1. *In re Lankford*, No. 12-15-00149-CV, 2016 Tex. App. LEXIS 9208 (Tex.App.—Tyler Aug. 24, 2016,orig. proceeding).

Facts: Mother and father had one biological child before they divorced in 2003. When the child was 3 months old, she began living with her father. Father worked outside of the United States from 2003 until 2007. During this time, paternal grandmother lived in father's house with the child and cared for the child while father was working. Father married stepmom in 2008. From 2007-2012, father worked away from home between 50-80% of the time and child remained in the family home with stepmom. In 2012, father elected "expatriate status," which prohibits him from being in the U.S. more than 35 days a year.

In 2014, stepmom filed for divorce from father. In her petition, she included a motion to modify the existing conservatorship order and requested that she and father be appointed joint managing conservators of the child and that she have the exclusive right to designate the child's primary residence.

Through various errors and misunderstandings that occurred in prior proceedings, the existing conservatorship order, which was rendered in 2004, made grandmother managing conservator and father and mother possessory conservators.

In December 2014, father and grandmother filed a motion to modify the 2004 order to make them joint managing conservators. Additionally, they asserted that stepmom's motion to modify must be filed in the pre-existing suit affecting the parent-child relationship (SAPCR). Stepmom moved to sever the conservatorship issue and consolidate it with the SAPCR. The trial court granted the motion. Father filed a plea to the jurisdiction and motion to dismiss alleging stepmom lacked standing. Grandmother raised the issue in her answer. After a hearing, the trial court concluded that stepmom had standing under section 102.003(a)(9) and, by written order, overruled the pleas to the jurisdiction and the motion to dismiss. The trial court also rendered temporary orders designating stepmom as a joint managing conservator of the child.

Holding: Mandamus denied.

Opinion: Father and grandmother claimed that stepmom did not have standing because she did not have "control": "A person has standing to sue . . . . [if she] has had actual care, control , and possession of the child for at least six months ending not more than 90 days preceding the date of filing of the petition." Father and grandmother argued that for stepmom to have standing she would need to have "legal control" of the child ("must mean something more than the control implicit in having care and possession of the child. . . .the word must be understood in the context of rights, duties, and responsibilities of a parent"). However, the Court of Appeals held that had the legislature intended "control" to mean "legal control" instead of "control" in its ordinary sense, it could have defined it as such. Or it could have defined "actual control" to mean "legal control", but the Legislature did neither. Therefore, the definition of "actual control" reflects the legislature's intent when it enacted the "control" requirement in this statute: the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child. Therefore, stepmom has standing because she had "actual control" of the child since 2007.

2. *In re G.P.*, No. 02-16-00236-CV, 2016 Tex.App. LEXIS 8964 (Tex.App.—Fort Worth Aug. 17, 2016, orig. proceeding).

Facts: In January 2013, the trial court rendered an agreed "Order Adjudicating Parentage" of a child. The order named father and mother joint managing conservators. The order gave the parents similar rights and duties but did not state that either of them had the exclusive right to designate the child's primary residence. Rather, the order stated only that the primary residence of the child must remain in Denton County or contiguous counties.

In June 2015, grandparents filed a petition asking to be named joint managing conservators of the child together with mother based on the allegation that father had a history of committing family violence. The trial court entered temporary orders that named grandparents the temporary possessory conservators; gave mother, for the first time, the exclusive right to designate the child's residence; and delineated periods of possession for father, mother, and grandparents.

Grandparents subsequently filed a motion to modify temporary orders, contending that there had been a material and substantial change of circumstances since the temporary orders were issued. Grandparents asked to be named temporary managing conservators of the child with the right to determine her domicile. The trial court declined to set a hearing, stating that it was prohibited from entering temporary orders changing the person with the exclusive right to designate the child's primary residence. Grandparents amended their petition and again asked to be appointed temporary managing conservators with the right to determine domicile asserting that the change was necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. Grandparents attached a supporting affidavit to their amended petition.

The trial court responded by email stating that its position had not changed and that no hearing would be set. Grandparents filed a petition for writ of mandamus.

Holding: Writ of Mandamus conditionally granted.

Opinion: Tex. Fam. Code § 156.006 only prohibits temporary orders changing the person with the exclusive right to designate the child's primary residence under a previous *final order*. Here, the only prior final order did not award either parent the right to designate the child's primary residence. Also, even if the statute did apply to this case, the trial court abused its discretion in stating that grandparents did not allege a basis for modification under section 156.006. In Grandparents' original petition, they alleged that the child's present circumstances would significantly impair the child's physical health or emotional circumstances. Grandparents then amended their petition by again alleging that the child's present circumstances would significantly impair the child's physical health or emotional circumstances, but they also attached an affidavit supporting this allegation. Therefore, even if the court held that the statute did apply, grandparents met all requirements to request the change in conservatorship. The writ of mandamus was granted because the trial court abused its discretion.

3. *Troiani v. Toriani*, No. 13-14-00630-CV, 2016 Tex. App. LEXIS 9962 (Tex.App.—Corpus Christi, Sept. 8, 2016, no pet. h.).

Facts: Mother and father divorced in 2013. The final decree provided that father was to pay $1,875 per month in child support for their two minor children. In 2014, mother filed a petition for modification of the parent-child relationship requesting that the court increase father's child support payments to include private school tuition, for one of the children, including school registration fees, costs of uniform/supplies, and the cost for school lunches. At the hearing, father testified that he paid about $900 per month in private school tuition for the child even though he was not required to do so. The trial court entered an order requiring father to pay the costs for the parties' son to attend private school for the upcoming year, including extracurricular activities, in addition to the $1,875 father was previously ordered to pay.

Holding: Reversed and rendered in part; and affirmed in part.

Opinion: The trial court abused its discretion by increasing the father's child support obligation, because mother presented no evidence that private school was a proven need of the child as required by Tex. Fam. Code § 154.126(a), (b). To establish private school as a proven need, the evidence must show something special that makes the particular child need or especially benefit from some aspect of non-public schooling. By ordering monthly private school payments of $900, the trial court effectively increased the father's monthly obligation to at least $2,775, which exceeded the presumptive child support amount established by Tex. Fam. Code §§ 154.125, 154.126.

4. *R.M. v. Swearingen*, No. 08-15-00359-CV, 2016 Tex. App. LEXIS 8466 (Tex. App.—El Paso, Aug. 5, 2016, no pet. h.).

Facts: R.M. filed an application for a protective order against Swearingen alleging sexual assault. The trial court issued a ten year protective order finding that R.M. and Swearingen were intimate partners, that there were reasonable grounds to believe Swearingen sexually assaulted R.M., that Swearingen committed family violence, and that further family violence was likely to occur in the future. One year later, Swearingen moved to terminate the protective order because of his job. After the protective order was issued, Swearingen's employer, the US Border Patrol, initiated an administrative investigation. Swearingen could not transfer to a new location at his job because employees subject to pending administrative investigations could not transfer. He thought that lifting the protective order would end the administrative investigation and allow him to transfer. At the hearing, the trial court judge noted that if Swearingen left town, it would take pressure off of R.M and R.M. would have a less likely chance of running into him in their small town. Further, the judge stated that although he did not hear the evidence that supported the ten year protective order, he believed that was unusually long. Therefore, he lifted the protective order but stated that if R.M. ever felt unsafe, she should file something ASAP and Swearingen would have to appear before this judge again.

Holding: Reversed and rendered.

Opinion: Under the Texas Code of Criminal Procedure, a victim of a sexual assault may seek a protective order without a prior relationship between the assailant and the victim required. If the protective order is issued, it can be in place for up to the duration of the lives of the offender and

the victim. Further, the court cannot rescind a protective order on the ground of sexual assault unless the victim requests that the court do so.

Under the Texas Family Code, either the applicant or the person subject to the order can ask the issuing court to reconsider the need for a protective order after one year. However, when the Code of Criminal Procedure conflicts with the Texas Family Code, the Criminal Code takes precedent. Therefore, Swearingen lacked standing to move to rescind the protective order and the trial court judge could not have rescinded the protective order unless R.M. requested that he so so.

5. *In re L.T.H.*, No. 14-15-00366-CV, 2016 Tex. App. LEXIS 9354 (Tex.App.—Houston [14th] Dist. Aug. 25, 2016, no pet. h.).

Facts: Father filed a petition to modify the parent-child relationship seeking to revise and expand his possession under an earlier agreed order. Under temporary orders that were issued, father was to have possession and access to the child pursuant to a modified standard possession order, which expanded his periods of possession until the child reached the age of three. After the child reached the age of three, the temporary orders stated that father would have possession and access pursuant to a standard possession order.

Father then amended his petition seeking possession and access pursuant to a "fully expanded Standard Possession Order." The trial court referred the parties to mediation where mother and father reached a settlement and executed a meditated settlement agreement (MSA). The MSA provided, in relevant part:

> POSSESSION AND ACCESS: Dad's periods of possession are to begin at 3 pm pickup from daycare or mom's residence. If the child is not a[t] either location then Mom is to notify Dad so that he cannot pickup from the child's location
>
> Dad's periods of possession: Per Temporary Orders: Expanded SPO
>
> If Dad does not take the child to daycare on his Friday possession period he must notify mom the location of the child where.
>
> Kimberly Levi to draft Final Order: Order will include the Temp Order and the above additions to the Temp Orders.

The trial court held a hearing to address a dispute that had arisen concerning the language of the proposed order on the MSA as drafted by Father's attorney. At the hearing, mother took the position that the parties had agreed to an order incorporating the temporary orders and that—as in the temporary orders—the standard possession order would apply once the child reached the age of three. Mother complained that, contrary to the parties' agreement, the proposed order extended father's periods of possession after the child turned three beyond what was contemplated in the temporary orders. The trial court disagreed, concluding that "the MSA is clear."

Holding: Affirmed in part, reversed and remanded in part.

Opinion: While neither party argued that the terms of the MSA are ambiguous, mother and father provided conflicting interpretations of the meaning of "Per Temporary Orders: Expanded SPO." Mother essentially argued that the trial court erred by concluding that the terms of the expanded standard possession order were to continue after the child turned three, contrary to the temporary orders. Father argued that his periods of possession are per the temporary orders but with rights that are expanded beyond the standard possession order. The court disagreed with both mother and father: the court of appeals held that the meaning of the phrase "Per Temporary Orders: Expanded SPO" was ambiguous because it is susceptible to more than one reasonable interpretation, creating a fact issue on the parties' intent. Because the MSA ordered the parties to binding arbitration in the event of issues regarding the interpretation of the MSA, the parties were ordered to do so.

6. *Gonzales v. Maggio.*, No. 03-14-00117-CV, 2016 Tex. App. LEXIS 8971 (Tex.App.—Austin Aug. 18, 2016, no pet. h.).

Facts: Gonzales and Maggio are each Texas-licensed attorneys who were formerly partners in both marriage and law practice. They divorced both maritally and professionally. Gonzales appealed five issues including both issues concerning conservatorship and issues concerning the decree's award of interests in cases that had been originated by the Gonzales-Maggio law partnership.

During their marriage, Gonzales and Maggio had formed a general partnership known as "Gonzales & Gonzales" (the Partnership) through which they had both practiced law. Although no written partnership agreement is in evidence, it is undisputed that the couple had agreed to share 50-50 in the Partnership's capital, profits, and losses. The Partnership's chief business was plaintiffs personal-injury work, principally auto-collision claims that tended to settle prior to suit or trial. The Partnership's standard contracts with clients provided for a "contingent-fee" arrangement—if and when the Partnership obtained a recovery on the claim, it was entitled to reimbursement of any expenses it had advanced plus a percentage of the net recovery. When and to the extent the Partnership enjoyed a net profit on a claim, the proceeds would be split evenly between Gonzales and Maggio, and the two partners would likewise participate equally in any losses.

After the divorce litigation began, when both parties decided to part professionally as well, they entered into a Rule 11agreement dated May 30, 2012. Gonzales and Maggio agreed that "Maggio is no longer a partner at Gonzales & Gonzales and the partnership is dissolved." They further agreed in the Rule 11 that "[t]he liabilities of [the Partnership] and other issues pertaining to winding up the firm will be handled at a later time, most likely a final hearing." This provision, as the parties acknowledge, referenced principles of Texas law governing dissolution and termination of general partnerships, which have been codified at relevant times in the Texas Business Organizations Code. Under these requirements, the parties agree, the Rule 11 agreement "dissolved" the Partnership but did not immediately or automatically conclude the Partnership's legal existence or operations. Instead, it triggered requirements under the Code that the partners "wind up" the Partnership's business and affairs—basically discharge its existing

obligations and liquidate or distribute any remaining Partnership property among the partners—"as soon as reasonably practicable." During this process, a partnership's business operations continue to the limited extent necessary to wind up, and the partners continue to owe duties to the Partnership and each other to act with loyalty, with care, and in good faith. Only upon completion of this winding-up process does a partnership's legal existence terminate.

The Partnership's matters to be wound up included its rights and duties under its contingent-fee contracts in a number of cases that had not yet been resolved by the date of dissolution. Within a few weeks after dissolution, and as contemplated by another term of the Rule 11agreement, Gonzales and Maggio transmitted a joint letter on Partnership letterhead advising each of the Partnership's clients that Maggio had left the Gonzales & Gonzales firm "to practice as a solo practitioner"; that Gonzales was continuing to practice law under the name of "Gonzales & Gonzales, Attorneys at Law" (the predecessor to the "Gonzales & Gonzales" professional corporation (the P.C.) that is an appellant here); and that the client had the right either to have Maggio "continue in her new capacity to represent you in this matter," have "the firm known as Gonzales & Gonzales, Attorneys at Law to continue to represent you," or retain "an entirely new attorney." The letter also included a form in which the client could indicate his or her choice, along with a self-addressed stamped envelope in which to return the form. The vast majority of Partnership clients opted to have the new Gonzales & Gonzales entity "continue to represent" them.

Thereafter, while their divorce litigation remained pending, both Gonzales (through either the P.C. or its predecessor partnership) and Maggio settled a number of cases that had originated with the Partnership and received expense reimbursements and attorney's-fee payments. Disputes arose concerning the respective entitlements of Gonzales, his P.C., and Maggio to these monies or similar payments that either side would receive from Partnership-originated cases in the future. To summarize their positions, the parties' dispute focused on what were termed two "buckets" of Partnership-originated cases. "Bucket 2" consisted of thirty Partnership-originated cases that had been settled between the date of the Partnership's dissolution and the date of divorce, twenty-five of which had been handled and payment received by Gonzales post-dissolution and five of which had been handled by Maggio. "Bucket 3," on the other hand, consisted of approximately forty cases that had still been pending on the date of divorce, in thirty-three of which Gonzales was counsel or co-counsel of record, six in which Maggio was counsel or co-counsel, and the remainder having previously been referred by the Partnership to another lawyer.

The court awarded Gonzales and Maggio, as his or her separate property, 50% of the fees that had been earned on the Bucket 2 cases, to "be calculated after the party who advanced the out-of-pocket case expenses is reimbursed." In the event the out-of-pocket expenses to be reimbursed had been advanced by the Partnership, the court ordered that the reimbursement payment would be split 50-50 between Gonzales and Maggio. In addition to stating these awards in terms of equations or formulas, the district court awarded Maggio a lump sum of $44,815.39 to be paid her by Gonzales "for her equal share of the net proceeds" in the Bucket 2 cases. This figure corresponded to 50% of $89,630.78, a calculation presented in evidence as the difference between the total expense reimbursements and net fees Gonzales had received on Bucket 2 cases over the total amount Maggio had received.

As for the Bucket 3 cases, the district court awarded Gonzales and Maggio, as his or her separate property, percentages of any net fees ultimately earned on those cases that varied according to the level of that attorney's involvement post-Partnership dissolution. The

percentages varied as follows: 60% if the attorney had retained the case following the Partnership's dissolution; 40% if the other attorney had retained the case; and 50% if the case had been referred to a third-party attorney for handling. As with the Bucket 2 cases, the shares were to be calculated only after reimbursing the party who had advanced the out-of-pocket expenses, with Gonzales and Maggio each entitled to half of reimbursements of any expenses that had been advanced by the Partnership.

Gonzales argued that the parties' interests did not extend to rights in particular assets owned by the Partnership, as opposed to entitling them as partners to receive equal shares of profits and surplus. Emphasizing these principles, Gonzales characterized the district court's decree as having purported to divide Partnership property as if part of the community estate.

Holding: Affirmed in part, as to the geographical restrictions, reversed and remanded in part, as to the award of interests in cases.

Opinion: The Rule 11 agreement in evidence explicitly contemplated that the Partnership would be wound up "most likely at a final hearing," and the parties' conduct thereafter was consistent with that expectation. The district court's ensuing award of lump sums from the Bucket 2 settlements is consistent with a winding up of this portion of the Partnership's work in progress. These respective distributions, in turn, would have become part of the community estate and subject to the district court's "just and right" division. However, the court's disposition of the Bucket 3 cases—which, again, was in the form of percentages of future net fees under contingent-fee contracts rather than lump sums—was inconsistent with a winding up. This is so because "a partner . . . is not entitled to demand or receive from a partnership a distribution in any form other than cash" unless the partnership provides otherwise, and there was no evidence of such an agreement provision here. Consequently, the decree's disposition of the interests in Bucket 3 cases had the effect of awarding Partnership property as if part of the community estate, an abuse of discretion.

7. *Burt v. Francis*, No. 11-14-00244-CV, 2016 Tex. App. LEXIS 9354 (Tex.App.—Eastland Aug. 25, 2016, no pet. h.).

Facts: Mother and father signed an agreed divorce decree stating that father's possession of the children would take place at his mother's house. After the agreed decree was entered, father's behavior changed. Father appeared at mother's house and his mother's house to yell at the mother and the children. Even if they closed the door on him, father would continue yelling. This caused one of the children to cry and tremble and be fearful. Mother testified that the children were angry and stressed due to father's conduct. Mother and the children were fearful of father because father would have an intimidating posture when yelling at them. Further, father would smack his fists and communicated various threats. On one occasion, father shot off a gun at mother's house. Mother called the police on father multiple times, even though father was never physically violent with mother or the children. Father testified that he was an emotional, passionate person and that he did not feel like he was yelling when he talked to people.

The trial court granted mother's request for a protective order and father appealed arguing that there was no evidence that he ever tried to physically hurt mother or the children.

Holding: Affirmed.

Opinion: Even if no express threats are conveyed, a factfinder may conclude that an individual was reasonably placed in fear of imminent harm. Mother testified that she and the children were fearful of father and attributed this fear to his intimidating posture when yelling at her and the children. One of the children reacted by trembling and crying. Therefore, the trial court reasonably could have concluded that mother and her children reasonably feared imminent physical harm as a result of father's threats, violent gestures, and escalating conduct.