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DIRECTORS

James H. Austen
Sarah L. Blake
Hon. Andrew R. Bloch
Melanie M. Dunajeski
Mark A. Foster
Lynnette Gray
Alan M. Hux
Dr. Michael J. Jenuwine
Dean Jonna Kane MacDougall
Thomas A. Massey
Linda K. Meier
Richard S. Pitts
Jeffrey P. Smith
Teresa L. Todd
Inge Van der Cruysse

ICLEF

SCOTT E. KING
Executive Director

James R. Whitesell
Senior Program Director

Jeffrey A. Lawson
Program Director

18th ANNUAL
FAMILY LAW INSTITUTE

Agenda

8:30 A.M. **Registration and Coffee**

8:50 A.M. Welcome and Introduction
- *Andrew C. Mallor*, Institute Chair

9:00 A.M. Dealing with a Difficult Opposing Counsel: What you should do and what you shouldn't do*
- *Mark A. Glazier and Honorable G. Michael Witte*

10:00 A.M. Case Law Update
- *Andrew Z. Soshnick*

11:00 A.M. **Coffee Break**

11:15 A.M. Creative QDROs
- *Denise Alexander Pyle*

12:00 P.M. **Lunch Break**

12:30 P.M. Effective Evidence
- *Honorable William J. Hughes and Heather L. King*

2:00 P.M. **Refreshment Break**

2:15 P.M. "Graying Divorce" and Representation of Clients with Diminished Capacity
- *James A. Reed*

3:15 P.M. Effective Divorce Depositions
- Brian K. Zoeller

4:15 P.M. Mediation in a Zoom Environment**
- *Kathryn Hillebrands Burroughs, Andrew C. Mallor and Timothy M. Sledd*

5:00 P.M. **Adjourn**

October 23, 2020

18th ANNUAL
FAMILY LAW INSTITUTE

Faculty

Andrew C. Mallor - Chair
Mallor Grodner LLP
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One Penn Mark
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Hon. William J. Hughes
Hamilton Superior Court #3
One Hamilton County Square, Suite 311
Noblesville, IN 46060
(317) 776-9709
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550 Reserve Street, Suite 450
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Marion, IN 46953
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2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-2982
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Indianapolis, IN 46204
(317) 237-1243
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Hon. G. Michael Witte
Indiana Supreme Court
Disciplinary Commission
251 N. Illinois Street, Suite 1650
Indianapolis, IN 46204
(317) 232-1807
michael.witte@courts.in.gov

Brian K. Zoeller
Cohen & Malad, LLP
One Indiana Square, Suite 1400
Indianapolis, IN 46204-2058
(317) 214-0321
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October 23, 2020

Andrew C Mallor
Mallor Grodner LLP, Bloomington / Indianapolis

Andrew C. Mallor leads the firm's private client division, handling all legal needs of the firm's private clients, from matrimonial to wealth management and family wealth planning.

Andy has been a leading family lawyer in Indiana for over 35 years. He is board certified in family law and is an acclaimed trial lawyer. By applying his many years of experience and his innate creativity to the issue at hand, Andy is often able to devise unique solutions to achieve his clients' objectives. His distinctive team approach in family law matters ensures both a quick response and a total focus on his clients' interests. Andy's family law clients know that they have not only Andy to call upon, but also the talented and dedicated members of his team. Andy truly enjoys getting to know his clients and their families, and taking care of them is his highest priority.

Hon. William J. Hughes
Judge, Hamilton Superior Court

William J. Hughes is a judge for the Hamilton County Superior Court in Hamilton County, Indiana. He has served as a judge for the court since July 1988 and is currently the longest serving judge in Hamilton County.

Hughes was re-elected to the Hamilton County Superior Court on November 4, 2014, for a term that expires on December 31, 2020

Hon. G. Michael Witte
Indiana Supreme Court Disciplinary Commission, Indianapolis

G. Michael Witte is the Executive Secretary of the Indiana Supreme Court Disciplinary Commission. Witte was the first Asian American to serve as judge in the State of Indiana. His 25-year judicial career included service as Judge Pro Tem of the Wayne Superior Court No. 1, Richmond, Indiana (2009); Judge of the Dearborn Superior Court No. 1, Lawrenceburg, Indiana (2000-2008); and Judge of the Dearborn County Court (1985 – 2000). He received both his B.A. and J.D. degrees from Indiana University, served as President of the Indianapolis law school's Alumni Board in 2009, and was honored in 2008 by the I.U. Alumni Association as its Distinguished Asian Alumni.

He is a 1991 graduate of the Indiana Judicial College, the 2002 class of the Graduate Program for Indiana Judges, and a former member of the Indiana Commission on Courts. He is currently Chair of the ABA Judicial Division and served as Chairman of the ABA National Conference of Specialized Court Judges in 2006. From 2006-09, Witte served as Co-chair of the ABA Judicial Division's Standing Committee on Minorities in the Judiciary. He received his community's Dr. Martin Luther King, Jr. Memorial Award in 2009. In addition, Indiana Minority Business Magazine named Witte a 2010 Champion of Diversity. Witte has been a panelist at many national programs on diversifying the judiciary and improving diversity pipelines to a judicial career, including a 2009 program at the Harvard Law School.

Witte served as the National Highway Traffic Safety Administration (NHTSA) Region 5 Judicial Outreach Liaison in 2009-10, the NHTSA Judicial Fellow from 1995-98, and served on the U.S. Congressional Advisory Committee for Commercial Driver's License, 2007-08.

Witte joined The National Judicial College faculty in 1994. In addition, he has served as faculty for programs presented by the American Bar Association, NHTSA, the National Center for State Courts, the National Criminal Justice Association, the Indiana Judicial Center, and the Indiana Continuing Legal Education Forum. Witte's teaching experience is primarily in the field of impaired driving and traffic court administration. His legal teaching assignments have occurred in Arkansas, Hawaii, Indiana, Illinois, Ohio, District of Columbia, Florida, Georgia, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, South Carolina, Tennessee, Texas, Virginia, Toronto, Canada, and Washington. Judge Witte has performed NHTSA assessments of impaired driving for Hawaii, Missouri, Montana, South Carolina, Rhode Island, Kansas, Maryland, and Washington.

DENISE ALEXANDER_PYLE Biography

Practice Description:

Denise Alexander-Pyle has extensive experience practicing in all areas of family law. She has been recognized by numerous professional and legal organizations as a leading practitioner in this area, and has been designated as a "Best Lawyer in America", as well as both a "Michigan Super Lawyer" (top 5% of attorneys) and an Indiana Super Lawyer.

Ms. Alexander-Pyle has served as President of the American Academy of Matrimonial Lawyers, Michigan Chapter. She has also been recognized by *DBusiness Magazine* as a "Top Lawyer In Metro Detroit".

Ms. Alexander-Pyle is an active speaker on various family law issues, and has authored numerous articles on various family law topics, including *"Diplomacy In Domestic Relations"* for the Michigan State Bar Family Law Journal (Volume 22 April 1995); *"Procedures for Obtaining a Personal Protection Order"* for the Michigan State Bar Family Law Journal Special Edition for Single Parents (1998); *"To Sign or Not to Sign: Pitfalls of the Final Agreement"* for the Michigan State Bar Family Law Journal Special Edition - Dividing the Assets (2001).

Ms. Alexander-Pyle served on the Board of Trustees for the Michigan Inter-Professional Association on Marriage, Divorce and the Family, Inc. and is Past President of the Board of Trustees for the Child Abuse and Neglect Council of Oakland County (CANCO).

She has held numerous public service positions including serving on the Waterford Planning Commission (1997-2001); on the Southfield City Council (1989-1992); on the Southfield Planning Commission (1983-1989); as the HUD Deputy Assistant Secretary for Community Planning and Development (1992-1993); as the Executive Director of the Michigan Domestic Violence Prevention and Treatment Board (1991-1992); and the Executive Director of the Government Task Force on Children's Justice (1991-1992).

Ms. Alexander-Pyle is also a Member in Good Standing of the State Bar of Michigan, the Indiana State Bar, Grant County Bar and is a fellow in the American Academy of Matrimonial Lawyers.

Attorney Denise Alexander-Pyle has also been honored as a "90 For the 90s" honoree by Crain's Detroit Business, and as the Southfield Business and Professional Women's "Women of the Year" in 1992.

Bar Admissions:

Michigan, 1976

Indiana, 2011

U.S. District Court Eastern District of Michigan, 1976
U.S. District Court Western District of Michigan, 1976

Law School:

Detroit College of Law, J.D., 1976

Undergraduate School:

University of Michigan, B.G.S., Political Science, 1973

Community Involvement:

- Waterford Planning Commission, 1997 - 2001
- Southfield City Council, 1989 - 1992
- Southfield Planning Commission, 1983 - 1989
- HUD Deputy Assistant Secretary for Community Planning and Development, 1992 - 1993
- Michigan Domestic Violence Prevention and Treatment Board, Executive Director, 1991 - 1992
- Government Task Force on Children's Justice, Executive Director, 1991 – 1992
- Temple Shir Shalom, Instructor, 1988-1990.

Awards; Honors; Distinctions:

- Best Lawyers in America, 2012 to present
- Michigan Super Lawyer (Top 5%): 2006 to 2015
- Indiana Super Lawyers 2016-present
- Top 50 Women Super Lawyers, 2006
- DBusiness Magazine Top Lawyers in Metro Detroit
- American Academy of Matrimonial Lawyers, President Michigan Chapter
- Southfield Business Women's “Woman of the Year,” 1992
- Carehouse of Oakland County-Circle of Hope Award, 2007
- Crain's Detroit Business “90 for the 90's” Honoree

Published Legal Writing:

"Diplomacy in Domestic Relations", Michigan State Bar Family Law Journal, Volume 22, April, 1995

"To Sign or Not to Sign: Pitfalls of the 'Final' Agreement", Michigan State Bar Family Law Journal Special Edition - Dividing the Assets, 2001

State Bar of Michigan Family Law Journal Author

Diplomacy In Domestic Relations

Procedures for Obtaining a Personal Protection Order

To Sign or Not to Sign

Pitfalls of the Final Agreement

Legal Lectures:

Family Law Seminars, State Bar of Michigan CLE

MI Chapter AAML annual seminars

Lecturer: Institute of Continuing Legal Education

State Bar of Michigan Family Law Section

Oakland County Bar Association's People's Law School

Mark Glazier
Cross Glazier Burroughs, PC., Carmel

A partner in the firm, Mr. Glazier is a lifelong resident of Indianapolis where he graduated from North Central High School. Mr. Glazier received his undergraduate degree from Indiana University in 1990 with a double major in Economics and History. He earned his law degree from Boston University School of Law in 1993 and was admitted to the Indiana Bar in 1993 and the Illinois Bar in 1994. Mr. Glazier is a Fellow of the American Academy of Matrimonial Lawyers and is a Certified Family Law Specialist - Family Law Certification Board. He is also a registered domestic relations mediator and trained collaborative law professional. Mr. Glazier has lectured extensively to other attorneys on a wide variety of family law issues. Mr. Glazier is a member of the American, Indiana, Hamilton County and Indianapolis Bar Associations, and he is a former chair of the executive committee of the Family Law Section of the Indianapolis Bar Association. Mr. Glazier has been named a "Super Lawyer" in Indianapolis Monthly magazine each year since inception of the honor. An Eagle Scout, he remains active with the Crossroads of America Council of the Boy Scouts of America. Mr. Glazier and his wife have four children and reside in Carmel.

Kathryn Hillebrands Burroughs
Cross Glazier Burroughs, PC., Carmel

Kathryn Hillebrands Burroughs concentrates her practice in matrimonial and family law including premarital agreements; cohabitation agreements; dissolution of marriage; child custody, parenting time and support; and interstate disputes and modifications.

Ms. Burroughs became a Certified Family Law Specialist in 2002, the first year it was available in Indiana. Kathryn is the immediate past chair of the Indiana State Bar Association, Family and Juvenile Law Section. She also serves as a board member of the State of Indiana Independent Certification Organization, which certifies family law specialists.

Kathryn presently serves as a member of the Indiana Board of Law Examiners by appointment of the Indiana Supreme Court. She also serves on the Indiana Child Custody and Support Advisory Committee, a committee created by statute to make recommendations to the Indiana Supreme Court on the Child Support Guidelines and other terms relating to the welfare of children of families no longer intact.

HEATHER L. KING

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EDUCATION/LICENSE

B.A., Texas Christian University, 1987
J.D., Texas Tech University School of Law, 1995
Board Certified – Family Law, Texas Board of Legal Specialization, December of 2000
Re-Certified – Family Law, Texas Board of Legal Specialization, December of 2005
Re-Certified – Family Law, Texas Board of Legal Specialization, December of 2010
Re-Certified – Family Law, Texas Board of Legal Specialization, December of 2015

PROFESSIONAL ACTIVITIES

Director, Officer & President, Tarrant County Family Law Bar Association 1998-2003
Director, Officer & President, Tarrant County Bar Association 2003-2010
Director/Officer & President, Texas Academy of Family Law Specialists, 2003 to 2012
Council Member, Officer & Chair, Family Law Council, State Bar of Texas, 2004 to 2017
Fellow, American Academy of Matrimonial Lawyers, 2005 to Present
Member/Fellow, College of the State Bar of Texas, 1999 to Present
Member, Tarrant County Young Lawyers Association, 1996 to 2002
Associate Member, Barrister, Officer, & E Eldon B. Mahon Inn of Court, 1997-98, 2001-2005, 2007-2008, 2010 to 2011, 2017-Present
Master, Eldon B. Mahon Inn of Court, 2015 to Present.
Senior Counsel, American College of Barristers, 2001 to Present
Fellow, Texas Bar Foundation 2002 to Present
Lifetime Fellow, Texas Family Law Bar Foundation 2004 to Present
Fellow, Tarrant County Bar Foundation 2004 to Present
Board of Directors Membership, Tarrant County Family Law Foundation, 2017-Present
Lawyers of Distinction, 2018- Present

AWARDS/RECOGNITION

Friend of the Inn for outstanding contributions to Eldon B. Mahon Inn of Court, 2002
President's Certification of Outstanding Achievement from Tarrant Co. Bar Assoc., 2003
Texas Super Lawyer, *Texas Monthly Magazine* 2003 to Present
Who's Who in Executives and Professionals 2003
Top Attorneys featured in *Fort Worth, Texas Magazine* 2003 to Present
Top Fifty Female Attorneys in Texas, Texas Monthly Magazine 2004 to Present
Top Fifty Female Super Lawyers, *Texas Monthly Magazine* 2006 to Present
Top 100 Lawyers in Dallas Fort Worth, Texas Monthly Magazine 2006 to Present
Top 100 Lawyers in Texas, Texas Monthly Magazine 2014 to Present
The Best Lawyers in America 2007 to Present
Top Women Lawyers, D Magazine, 2010
Fort Worth Business Press Power Attorney 2014
Fort Worth Magazine Top Attorneys 2014 to Present
Joseph W. McKnight Best Family Law CLE Article, 2017
Dan Price Award Recipient, 2017
TexasBarCLE Standing Ovation Award Recipient, 2017-2018
TAFLS- Sam Emison Award, 2018
Top Lawyer, Fort Worth Magazine, 2017- Present
Top Attorney, 360 West Magazine, 2018- Present

LAW RELATED SEMINAR PUBLICATIONS & PARTICIPATION

Author, *An Attorney Ad Litem Is Really A Lawyer*, Attorney Ad Litem Training Seminar 1997.
Author, *Trial Preparation & Planning*, "Nuts & Bolts" Protective Order Seminar 1997.
Author, *Challenging Characterization Issues: Characterizing Trusts, Employee Stock Options, Workman's Compensation Claims, And Intellectual Property*, Advanced Family Law Course 1997.
Author, *Some Changes In The Texas Family Code*, Blackstone Seminar 1998.
Author/Speaker, *Uncontested Divorce Outline*, Pro Bono Family Law Seminar 1998.
Author, *Factors Affecting Property Division & Alimony*, Family Law Basics From the Bench, Tarrant County Bar Association Brown Bag Seminar 1998.
Speaker, *Practice Tips On Procedures At The Courthouse and Communicating With Court Personnel*, Advanced Family Law Trial Skills Seminar 1998.
Author, *The Potential Effect of The New Texas Family Law Legislation Regarding Proportional Ownership, Equitable Interests, Division Under Special Circumstances, & A Look At New Legislative Provisions For Transmutation Agreements*, Advanced Family Law Course 1999.
Speaker, *Recent Cases in Child Support, Possession & Access*, 1999 Annual TADRO Conference 1999.
Speaker, *Filing Pleadings, Obtaining Settings, and Interacting With Court Coordinators and Clerks*, Family Law Trial Skills Seminar, West Texas Legal Services PAI Program, 1999.
Author, *Discovery In Property Cases Under The New Rules*, Advanced Family Law Course 1999.
Author/Speaker, *Drafting Family Law Pleadings: It's Almost All In The Manual*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.
Author, *Deciding When You Need A Jury & Conducting Voir Dire*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.
Author/Speaker, *Proper Drafting and Filing of Pleadings*, 26th Annual Advanced Family Law Course, Boot Camp 2000.
Author, *Discovery Gotta Haves: Essential Ideas for Discovery in Property and SAPCR's*, Marriage Dissolution Institute 2001.
Author, *Discovery*, Advanced Family Law Trial Skills, West Texas Legal Services PAI Program 2001.
Author/Trainer, "Proper Drafting and Filing of Pleadings", "Nuts & Bolts" Family Law Seminar, West Texas Legal Services PAI Program 2001.
Presenter, *Winning Trial Techniques in Property Cases*, Texas Academy of Family Law Specialists Annual Trial Institute 2002.
Author/Trainer, "Proper Drafting and Filing of Pleadings", 2002 Family Law Seminar, West Texas Legal Services PAI Program.
Author/Speaker, *Discovery & Mediation*, 28th Annual Advanced Family Law Course, Family Law Boot Camp 2002.
Panel Member, *Use and Abuse of Legal Assistants*, 28th Annual Advanced Family Law Course 2002.
Speaker, *Use and Abuse of Legal Assistants*, Panhandle Family Law Bar Association November Luncheon, 2002.
Author/Speaker, *Drafting Trial Documents With An Eye Toward Winning*, Advanced Family Law Drafting Course 2002.
Author/Speaker, *Discovery: Tools, Techniques & Timebombs*, Texas Academy of Family Law Specialists Annual Trial Institute 2003.
Author/Player, *Associate Judge Do's & Don't's*, Tarrant County Family Law Bar Association 2003.
Author/Speaker, *Evaluating A Custody Case*, 26th Annual Marriage Dissolution Institute 2003.
Co-Director, Family Law Boot Camp, 29th Annual Advanced Family Law Seminar 2003.
Author, *Discovery in Hard Places*, 29th Annual Advanced Family Law Seminar 2003.
Speaker, *Practicing Law For Fun & Profit*, 29th Annual Advanced Family Law Seminar 2003.
Author/Speaker, *Internet Searches for Financial & Personal Information Useful in Family Law Litigation*, Texas Academy of Family Law Specialists Annual Trial Institute 2004.
Moderator, Effective Courtroom Advocacy, Tarrant County Bench Bar Seminar 2004
Author/Speaker, *Internet Investigation of Personal Information & Assets*, Marriage Dissolution Institute 2004.
Director, Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.
Author/Speaker, *Drafting 101, Basic Drafting of Pleadings*, Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, Tarrant County Family Law Bar Association, Summer Bar Seminar 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, State Bar College "Summer School" 2004.

Author, *The Life of a Grievance & The New Disciplinary Rules, What You Don't Know Can Hurt You*, 30th Annual Advanced Family Law Seminar 2004.
Director, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.
Author/Speaker, *Drafting 101, Basic Drafting of Pleadings*, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.
Author/Speaker, *Investigation of Personal Information & Assets*, Legal Assistant's University 2004
Author, *Advanced CYA For The Family Law Attorney*, Family Law Ultimate Trial Notebook 2004
Author/Speaker, *Divorce Planning*, Representing Small Business 2004
Assistant Director, Texas Academy of Family Law Specialists Annual Trial Institute 2005
Instructor, *Marital Property*, The People's Law School, Fort Worth 2005
Author/Speaker, *Marital Property 101*, State Bar of Texas Spring Training, Fort Worth 2005
Author/Speaker, *Effective Use of Psychologists and Psychistrists*, 28th Annual Marriage Dissolution Institute 2005.
Panelist/Moderator, Evidence and Discovery Workshop, 30th Annual Advanced Family Law Seminar, Dallas 2005
Author/Speaker, *Internet Investigation of Personal Information and Assets*, Tarrant County Bar Association September 2005 Luncheon.
Director, Texas Academy of Family Law Specialists Trial Institute 2006, Reno, Nevada
Author/Speaker, *Avoiding Divorce Disasters*, Representing Small Businesses, Dallas March 23-24, 2006
Panelist/Author, 29th Annual Marriage Dissolution Institute Bootcamp – Practical Aspects of Enhancing Your Practice, *How To Lose A Paralegal In 10 Days, or Keep One for 10 Years*, April 19, 2006, Austin.
Moderator, 29th Annual Marriage Dissolution Institute, *Electronic Evidence*, April 20-21, 2006, Austin.
Speaker, *Being A Family Law Attorney*, Tarrant County Bench-Bar, April 27, 2006, The Woodlands.
Speaker, *Ethics: Evidence, Discovery and Witnesses*, Tarrant County Bar Association Brown Bag Luncheon, June 23, 2006, Fort Worth.
Author/Speaker, *21st Century Issues Dealing with Nontraditional Relationships*, 31st Annual Advanced Family Law Seminar, August 14-17, 2006, San Antonio.
Speaker, UTCLE Parenting Plan Conference, *Effective Strategies For Reaching Parenting Plan Agreements*, October 13, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Navigating the Family Code*, October 20, 2006.
Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Helpful Appellate References*, October 20, 2006.
Moderator, Texas Academy of Family Law Specialists Trial Institute 2007, Sante Fe, New Mexico, Electronic Evidence Panel.
Moderator, 30th Annual Marriage Dissolution Institute, *Electronic Evidence*, May 10-11, 2007, El Paso.
Co-Speaker, *Interesting Appellate Cases*, Tarrant County Family Law Bar Luncheon, May 22, 2007.
Speaker/Author, UTCLE Family Law on the Front Lines, *Appellate Tips for Family Law Attorneys*, Galveston, Texas June 28-29, 2007.
Speaker/Author, *Evidence, Keeping in In and Keeping it Out*, 32nd Annual Advanced Family Law Seminar, San Antonio.
Speaker, *Appellate Considerations*, Texas Academy of Family Law Specialists Trial Institute 2008, Sante Fe, New Mexico.
Speaker, UTCLE 8th Annual Family Law on the Front Lines, *Justice Behind Closed Doors: Protecting the Record, Your Client and Yourself In Chambers*, Galveston, Texas June 19-20, 2008.
Speaker/Author, SBOT Advanced Family Law Drafting, *Discovery*, Austin, Texas, December 3-4, 2008.
Speaker/Author, UTCLE Parent-Child Relationships: *Critical Thinking for Critical Issues, Discovery and Evidence, A Primer for Family Law Attorneys*, Austin, Texas, January 29-30, 2009.
Speaker/Author, SBOT Representing Small Business, *Protecting Business Before Divorce: What Every Business Lawyer Must Know About Family Law*, Dallas, Texas, March 26-27, 2009.
Speaker, UTCLE, 9th Annual Family Law on the Front Lines, *Electronic Evidence and Discovery*, San Antonio, June 18-19, 2009.
Director, 35th Annual Advanced Family Law Seminar, Dallas, Texas, August 3-7, 2009.
Speaker/Author, SBOT The Ultimate Trial Notebook: Family Law, *Effective Use of Prior Testimony*, San Antonio, December 3-4, 2009.
Speaker/Author, UTCLE 2010 Parent-Child Relationships: Critical Thinking for Critical Issues, *Discovery and Evidentiary Issues in Substance Abuse Scenarios*, Austin, Texas January 28-29, 2010.

Speaker/Author, SBOT Essentials of Business Law, *Business Succession Planning: Protecting Business In Divorce*, Dallas, Texas, April 29-30, 2010.
Presiding Officer, UTCLE 10th Annual Family Law on the Front Lines, San Antonio, Texas, July 1-2, 2010.
Speaker/Author, 36th Annual Advanced Family Law Seminar, *Evidence: In or Out?* San Antonio, August 9-12, 2010.
Speaker/Panelist, New Frontiers in Marital Property Law, *Fiduciary Litigation and Other Financial Causes of Action*, Scottsdale, AZ, October 28-29.
Speaker/Panelist, American Bar Association Family Law Section Fall Meeting, *Tech Torts and Related Difficult Evidentiary Issues*, October 23, 2010, Fort Worth.
Speaker/Panelist, NBI Handling Divorce Cases from Start to Finish, *Exploring Custody, Visitation and Support Issues*, and *Ethical Perils In Divorce Practice*, November 7, 2010, Fort Worth.
Speaker, Tarrant County Court Coordinator's CLE, *Electronic Evidence and Social Networking*, February 23, 2011, Fort Worth.
Speaker, Tarrant County Bench Bar, *Family Law In A Nutshell*, April 2, 2011, Possum Kingdom.
Author/Speaker, *What Every Business Attorney Needs to Know About Family Law*, Essentials of Business Law, April 14-15, 2011, Houston.
Author/Speaker, *Modern Evidence*, 34th Annual Marriage Dissolution Institute, Austin, April 28-29, 2011.
Presiding Officer, Family Law on the Frontlines, June 16-17, 2011, Austin, Texas.
Author/Speaker, *Electronic Evidence Issues*, 2011 Family Law Seminar, Legal Aid of Northwest Texas Equal Justice Volunteer Program, July 21-22, 2011, Fort Worth.
Author/Speaker, 37th Annual Advanced Family Law Seminar, *Evidence*, San Antonio August 1-4, 2011.
Author/Speaker, Texas Advanced Paralegal Institute, *Social Networking*, Fort Worth, October 6-7, 2011.
Speaker, Tarrant County Court Coordinator's Luncheon, *Evidence and Social Networking*, Fort Worth, October 11, 2011.
Moderator/Panelist, New Frontiers in Marital Property Law, *Remedies in Property Cases*, San Diego, October 13-14, 2011.
Author/Speaker, *Drafting Family Law Discovery: Basic and Electronic*, Advanced Family Law Drafting 2011, December 8-9, 2011, Dallas, Texas.
Panelist, Introductory Notes, Lawyer Practice Notes and Panelist, *More than Sex, Drugs and Rock & Roll: Evaluating Your Custody Case from a Psychiatric, Psychological and Legal Perspective*, UTCLE, AAML, 2012 Innovations – Breaking Boundaries in Custody Litigation, January 19-20, 2012, Houston, Texas.
Author/Speaker, Attacking and Enforcing Mediated Settlement Agreements, 35th Annual Marriage Dissolution Institute, Dallas, April 26-27.
Faculty Member, Houston Family Law Trial Institute, South Texas College of Law, May 2012.
Speaker, *Social Networking in Family Law and Electronic Evidence*, Legal Aid of Northwest Texas EJV Program 2012 Family Law Seminar, Fort Worth, July 12-13, 2012.
Speaker, A Sampling of Interesting Appellate Cases, Tarrant County Family Law Bar Luncheon, Fort Worth, July 21, 2012
Author/Panelist, *Discovery, Keeping It In, Keeping it Out; Facebook; Social Networking*, 38th Annual Advanced Family Law Seminar, Bootcamp, August 5, 2012.
Author/Speaker, *Evolving Evidentiary Issues in the 21st Century*, 38th Annual Advanced Family Law Seminar, August 6-9, 2012.
Speaker, *Social Networking in Family Law and Electronic Evidence*, Texas Advanced Paralegal Seminar, State Bar of Texas, Addision, October 3-5, 2012.
Moderator, *Identifying, Valuing and Characterizing Natural Resources*, 17th Annual New Frontiers in Marital Property Law, New Orleans, October 4-5, 2012.
Speaker, *Social Networking*, Texas Association of Court Administrators Annual Meeting, Fort Worth, Texas October 25, 2012.
Speaker/Co-Author, *Electronic Evidence Cases Every Family Lawyer Should Know*, SBOT Family Law Technology Course, Austin, Texas December 12-13, 2012.
Speaker/Author, *Evidence Cases Every Family Law Attorney Should Know*, Dallas Family Law Bench Bar, Dallas, Texas, February 8, 2013
Participant/Attorney, Texas Academy of Family Law Specialists Annual Trial Institute, Colorado Springs, Colorado, February 15-16, 2013.
Speaker, Tarrant County Bar Association Court Coordinators Continuing Education, *Searching The Internet*, Fort Worth, Texas, April 4, 2013.
Author/Speaker, Tarrant County Bar Association Bench Bar, *Evidence Cases Every Attorney Should Know*, Possum Kingdom, Texas, April 12-13, 2013.

Author/Speaker, 35th Annual Marriage Dissolution Institute, Bootcamp, *Preparing the Client*, April 17-19, 2013, Galveston, Texas.
Faculty Member, Houston Family Law Trial Institute, South Texas College of Law, May 2013.
Author/Speaker, 39th Annual Advanced Family Law Seminar, Important Evidence Cases, as a part of the Discovery/Evidence Presentation, San Antonio, August 5-8, 2013.
Panelist, Unanswered and Unique Receivership/Bankruptcy Questions, 18th Annual New Frontiers in Marital Property Law, Napa Valley, October 4-5, 2013.
Author/Speaker, 36th Annual Marriage Dissolution Institute, *Settlement Agreements, MSA's, Etc…*, April 22-23, 2014, Austin, Texas.
Faculty Member, Houston Family Law Trial Institute, South Texas College of Law, May 2014.
Panelist, Innovations – Breaking Bounds in Custody Litigation, *You Don't Own Me- Alienation and Reunification*, Dallas, June 12, 2014.
Author/Speaker, State Bar Annual Meeting, *Evidence Cases Every Attorney Should Know*, Austin, June 26, 2014.
Author//Speaker, Legal Aid of Northwest, Texas, Texas A&M School of Law Family Law Seminar, Evidence: Authentication and Admissibility, Fort Worth, Texas, July 24, 2014.
Author/Speaker, Family Law 101 Course, *Evidence*, San Antonio, August 3, 2014.
Author/Speaker, 40th Annual Advanced Family Law Course, *Evidence-Update and Current Issues*, San Antonio August 5, 2014.
Co-Director, New Frontiers in Family Law, Lake Tahoe October 23-24, 2014.
Author/Speaker, *Texas Association of Domestic Relations Offices Annual Meeting*, Social Networking and Evidence, San Antonio October 29, 2014
Author/Speaker, TCFLBA 4th Annual CLE Family Law In Review, *Evidence*, Fort Worth, November 7, 2014.
Author/Speaker TCFLBA Monthly Luncheon, *Social Networking*, November 18, 2014.
Author/Speaker SBOT 9th Annual Fiduciary Litigation Course, Electronic Discovery and Electronic Evidence, Horseshoe Bay, December 4-5, 2014.
Author/Speaker, SBOT Family Law Technology 360, *Proving It Up, Email and Social Media Evidence/Predicates*, Austin, December 4-5, 2015
Witness, Texas Academy of Family Law Specialists Trial Institute, January 15-16, 2015.
Co-Speaker, *Finding and Proving Up Email & Social Media Evidence*, Extreme Family Law Makeover XIII, San Antonio, February 27, 2015.
Moderator/Co-Speaker/Co-Author, *Cradle to the Grave – The Impact of Family on the Business*, Essentials of Business Law Course 2015, Dallas, March 12-13, 2015.
Speaker/Author, *Pleading, Discovering and Arguing Marital Fraud, Waste & Reconstituted Estate*, 38th Annual Marriage Dissolution Institute, Dallas, April 9-10, 2015.
Speaker, *Oops, I Spoliated Again!*, Tarrant County Bench Bar, April 24-25, 2015.
Speaker/Author, *SAPCR Update*, Advanced Family Law 2015, San Antonio, August 3-6, 2015.
Speaker/Author, *Hearsay*, Advanced Family Law 2015 Judge's Track, San Antonio, August 3-6, 2015.
Speaker/Author, *Spoiliation of Evidence*, Texas Advanced Paralegal Seminar, Fort Worth, October 1, 2015
Panelist/Co-Speaker, *The Role of Experts in Characterizing and Tracing Property*, New Frontiers in Marital Property Law, Denver, October 15-16, 2015
Speaker/Author, *Everything a Business Lawyer Needs to Know About Characterization*, Advanced Business Law, Houston, November 20, 2015
Speaker/Author, *Waste Fraud and the Reconstituted Estate*, Advanced Family Law Drafting, Dallas, December 10-11, 2015
Participant/Attorney, 32nd Annual Texas Academy of Family Law Specialists Trial Institute, Charleston, South Carolina, January 14-17, 2016
Speaker/Author, *Technical Issues in Property Cases*, 2016 Family Justice Conference, Cedar Creek, Texas January 25, 2016
Speaker/Author, Ethical Considerations in Family Law, 22nd Annual Ethics Symposium, South Texas College of Law, February 5, 2016
Speaker/Author, *Spoliation, Creation of Fraudulent Evidence*, 39th Annual Marriage Dissolution Institute, Galveston, April 7-8, 2016.
Speaker/Author, *Evidence*, State Bar of Texas Annual Meeting 2016, Fort Worth, Texas.
Speaker/Participant, Estate Planning for the Family Business Owner, Webinar, November 3, 2016

Speaker/Author, *Evidence Updates*, Tarrant County Family Bar Association "Advanced on a Shoestring" Seminar, Ft. Worth, Texas, November 10-11, 2016
Course Director/Speaker/Author, *HIPPA*, Family Law Technology Course, Austin, Texas, December 8-9, 2016
Speaker/Author, *Evidence- Knowing When to Hold Em' and When to Fold Em' in the Courtroom*, Extreme Family Law Makeover XV Seminar, San Antonio, Texas, February 24, 2017
Moderator, *Courtroom Evidence & Demonstration*, Marriage Dissolution, Austin, Texas, April 21, 2017
Participant/Attorney, 33rd Annual Texas Academy of Family Law Specialists Trial Institute, Houston, TX, May 22nd-26th, 2017
Speaker/Author, Evidence Update and Issues, Advanced Family Law Course, San Antonio, Texas, August 6, 2017
Speaker/Author, *Drafting with Litigation in Mind*, Advanced Family Law Drafting, Dallas, Texas, December 7, 2017
Speaker/Author, *Pending*, 34th Annual Texas Academy of Family Law Specialists Trial Institute, February 15-16, 2018
Speaker/Author, *Effective Evidence*, Nevada Family Law Conference, Bishop, CA, March 1-2, 2018
Speaker/Author, *Evidence Update and Issues*, Advanced Family Law Course, San Antonio, Texas, August 8, 2018
Speaker/Author, *Spoliation and Fraudulent Documents*, NTEC Bar, Colleyville, Texas, August 21, 2018

Speaker/Author, *Evidence Trial Skills: Getting It In & Keeping it Out*, Trial Skills for Family Lawyers, New Orleans, LA, December 13-14, 2018
Speaker/Author, *Preparing for Direct on your Way to the Courthouse and Preparing for Cross During Direct*, Galveston, TX, April 25-26, 2019
Speaker/Faculty, 35th Annual Texas Academy of Family Law Specialists Trial Institute, May 18-25, 2019
Speaker/Author, *Courtroom Examination in Family Law Cases*, Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence Trial Skills- Getting It In and Keeping It Out*, Advanced Family Law Course, San Antonio, Texas, August 13, 2019
Speaker/Author, *Evidence in Family Court*, Annual Judicial Education Conference, San Antonio, Texas, September 3-6, 2019
Speaker, Oral Arguments Presentation, Texas A&M University School of Law, Fort Worth Texas, October 10, 2019
Speaker/Author, *Evidence*, Tarrant County Family Law Bar Association, Fort Worth, Texas, November 12,2019
Speaker/Author, *Defense Against the Dark Arts: Evidence*, South Carolina Bar Convention, Columbia, South Carolina, January 23, 2020
Speaker/Author, *I Know There's and Answer: Getting the Information You Need to Win*, Advanced Family Law, Webcast, Texas, August 4, 2020
Speaker/Author, Evidence: *Get it In, Keep it Out*, DMAP by the Dallas Bar Association, Webcast, Texas, September 18, 2020

LAW RELATED PERIODICAL/MAGAZINE PUBLICATIONS

Author, "Beating Out The Big Firms", *Texas Lawyer*, Vol. 18, No. 21, July 29, 2002.
Interviewed/Quoted "Divorce 101", *Fort Worth Magazine*, July 2003 edition.
Author, "Basic Internet Searches for Persons and Assets", *The College Bulletin, News for Members of the College of the State Bar of Texas*, Summer 2006
Author, "New Marital Estate in Divorce: Zombie Money", *Texas Lawye*r 2013
Author, "Killing the Messenger", *Texas Bar Journal*, September 2014, Vol. 77, No. 8, P712

LAW RELATED BOOKS

Co-Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines*, Heather King, Bruce Beverly & Syd Beckman (Imprimatur Press 2000).
Co-Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines, A Focus on Children*, Heather King, Bruce Beverly & Syd Beckman (Imprimatur Press 2002).
Co-Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines, A Focus on Property*, Heather King, Bruce Beverly, Syd Beckman & Randal Wilhite (Imprimatur Press 2004).
Co-Annotator for *Lexis Texas Annotated Family Code* 2007-2010.
Co-Author, *Protecting Your Assets From A Texas Divorce* 2nd Ed. (PSG Books 2009).
Co-Author, updates to *Family Law Depositions*, © 2012 JurisPublishing, Inc. to Present.

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EDUCATION

B.B.A., Marketing, Baylor University, 2006
J.D., *Cum Laude*, Texas Wesleyan University School of Law, 2009

LEGAL EXPERIENCE/CERTIFICATIONS

KOONSFULLER, PC.
Attorney, January 2010 – Present

- Practice limited to family law.
- Litigation and appellate experience handling complex property disputes and child custody proceedings.
- Board Certified – Family Law, Texas Board of Legal Specialization, January 2015

Texas A&M School of Law
Adjunct Professor—Family Law Drafting, August 2014 – Present

PROFESSIONAL ASSOCIATIONS

Member, Baylor University Alumni Association, 2006 – Present
Member, Kappa Delta Alumni Association, 2006 – Present
Member, State Bar of Texas, 2009 – Present
Alumni, Houston Family Law Trial Institute, 2010
Member, Tarrant County Bar Association, 2010 – Present
Member, Tarrant County Family Law Bar Association, 2010 – Present
Member, Dallas County Bar Association, 2010 – Present
Member, Tarrant County Young Lawyer's Association, 2010 – Present
Member, Tarrant County Appellate Section, 2011 – Present
Member, Appellate Section—State Bar of Texas, 2011 – Present
Member, Eldon B. Mahon Inn of Court, 2011 – Present
Appellate Committee State Bar of Texas, Assistant to the Chair, 2013—Present

AWARDS/RECOGNITIONS

Fort Worth, Texas Magazine Top Attorney, 2012- Present
Texas Lawyer's Legal Leaders On The Rise (Only 25 Selected in Texas), 2013
Best Attorney in Northeast Tarrant County, Living Magazine, 2013
Texas Rising Star (SuperLawyers), 2014- Present
76092 Magazine's Local Luminary, 2014
Up- and- Coming 50: Women Texas Rising Stars, 2018-2019
Up- and- Coming 50: Texas Rising Stars, 2018-2019
The Best Lawyers in America, in family law as recognized by, Best Lawyers LLC, 2015-Present
Joseph W. McKnight Best Family Law CLE Article, 2017
Elite Lawyer by Elite Lawyers, 2018
Top Attorney, 360 West Magazine, 2018- Present

LEGAL PUBLICATIONS/PARTICIPATION

Interviewed/Quoted, *Fact vs. Fiction: First-Year Associates Dish About "The Deep End"*, Texas Lawyer Magazine, February 1, 2010.
Co-Editor, Texas Annotated Family Code, Published by LexisNexis, 2010 – 2013.
Author, *Exploring Custody, Visitation and Support Issues*, "Handling Divorce Cases from Start to Finish", National Business Institute, November 7, 2010, Fort Worth, Texas.

Author, *Drafting Family Law Discovery: Basic and Electronic*, Advanced Family Law Drafting, December 8-9, 2011, Dallas, Texas.
Author (Introductory Notes and Lawyer Practice Notes), *More than Sex, Drugs and Rock & Roll: Evaluating Your Custody Case from a Psychiatric, Psychological and Legal Perspective*, "Innovations—Breaking Boundaries in Custody Litigation", UTCLE, AAML, January 19-20, 2012, Houston, Texas.
Author, *Attacking and Enforcing Mediated Settlement Agreements*, 35th Annual Marriage Dissolution Institute, April 26-27, 2012, Dallas, Texas.
Author, *Discovery (Getting It In and Keeping It Out), Facebook and Social Networking*, 38th Annual Advanced Family Law Seminar: Bootcamp, August 5, 2012, Houston, Texas.
Author, *Discovery in Divorce*, "Family Law from A to Z", National Business Institute, October 2, 2012, Houston, Texas.
Author, *Electronic Evidence Cases Every Family Lawyer Should Know*, Family Law Technology Course, December 13-14, 2012, Austin, Texas.
Speaker, *Divorce Cases & E-Discovery*, Strafford Publishing Webinar, February 27, 2013, Fort Worth, Texas.
Author, *What You Tweet Can And Will Be Used Against You*, North Texas Magazine, March 1, 2013, Fort Worth, Texas.
Author, *Client Preparation*, 36th Annual Marriage Dissolution Institute, April 18-19, 2013, Galveston, Texas.
Speaker, *Evidentiary Issues*, Trying a Case in the New Age, May 10, 2013, Fort Worth, Texas.
Author, *Evidence Cases Every Family Law Attorney Should Know*, 39th Annual Advanced Family Law Course, August 5-8, 2013, San Antonio, Texas.
Author, *Unanswered and Unique Bankruptcy Questions*, 18th Annual New Frontiers in Marital Property Law, October 3-4, 2013, Napa, California.
Author/Speaker, *Really Good Ways to Ask, Answer and Object to Discovery*, Advanced Family Law Drafting, December 5-6, 2013, Dallas, Texas.
Author/Speaker, *Social Media Do's and Don'ts*, 37th Annual Marriage Dissolution Institute, April 24-25, 2014, Austin, Texas.
Author/Speaker, *Onshore Shale—Where Oil & Gas Law and Family Law Meet*, Institute for Energy Law, July 10, 2014, Southlake, Texas.
Author/Speaker, 40th Annual Advanced Family Law Course, *Modern Discovery*, San Antonio August 5, 2014.
Author, 40th Annual Advanced Family Law Course, *Evidence*, San Antonio August 5, 2014.
Author, New Frontiers in Family Law, *Evidence—A Master Class*, Lake Tahoe October 23-24, 2014.
Author/Speaker TCFLBA Monthly Luncheon, *Social Networking*, November 18, 2014.
Author/Speaker SBOT 9th Annual Fiduciary Litigation Course, Electronic Discovery and Electronic Evidence, Horseshoe Bay, December 4-5, 2014.
Author/Speaker, *Finding and Proving Up Email & Social Media Evidence*, Extreme Family Law Makeover XIII, San Antonio, February 27, 2015
Author/Speaker, *Defending Enforcements: Title I and Title V*, Marriage Dissolution Institute, Galveston, April 7-8, 2016
Author/Speaker, *Discovery and Spoliation and The Weekly Homes Demonstration*, Family Law Technology, Austin, December 8-9, 2016
Co- Author, *The New Normal- Modern Family Issues in a Changing Landscape*, Innovations, February 17, 2017
Author/Speaker, *Discovery- Uses and Abuses*, Marriage Dissolution Institute, Galveston, April 21, 2017
Author
Author/Speaker, *Evidence Handbook*, Advanced Family Law 2017, San Antonio, August 7-10, 2017
Author/Speaker, *Innovative Discovery*, Advanced Family Law Drafting, Fort Worth, December 7-8, 2017
Author/Speaker, *Waste, Marital Fraud & The Reconstituted Estate (Zombie Money)*, South Texas Litigation Course, May 17, 2018
Speaker/Author, *Spoliation and Fraudulent Documents*, NTEC Bar, Colleyville, Texas, August 21, 2018
Speaker/Author, *Gimme That "Fake Smile" While Putting on Your Fake Evidence*, Fort Worth, Texas, July 18, 2019
Speaker/Author, *Evidence Trial Skills- Getting it in and Keeping it Out*, Family Law Advanced, San Antonio, Texas, August 12-15, 2019
Speaker/Author, *Discovery Hacks*, Family Law Drafting 2019, Dallas, Texas December 12, 2019
Speaker/Author, *These Boots Are Made for Walkin: What to Bring to Court for the Expected and the Unexpected*, Advanced Family Law, Webcast, Texas, August 4, 2020

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EDUCATION
J.D., Texas A&M University School of Law, 2014
B.S., Marriage, Family, and Human Development, Brigham Young University, 2010

EMPLOYMENT
Associate Attorney, KoonsFuller, P.C., 2015–Present
Briefing Attorney, Eastland Court of Appeals, 2014–2015

AWARDS/RECOGNITIONS
Texas Rising Star (SuperLawyers), Appellate, 2020
360 West Magazine Top Attorney in Appellate Law, 2019–2020
Fort Worth Magazine Top Attorney in Family Law, 2019
Top 40 Under 40, The National Advocates, 2018
10 Best Attorney for Client Satisfaction, American Institute of Family Law Attorneys, 2017
The Joseph W. McKnight Best Family Law CLE Article 2017

PROFESSIONAL ASSOCIATIONS
Admitted, State Bar of Texas; Member, Appellate and Family Law Sections
Admitted, United States District Court for the Northern District of Texas
Admitted, United States Court of Appeals for the Fifth Circuit
Member, Texas Bar College
Member, Texas Family Law Foundation
Member, Texas Young Lawyers Association
Member, Tarrant County Bar Association
Member, Tarrant County Family Law Bar Association
Associate Member, Eldon B. Mahon Inn of Court
Alumnus, National Family Law Trial Institute

CLE ACTIVITIES
-Author, *What to Bring to Court for the Expected and Unexpected*, 2020 State Bar of Texas Annual Advanced Family Law, Online CLE Webinar.
-Author/Speaker, *Discovery Hacks*, 2020 State Bar of Texas Paralegal Division, Online CLE Webinar.
-Author, *Discovery Hacks*, 2019 State Bar of Texas Advanced Family Law Drafting, Dallas, Texas.
-Author/Speaker, *Evidence Trial Skills*, 2019 Advanced on a Shoestring, Tarrant County Family Law Bar Association, Fort Worth, Texas.
-Author/Speaker, *Gimme that "Fake Smile" While Putting on Your Fake Evidence*, 2019 Legal Aid of North West Texas Family Law Seminar, Fort Worth, Texas.
-Author, *Courtroom Examination in Family Law Cases: Effective and Efficient Presentation*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Evidence Trial Skills: Getting It In and Keeping It Out*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Gray Divorce: Strategies for Over 65, Dementia, and Durable POAs*, 2019 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Speaker, *Roughin' It Through Family Law - 2018-2019 Case Law Update*, 2019 Collin County Bench Bar, Glen Rose, Texas.
-Author, *Evidence Trial Skills: Getting It In & Keeping It Out*, 2018 Advanced Trial Skills for Family Lawyers, New Orleans, Louisiana.

-Speaker, *Firearms and Gun Trusts*, 2018 Advanced on a Shoestring, Tarrant County Family Law Bar Association, Fort Worth, Texas.
-Author/Speaker, *Evidence Update*, 2018 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Effective Evidence*, 2018 State Bar of Nevada Annual Family Law Conference, Bishop, California.
-Author, *The Divorce of Las Vegas Mobster, Benjamin "Bugsy" Siegel and Esta Krakower*, 2018 Texas Academy of Family Law Specialists Annual Trial Institute, Las Vegas, Nevada.
-Author, *Innovative Discovery*, 2017 State Bar of Texas Advanced Family Law Drafting, Fort Worth, Texas.
-Author, *Evidence Handbook*, 2017 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *Courtroom Evidence and Demonstration*, 2017 State Bar of Texas Annual Marriage Dissolution Institute, Austin, Texas.
-Author, *Technology Case Law Update*, 2016 State Bar of Texas Family Law and Technology, Austin, Texas.
-Author, *The New Evidence Handbook*, 2016 State Bar of Texas Annual Advanced Family Law, San Antonio, Texas.
-Author, *The Hearsay Rule Revisited: Practical Application of the Hearsay Rule in Family Court*, 2016 South Carolina Bar Convention - Family Law Section, Charleston, South Carolina.
-Author, *The Role of Experts in Characterizing and Tracing Property*, 2015 State Bar of Texas Annual New Frontiers in Marital Property Law, Denver, Colorado.
-Author, *Mandamus and Habeas Corpus*, 2014 State Bar of Texas Annual Marriage Dissolution Institute, Austin, Texas.
-Author, *Remand*, 2014 State Bar of Texas Annual Marriage Dissolution Institute, Austin, Texas.

PUBLICATIONS
-Contributing Editor of *Predicates Manual 4.0*, Texas Family Law Foundation, 2019.
-Author, *Getting Divorced? 8 Ways to Smooth the Process and Ease the Pain*, Fort Worth Magazine, March 2019.
-Contributing Author, *Fast Guide to Family Law: Checklist for Everyday Practice*, State Bar of Texas Family Law Section, 2016.
-Author, *When Evidentiary Matters Cross Ethical Boundaries*, 57 South Texas Law Review 527, Summer 2016.

REPORTED CASES
-*Smith v. Smith*, --- F.3d ---, 2020 WL 5742023 (5th Cir. Sep. 25, 2020).
-*In re J.C.*, 594 S.W.3d 466 (Tex. App.—Fort Worth 2019, no pet.).
-*Waldrop v. Waldrop*, 552 S.W.3d 396 (Tex. App.—Fort Worth 2018, no pet.) (op. on en banc reconsideration).
-*In re S.V.*, 599 S.W.3d 25 (Tex. App.—Dallas 2017, pet. denied) (op. on reh'g).

REPRESENTATIVE UNREPORTED CASES
-*In re E.A.*, No. 02-18-00233-CV, 2020 WL 3969587 (Tex. App.—Fort Worth June 18, 2020, no pet.) (mem. op.).
-*In re S.U.*, No. 02-19-00395-CV, 2020 WL 1949626 (Tex. App.—Fort Worth April 23, 2020, no pet.) (mem. op.).
-*Bartee v. Bartee*, No. 11-18-00017-CV, 2020 WL 524909 (Tex. App.—Eastland Jan. 31, 2020, no pet.) (mem. op.).
-*Wright v. Payne*, No. 02-19-00147-CV, 2019 WL 6003243 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (mem. op.).
-*C.C. v. L.C.*, No. 02-18-00425-CV, 2019 WL 2865294 (Tex. App.—Fort Worth July 3, 2019, no pet.) (mem. op.).
-*In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.).
-*In re M.S.*, No. 02-18-00379-CV, 2019 WL 1768993 (Tex. App.—Fort Worth April 22, 2019, pet. denied) (mem. op.).
-*In re C.W.J.*, No. 11-17-00085-CV, 2019 WL 1067489 (Tex. App.—Eastland March 7, 2019, no pet.) (mem. op.).
-*In re K.F.*, No. 02-18-00187-CV, 2018 WL 6816119 (Tex. App.—Fort Worth Dec. 27, 2018, pet. denied) (mem. op.).
-*In re A.C.*, No. 02-18-00129-CV, 2018 WL 5273931 (Tex. App.—Fort Worth Oct. 24, 2018, pet. denied) (mem. op.).
-*Pedone v. Harvey*, No. 07-17-00394-CV, 2018 WL 3677804 (Tex. App.—Amarillo Aug. 2, 2018, no pet.) (mem. op.).
-*In re Garza*, No. 05-18-00816-CV, 2018 WL 3569384 (Tex. App.—Dallas July 25, 2018, orig. proceeding) (mem. op.).
-*In re E.B.*, No. 12-17-00214-CV, 2017 WL 4675109 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding [mand. denied, June 8, 2018]) (mem. op.).
-*In re B.L.*, No. 02-16-00360-CV, 2016 WL 6804467 (Tex. App.—Fort Worth Nov. 17, 2016, orig. proceeding). (mem. op.).
-*Saldana v. Saldana*, No. 10-15-00411-CV, 2016 WL 1238730 (Tex. App.—Waco March 24, 2016, no pet.) (mem. op.).

James A. Reed
Dentons Bingham Greenebaum LLP, Indianapolis

Jim Reed has concentrated his practice in the legal aspect of relationship transitions of all types since graduating from law school. He has been involved in divorce cases with some of the largest marital estates in Indiana. He represents many professionals (medical, legal, accounting, financial), business owners and executives, community leaders, high-profile individuals in entertainment, sports and politics, and the spouses/partners of these individuals. Because of his experience and the personal nature of the practice, Jim has helped individuals and families find solutions to complex relationship and legal transitions. His practice includes counseling cohabitating partners in implementing plans for estate transitions, health care decision making, joint ownership and survivorship, as well as representing partners in the conclusion of relationships, custody and support of their children, and the division of property and assets. Jim approaches the representation of his clients with years of diverse experience and from a broad perspective.

Timothy M. Sledd
Mallor Grodner LLP, Bloomington

Timothy M. Sledd is an attorney in our family law division. Prior to joining Mallor Grodner, Tim sat as the Juvenile Law Judge (Referee) in Lawrence County where he presided over paternity, custody, child support, protective order, and CHINS cases. From that experience on the bench, he honed an ability to see the many sides of complex legal issues and how to formulate cases to be most effectively heard by the Court.

Tim spent 6 years as the Chief Deputy Prosecuting Attorney in Lawrence County Indiana in a courtroom almost every day, advocating, arguing, and litigating a wide variety of cases. In this role, it was very important to be able to balance the interests and needs of victims of crime with the full power of the law and its ability to punish offenders.

Tim is a registered mediator for both civil matters and family law matters. He has mediated close to 300 cases using patience, creativity, effective communication, and a 'stay in the fight' attitude to help parties come to an agreed resolution of their legal issues. He believes in helping clients craft the outcome of their cases, and mediation is a great tool for doing this and avoiding the risks of the courtroom.

Tim is able to help you with your family law, adoption, guardianship, wills, or criminal defense needs.

Tim is an aggressive competitor. He holds the esteemed rank of 2nd degree black belt in Brazilian Jiu Jitsu having trained in that martial art for over 20 years. He has owned two Jiu Jitsu gyms and traveled to many states and foreign countries to teach the art. Tim takes his determination to succeed in competition and applies it to his cases and clients.

Andrew Z. Soshnick
Faegre Drinker Biddle & Reath LLP, Indianapolis

Drew Soshnick concentrates his practice in counseling and representing individuals in a wide array of family law matters, with particular emphasis on the economic aspects of matrimonial law. This concentration includes, among other things, addressing sophisticated financial issues such as valuing and dividing complex marital assets (including corporations, partnerships, professional practices and proprietorships), assessing executive compensation and benefits, tax analysis and planning, tracing of assets, and drafting premarital agreements. Drew also represents clients in contested child custody and child support proceedings. Faegre Baker Daniels' family law group draws upon the firm's breadth of experience and resources in litigation, corporate, financial services, entrepreneurial services, taxation, estate planning, real estate and bankruptcy in providing comprehensive personal services.

Drew is past chair of both the Indiana State Bar Association Family & Juvenile Law Section and the Indianapolis Bar Association Family Law Section. Drew also serves as a member of the State of Indiana Family Law Independent Certification Organization.

Drew is a frequent speaker at national and state family law seminars, including the American Academy of Matrimonial Lawyers' annual meeting in Chicago and the American Bar Association annual meeting. Since 1999, Drew has presented the annual "Family Law Update" to Indiana jurists at the Judicial Conference of Indiana. Drew also writes extensively on family law in both national and state treatises and publications.

Certifications
•Certified Family Law Specialist, as certified by the Family Law Certification Board
•State of Indiana Registered Family Law Mediator

Brian K. Zoeller
Cohen & Malad, LLP, Indianapolis

Brian joined Cohen and Malad in 1999, and is a Partner. Brian concentrates his practice in the area of Family Law. He believes constant communication with his clients and his availability to quickly and effectively deal with any family law emergencies to be the cornerstone of his practice. He is in court on a daily basis, representing the best interest of his clients, and believes that thorough preparation is the key to success in the courtroom. In 2004, Indianapolis Monthly Magazine named Brian a Super Lawyer among Family Law Attorneys, one of 26 attorneys in the state of Indiana. Brian also received the distinction of Super Lawyer in 2003. Brian represents clients at the state and appellate court levels and focuses his litigation practice in the following areas of law: Contested and Noncontested Marriage Dissolution Contested Custody Disputes and Modifications Child Support Matters Adoptions Contested and Noncontested Paternity Actions Complex Family Law Jurisdiction Actions Educational Background JD, Indiana University School of Law, Indianapolis, 1996 BS, Political Science, University of Indianapolis, 1992 BA, History, University of Indianapolis, 1992 Honors: Cum laude with distinction Bar Admissions Indiana, 1996 U.S. District Court, Northern District of Indiana, 1996 U.S. District Court, Southern District of Indiana, 1996 Certifications/Specialties Certified Family Law Specialist, Family Law Certification Board Professional Associations & Memberships Indiana State Bar Association, Family Law section Indianapolis Bar Association Johnson County Bar Association, Secretary - Treasurer Published Works "Taking Abusers To Court, " Trial Magazine, June 1995. "Interspousal Relationship Violence Suits, " Crime Victim's Litigation Quarterly, November 1995. Honors & Awards Brian was named an Indiana Super Lawyer in 2004, 2005, 2006, 2007, 2008 & 2009. Certified Family Law Specialist Past Employment Sargent & Meier, Law Clerk, 1992 - 1996 Sargent & Meier, Attorney, 1996 - 1998

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Dealing With a Difficult Opposing Counsel: What You Should do and What You Shouldn't do..... Mark A. Glazier
Hon. G. Michael Witte

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8. *Ferrill v. Ferrill*, 143 N.E.3d 350 (Ind. Ct. App. 2020) 18

9. *In re Paternity of C.B. and S.B.*, 144 N.E.3d 759 (Ind. Ct. App. 2020) 20

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Mark A. Glazier
Cross | Glazier | Burroughs, PC
Carmel, Indiana

Hon. G. Michael Witte
Indiana Supreme Court
Disciplinary Commission
Indianapolis, Indiana

Section One

Dealing With a Difficult Opposing Counsel:
What You Should do and What You
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2020 INDIANA FAMILY LAW UPDATE

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2020 INDIANA FAMILY LAW UPDATE

I. INTRODUCTION

Summarized below are the published family law opinions from the Indiana Court of Appeals and Indiana Supreme Court from August 2019 to August 2020. Even in the midst of the unprecedented COVID-19 pandemic, Indiana appellate courts continued a robust disposition of appeals. As has been the case for many years, "Memorandum Decisions" constituted the majority of family law decisions. "For Publication" opinions addressed many important substantive areas, as discussed in the annotations.

II. CASE LAW

A. PROPERTY DIVISION

1. *Smith v. Smith*, 136 N.E.3d 275 (Ind. Ct. App. 2019). In October 2009, husband and wife married. Husband was a PGA golfer and both parties brought significant assets into the marriage. The parties resided in husband's residence which he owned prior to the marriage. On the date the parties were married, husband owned a residence, PGA pension accounts, and approximately $1,700,000.00 in additional assets. Wife had assets prior to the marriage in the form of stocks, retirement accounts, insurance policies, and luxury vehicles that were sold during the marriage for approximately $900,000.00. During the marriage, the parties' spent nearly $500,000.00 to renovate and remodel the marital residence. The parties also had no income during certain periods of the marriage. The parties owned two business: SmartView Imaging and One Five Group. The parties invested approximately $450,000.00 in SmartView Imaging. The business was not successful. One Five Group was formed to manage husband's golf career during the course of the marriage. On the date of filing, the parties had significant credit card debt, a home equity line of credit, and loans totaling over $350,000.00. The only remaining assets with significant value were the marital residence and husband's PGA retirement accounts. Husband also had an unvested PGA pension. On September 8, 2014, husband filed a petition to dissolve the parties' marriage. On December 5, 2014, wife filed a counterpetition to dissolve the parties' marriage. During the divorce proceedings, wife filed seven motions to continue the final hearing. Six of those motions were filed after August 2016. Husband objected to several of the continuance requests, including the last two motions. The trial court scheduled the final hearing for February 15, 2018. Two weeks prior to the final hearing, wife's attorney filed a motion to withdraw his appearance, which the trial court granted. Wife attempted to find a new attorney but was unsuccessful. She filed her seventh motion to continue the final hearing in order have more time to find a new attorney. Husband objected to the motion, and the trial court denied the motion on February 9, 2018. Wife appeared without counsel at the final hearing. On August 23, 2018, the trial court entered its decree of dissolution of marriage. Among its findings, the trial court found the net value of the marital estate to be $512,711.27 and awarded 74% of the marital estate to husband. In addition, the trial court found that the parties had previously divided their household goods and jewelry and were entitled to the personal property in each party's possession. Wife appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded. As to wife's contention that the trial court abused its discretion when it denied her motion to continue the final hearing, the Court of Appeals observed

that wife filed seven motions to continue the final hearing and that husband also filed two motions to continue the final hearing. From August 2016 to the final hearing in February 2018, the final hearing was continued five times at wife's request. When wife filed her February 7, 2018, continuance motion, the case had been pending almost 3 ½ years. Wife engaged in dilatory conduct during the proceedings, including failing to comply with the trial court's discovery order. Although another judge might have made a different decision under the circumstances, the Court of Appeals could not conclude that the trial court abused its discretion when it denied wife's continuance motion. As to the division of the parties' marital estate, the Court of Appeals agreed with wife's argument that the trial court failed to include a Ford Raptor pick-up in its division of the marital estate and remanded to the trial court to assign a value to this pick-up and distribute the value between the parties accordingly. Wife next contended that the trial court failed to distribute $505,742.07, which was reflected as an asset on a trial exhibit. Specifically, the trial court admitted exhibits prepared by the parties' accountant that established that husband's assets totaled approximately $1,780,000.00 on the date of the parties' marriage, excluding the marital residence and husband's PGA retirement accounts. According to the accounting, husband spent approximately $1,275,000.00 during the marriage. Wife argued that the remaining funds should have been included in the marital estate and divided between the parties. However, wife presented no evidence that these funds existed on the date of final separation. The Court of Appeals concluded the wife's claim that the trial court failed to include and distribute $505,742.07 was not supported by substantial evidence and that the evidence supported the conclusion that the funds were spent by the parties during their marriage. Finally, wife contended that the trial court erred when it awarded approximately 75% of the marital estate to husband. The trial court considered that husband brought over $1,700,000.00 into the marriage and the trial court erred in concluding that wife, in bringing nearly $900,000.00 into the marriage, "brought some money into the marriage, she did not demonstrate to the trial court the amount of the same." Despite this error in the finding, the Court of Appeals found that the trial court properly considered that the assets brought into the marriage were substantially less than husband's assets, as they totaled approximately 25% of the parties' combined assets and that nearly $900,000.00 of husband's net assets were insurance and trust proceeds that were obtained due to the death of his first wife. Neither party presented evidence that they earned income during the marriage and the parties spent significant assets during the marriage. After the parties separated, wife failed to pay the loan on one of the parties' vehicles and, as a result, husband was sued. She also sold SmartView Imaging equipment for $25,000.00, which resulted in husband being sued on an equipment loan and a judgment entered against him in the amount of $35,830.30. In addition, when the parties separated, wife disposed of husband's personal property worth approximately $29,000.00 without his knowledge or consent. Finally, the trial court assigned all marital debts to husband. For all of these reasons, the Court of Appeals agreed with the trial court that husband rebutted the presumption that an equal division of the marital estate was just and reasonable and wife had not met her burden of persuading the Court of Appeals that the trial court abused its discretion by awarding her only 25% of the marital estate. Finally, wife argued that the trial court abused its discretion when it assigned any net carry over losses from SmartView Imaging to husband to offset future tax liabilities. Wife argued that her financial contributions to the business greatly exceeded husband's contributions, in that she

should have been awarded any net carry over losses. Pursuant to Ind. Code § 31-15-7-7, the trial court, in determining a just and reasonable division of a marital estate shall consider the tax consequences of the property disposition with respect to the present and future economic circumstances of each party. However, the trial court is required to consider only the direct, inherent, and necessarily incurred tax consequences of the property disposition. *See Knotts v. Knotts*, 693 N.E.2d 962, 968 (Ind. Ct. App. 1998). The trial court's finding assigning net carry over losses to husband did not specifically reference SmartView Imaging. There was also no evidence presented establishing any director inherent tax consequences concerning the disposition of the remaining assets and liabilities of that company. The only evidence concerning SmartView Imaging was the amount of the initial investment lost and husband's exclusive personal liability for the unpaid cost of SmartView Imaging's equipment. There was no basis on the evidence to believe that the trial court abused its discretion regarding SmartView Imaging net carry over losses. The only evidence concerning "capital losses" on either party's tax returns were losses husband suffered with regard to another entity and golf losses. Husband requested that the trial court assign those losses to him, and it was reasonable for the Court of Appeals to conclude that those losses are also the losses referenced by the trial court in its order. The trial court did not abuse its discretion when it assigned those losses to husband.

2. *Hernandez-Velazquez v. Hernandez*, 136 N.E.3d 1130 (Ind. Ct. App. 2019). In August 2001, husband and wife married. Wife was a United States citizen, while husband was a citizen of Mexico who resided in the United States without proper documentation. Husband worked from approximately 2001 to 2005 at Lithonia Lighting and then from 2005 to 2008 at Harrison Steel. Wife worked as a translator on a contract basis and also babysat occasionally, but was primarily focused on raising her and husband's four children. Husband's brother, Modesto, was close to the family throughout the marriage. Modesto also was a citizen of Mexico and resided in the United States without proper documentation. Modesto was in a relationship with Elizabeth, who also was a citizen of Mexico, for more than thirty years without marrying. In September 2005, husband and Modesto decided to buy and renovate a foreclosed house at 317 Harrison Street, Crawfordsville, Indiana. The brothers bought the house for $11,000.00 cash, with Modesto putting $9,600.00 toward the purchase price and husband providing the balance and doing the renovations. The house was titled and insured in husband's name. After renovations, 317 Harrison Street was rented for $600.00 per month and wife was responsible for collecting rent and paying property taxes. In June 2006, husband and Modesto purchased another house at 316 West Van Buren Street, Veedersburg, Indiana. The brothers bought the house for $18,000.00 cash. The house was titled and insured in husband's name. This house was the marital residence throughout the remainder of the parties' marriage. After husband was fired from Harrison Steel in 2008, he and wife started a business (Sorani Construction and Remodeling) that would buy, renovate, and rent or sell foreclosed homes. In January 2010, husband decided to buy and renovate a foreclosed duplex at 115 North Walnut Street, Crawfordsville, Indiana. The duplex was purchased for $10,500.00 cash and was titled and insured in husband's name. Each unit was rented for $400.00 per month, and wife was responsible for collecting rent, and Sorani Construction paid the property taxes. In March 2010, husband decided to buy and renovate a foreclosed house at 821 North Sherman Street, Veedersburg, Indiana. The purchase price of this house was $9,000.00 and was paid for by a

cashier's check in husband's name. The house was titled and insured in husband's name. After renovations were complete, 821 North Sherman Street was rented for $425.00 per month. Wife was responsible for collecting rent and husband paid the property taxes. In May 2010, husband and Modesto decided to buy a house located at 415 West North Street, Crawfordsville, Indiana. The brothers bought the house for $6,000.00 cash, with Modesto putting $5,348.24 toward the purchase price and husband providing the balance and doing the renovations. The house was titled in Modesto's name and Sorani Construction paid the property taxes. In November 2012, Modesto married wife's aunt, Penny, as part of an attempt to acquire lawful permanent residence status. In May 2013, husband decided to buy and renovate a foreclosed house at 404 South Gray Street, Crawfordsville, Indiana. The purchase price for the house was $8,500.00 and was paid for by a cashier's check in husband's name. The house was titled and insured in husband's name. 404 South Gray Street was rented for $650.00 per month. Wife was responsible for collecting rent and Sorani Construction paid the property taxes. In December 2013, the brothers became worried that if Modesto divorced Penny she could get the house located at 415 West North Street, so Modesto transferred ownership of that real estate to husband. Husband did not pay Modesto any money in exchange for the transfer. In February 2014, husband sold 415 West North Street to third parties under a rent-to-own arrangement. The monthly payments were $680.00 per month. In April 2014, husband decided to buy and renovate a house at 515 Chamber Street, Veedersburg, Indiana. Husband purchased the house for $19,500.00 cash, and it was titled and insured in his name. In September 2014, while Modesto was still married, his partner, Elizabeth, arrived in the United States without proper documentation. Husband and wife traveled to Texas to pick up Elizabeth and, after they returned to Indiana, their marriage began to deteriorate. Husband told wife that she needed to show Elizabeth how to collect rent and issue receipts because Elizabeth would now do that job instead of wife. Husband also had wife type a document saying that they owed Modesto $51,500.00. Both husband and wife signed the document. Then, on October 13, 2014, husband conveyed all properties titled in his name to Elizabeth for $10.00. Less than a month later, wife requested a protective order, alleging that husband had committed two acts of domestic violence against her. On November 18, 2014, wife filed a petition for dissolution of marriage. In May 2016, the trial court entered a decree of dissolution of marriage. Both parties filed motions to correct errors, and the trial court entered an agreed order vacating the property division portion of the decree. A special judge was appointed to resolve the property division issues. In July 2017, wife filed an amended petition for dissolution of marriage alleging that husband made the conveyances to Elizabeth with the intent to hinder, delay, and defraud creditors, including wife. Wife did not cite the Uniform Fraudulent Transfer Act ("UFTA"), but she used language found in the statute. *See* Ind. Code § 32-18-2-14. Wife's amended petition for dissolution of marriage also brought Elizabeth into the proceedings. In 2018, the trial court held a three-day final hearing. In December 2018, the trial court issued its decree, finding that the UFTA applied to husband's conveyance of the properties to Elizabeth and that wife was a creditor under the UFTA. After putting the disputed properties into the marital estate, the trial court divided the marital estate equally. Wife was assigned the properties located at 317 Harrison Street, 515 West North Street, 115 North Walnut Street, and 316 West Van Buren Street. The trial court also found that husband and wife were both responsible for $51,500.00 that they owed to Modesto. The trial court included the $51,500.00

as marital debt and divided it equally between husband and wife. After the trial court divided the marital estate, it ordered husband to pay wife a lump-sum equalization payment of $2,382.30 within 90 days. Husband, Modesto, and Elizabeth appealed and the Indiana Court of Appeals affirmed. The trial court found that there was evidence that husband's conveyances to Elizabeth in October 2014 were fraudulent under the UFTA. The UFTA defines "creditor" as "a person that has a claim." Ind. Code § 32-18-2-2. The trial court's findings supported the conclusion that the properties were part of the marital estate and that wife was a creditor under the UFTA. As to fraudulent intent, it may be inferred from various factors or "badges of fraud" present in a given transaction. *See Greenfield v. Arden Seven Penn Partners LP*, 757 N.E.2d 699, 703 (Ind. Ct. App. 2001). In this case there were at least 5 "badges of fraud" present. All of the facts together constituted a pattern of fraudulent intent

3. *Baglan v. Baglan*, 137 N.E.3d 271 (Ind. Ct. App. 2019). On September 9, 1989, the parties married. During the course of the marriage, both parties were employed by Boeckman's Furniture, Inc., a business located in Jasper, Indiana, which had been owned and operated by wife's parents since 1972. On January 1, 2015, wife's mother gifted wife 26 shares in Boeckman's Furniture. For gift tax purposes, the shares were valued at $120,640.00 at the date of transfer. On August 2, 2017, husband filed a petition for dissolution of marriage. On September 10, 2018, and December 21, 2018, the trial court held a final hearing. Wife argued that the Boeckman's Furniture shares should not be included in the marital estate. Wife did not have the shares valued for trial purposes, but proposed a value of the shares based upon the gift tax value of $120,640.00. Husband argued that the shares had been acquired during the marriage and that their value should be included in the marital estate, although he agreed that wife should retain ownership of the shares. Husband presented expert testimony valuing the shares as of the date of filing at $171,054.00. Evidence adduced at trial was that one of the properties owned through Boeckman Rentals was a commercial warehouse which had been purchased in 2015 for $110,000.00 and was rented by Boeckman's Furniture. Husband presented an appraisal valuing the warehouse at $262,500.00. Wife argued that the Boeckman Rentals properties should not be part of the marital estate because they were purchased with money from their children's bank accounts. However, wife's expert testified that the warehouse was worth $121,000.00. As to the parties' personal property, husband argued that his gun collection and wife's jewelry had an approximate equal value and that those items offset one another. The parties disputed the value of German American Bank stock, with wife valuing it at $49,232.00 and husband valuing it $64,765.64. The parties further disputed the values of other personal property. On April 4, 2019, the trial court entered its decree in which it found that the Boeckman's Furniture shares were valued at $120,640.00 and "that the stock remain the property of wife and not be included in the value of the marital estate." The trial court further found that the warehouse owned by Boeckman Rentals was worth $135,000.00. The trial court did not enter any findings or conclusions regarding the German American Bank stock or the net value of the marital estate, but ordered husband to make an equalization payment to wife of $27,747.50. Husband appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded. The trial court erred when it failed to include in the marital estate the 26 shares in Boeckman's Furniture gifted to wife during the marriage, the vehicles owned by the parties, and the German American Bank stock. Given the trial court's resolution of that issue, it was unnecessary to address

husband's argument that the trial court abused its discretion when it awarded wife an unequal share of the marital estate. Husband also contended that the trial court erred when it valued the 26 shares in Boeckman's Furniture and the properties owned by the parties through Boeckman Rentals. As to the shares in Boeckman's Furniture, the trial court did not enter a finding regarding what date it used for valuing the shares and found only that "credible evidence" supported its chosen value. There was nothing in the record or the decree from which the Court of Appeals could infer that the trial court chose a valuation date between the defined parameters. The trial court abused its discretion when it apparently valued the Boeckman's Furniture shares as of January 1, 2015. The Court of Appeals remanded and instructed the trial court to select a valuation date for the shares between the date of filing and the date of final hearing. As to the Boeckman Rentals warehouse, the trial court's valuation was within the range of value suggested by the parties' expert witnesses and the Court of Appeals affirmed.

4. *Henderson v. Henderson*, 139 N.E.3d 227 (Ind. Ct. App. 2019). The parties had two children during the marriage, and wife was pregnant at the date of divorce. In March 2010, husband entered in a contract with sellers to purchase 37.93 acres in Tipton, Indiana for $189,650.00. Husband paid sellers $1,000.00 as a down payment. Wife was not a party to the contract. The contract required husband to make annual payments of principal and interest in the amount of $15,137.76 for a term of 20 years, but denied him the "privilege of pre-payment." Husband also was required to pay taxes on the real estate and to keep the real estate insured. The contract required husband to use the real estate, and on the date the contract was executed husband took "full and complete possession of the real estate" and obtained the right to plant crops and perform all other functions in connection with farming the real estate. The contract prohibited the real estate from being rented, leased, or occupied by any person other than husband. The contract prohibited both sellers and husband from selling or assigning their interests in the contract or the real estate without the other party's written consent, with consent not to be unreasonably withheld. The contract also prohibited sellers from obtaining a loan secured by a mortgage on the real estate. The contract contained a forfeiture clause, which provided that if husband failed to perform as agreed or make any payments as they became due, the contract would be forfeited and terminated and all payments previously made retained by sellers as rent for use of the real estate. Finally, the contract provided that upon husband's full performance and the payment of all sums due under the contract, sellers would convey to husband the real estate by warranty deed. In February 2017, husband filed a petition for legal separation that was subsequently converted to a petition for dissolution of marriage. The parties agreed to bifurcate the divorce proceedings so that property issues would be decided separately from child-related issues. Mother requested findings of fact and conclusions of law pursuant to Ind. Trial Rule 52(A). In December 2018, a final hearing was held on property issues after which the trial court took those matters under advisement. In May 2019, the trial court issued an order dissolving the parties' marriage and dividing the marital estate. The order provided in relevant part that the value of the real estate was $303,600.00 and the amount owed on the real estate was $139,000.00. The trial court included the value of the real estate and the amount due on the contract in the marital estate, and calculated the marital estate to be worth $903,261.03. The trial court found that husband had rebutted the presumption that an equal division of the marital estate would be just and reasonable and awarded him 55% of the marital estate and wife

45% of the marital estate. The order awarded husband the contractual interest in the real estate. To achieve an equitable division of the marital estate, husband was ordered to pay wife $257,504.47. Husband appealed and the Indiana Court of Appeals affirmed. The trial court concluded that husband's contractual interest in the real estate was a marital asset. Specifically, husband argued that the real estate was not a marital asset because it was not owned by the parties. The Court of Appeals noted *In re Marriage of Dall*, 681 N.E.2d 718 (Ind. Ct. App. 1997). In a footnote, *Dall* stated that the rule that an equitable interest in real property titled to a third party should not be included in a marital estate would not apply when husband and/or wife are a contract purchaser to the real estate. *Id.* at 722 n.5. Subsequent cases that cited *Dall* did not acknowledge the limitations in that footnote. Unlike *Dall* and the subsequent cases, husband and sellers had executed a written contract where husband had a vested interest in the contract, and husband's equitable interest in the real estate was not indeterminate but was derived by the contract. Husband would obtain title to the real estate upon full performance of the contract. As such, the general rule announced in *Dall*, that an equitable interest in real property titled to a third party should not be included in a marital estate, did not apply. The Court of Appeals also referred to *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973) as supporting its determination. The trial court did not err by including husband's contractual interest in the real estate in the marital estate. Husband also contended that the trial court erred in valuing the real estate. Husband submitted an appraisal valuing the real estate at $303,000.00, and wife provided evidence that the real estate was worth $379,000.00. The trial court weighed the evidence and determined that the value of the real estate was $303,000.00. Husband argued that the trial court erred in relying on the appraisal because it was based on a fee simple interest that could be sold in an unrestricted sale. Husband submitted the appraisal that he was taking issue with and called the appraiser as a witness but did not question her as to how the contract provisions affected the value of his interest in the real estate. Other than the appraisal and the wife's valuation evidence, husband did not direct the Court of Appeals to any evidence in the record assigning a value to the real estate. The trial court's valuation of the real estate was supported by the evidence and the trial court did not abuse its discretion. Finally, husband asserted that the trial court erred in excluding testimony from one of the sellers in corresponding exhibits. Any error in a ruling to admit or exclude evidence does not constitute reversible error unless it affects a substantial right of the party. Ind. Evid. R. 103. The trial court did not abuse its discretion in excluding exhibits and testimony based on the exhibits.

5. *Tyagi v. Tyagi*, 142 N.E.3d 960 (Ind. Ct. App. 2020). On September 21, 2007, husband and wife married. On October 2016, wife filed to dissolve the parties' marriage. In September 2017, husband's parents moved to intervene in the divorce case on the grounds that husband's parents, individually and separately, owned Hoosier Broad Band, LLC ("HBB") and a residence in Zionsville, Indiana. The trial court granted the motion to intervene. Husband and wife jointly moved to bifurcate the divorce case and requested that the trial court determine whether HBB and the Zionsville residence were marital assets. The trial court granted the bifurcation and in January 2019, held a separate hearing. Testimony at the hearing revealed that HBB was established in 2004 by husband and two non-parties. In 2005, after suffering financial difficulties and to avoid conflicts, husband transferred his 75% ownership interest in HBB to his mother. Around the time of the parties' marriage, wife began helping husband with HBB and

eventually became HBB's Chief Operating Officer. After HBB obtained a line of credit that wife helped HBB obtain, wife told husband to ask his mother to have HBB's ownership transferred to reflect him as the owner. Husband complied, but husband's mother refused husband's request. Husband continued to take a lead role in the financial affairs of HBB. In 2009, husband's father purchased the Zionsville residence on the advice of his son who was looking for a business location and residence. Husband's father contributed $60,000.00 and borrowed another $60,000.00 from husband. In 2012, the Zionsville residence's mortgage was refinanced and husband's father contributed $11,000.00 and borrowed $11,000.00 from husband to put toward the refinance. Neither contribution by husband was reduced to writing. The trial court found that HBB and the Zionsville residence were not marital assets, but were property of husband's parents. Wife appealed and the Indiana Court of Appeals affirmed. Wife contended that husband owned HBB and that HBB in turn owned the Zionsville residence. Wife failed to show that husband owned HBB and the Zionsville residence, and the trial court did not abuse its discretion in finding that HBB and the Zionsville residence were owned by husband's parents and were not marital assets.

6. *Anselm v. Anselm*, 146 N.E.3d 1042 (Ind. Ct. App. 2020). On May 31, 2014, the parties married. They had two children. During the marriage, father's work schedule required him to work three overnights per week one week and four overnights per week the next week on rotating nights. Mother worked as an office manager for her parents' company. On March 20, 2018, mother filed a petition for separation and temporary custody of the children and child support. At a hearing on mother's petitions, the parties signed and submitted a Child Support Obligation Worksheet, on which the parties agreed that father earned $900.00 per week and mother earned $543.00 per week. On August 17, 2018, mother converted her legal separation action into a divorce action. The trial court appointed a Guardian Ad Litem ("GAL"). On December 25, the GAL submitted her report to the trial court. In her report, the GAL recommended that mother have primary physical custody based on the fact that mother "is the primary caregiver for doctors appointments and routine daily needs" of the children. At the conclusion of the final hearing, the trial court dissolved the parties' marriage. The trial court found that the parties should share joint legal custody of the children, with mother awarded physical custody. The trial court ordered father to pay mother child support in the amount of $173.00 per week. As to real estate that the parties owned in Remington, Indiana, that was owned by father prior to the marriage, the trial court found that there was $33,000.00 of equity in that real estate and the mother should receive 50% of the equity. Father appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded with instructions. As to physical custody, the Court of Appeals noted that trial courts must consider all relevant factors under Ind. Code § 31-17-2-8. Trial courts are not required to enter a finding as to each statutory factor it enters in making a custody determination. The plain language of the statute only requires that trial courts to "consider" the factors, and not to make a finding regarding each factor. The evidence supports the findings and the trial court did not abuse its discretion in awarding mother primary physical custody of the children. As to the trial court's reliance on an unsigned child support worksheet and the fact that father did not object to the worksheet or otherwise dispute the content, he could not complain that the trial court improperly relied on that exhibit. The trial court did not err when it relied on mother's unsigned Child Support Obligation

Worksheet. Father also did not demonstrate that the trial court failed to properly credit him for the children's health insurance premiums. As to uninsured medical expenses, the trial court's order required father to pay for uninsured medical expenses twice – a prepayment when he paid his child support obligation (the 6% Rule amount) and the actual, full payment when the uninsured healthcare expenses were incurred. Such double payments were precisely the scenario the 6% Rule was designed to prevent. Here, the trial court neither awarded father a credit for the 6% of the healthcare expenses that he was already paying or explained why such a credit would be inappropriate on the facts there. As to the equity in the home, the Court of Appeals reversed and remanded with instructions for the trial court to divide the correct amount of the equity ($10,367.97) between the parties equally.

7. *Hartman v. BigInch Fabricators & Construction Holding Co.*, 148 N.E.3d 1017 (Ind. Ct. App. 2020). This case distinguished divorce case business valuation discounts from other settings. BigInch was a closely-held corporation in the business of fabricating and installing natural gas and pipeline stations and related apparatus. Hartman was one of the founders and a former president of BigInch. In 2006, the shareholders to the corporate predecessor of BigInch, each owning a minority position, entered into a Shareholder Agreement. The Shareholder Agreement required the company to purchase the shares of any shareholder who was involuntarily terminated as an officer or director of the company based on an appraised market value by a third-party valuation company. In 2018, Hartman was involuntarily terminated from his position as a director and officer of BigInch. BigInch retained a third-party valuation company to value Hartman's 17.77% interest in BigInch. The resulting business valuation discounted Hartman's interest by a combined 32% lack of control discount and marketability discount. Upon challenge by Hartman, the trial court entered summary judgment affirming application of the discounts. On appeal, the Indiana Court of Appeals reversed, determining that lack of control and marketability discounts do not apply to compelled return of ownership interests to a controlling party where there is a ready-made market. The majority opinion distinguished divorce cases where lack of control and marketability discounts may be applied. *See Alexander v. Alexander*, 927 N.E.2d 926 (Ind. Ct. App. 2010). The majority's distinction arose from trial court's broad discretion when determining the value of marital property in divorce proceedings and the fact that there was no sale of an ownership interest in Alexander. The Court of Appeals viewed the trial court in BigInch as attempting to prevent a windfall to the majority as opposed to the Alexander trial court simply trying to value an interest that was not being sold. The Court of Appeals also interpreted the prior rejection of discounts in *Wenzel v. Hopper & Galliher, P.C.*, 779 N.E.2d 30 (Ind. Ct. App. 2002) as applicable to all sales occurring in a closed market, regardless of whether a "fair value" statutory standard or other valuation standard applied. As a result of this analysis, the Court of Appeals concluded that the value of Hartman's shares under the buyback provision in the Shareholder Agreement, which required the application of the "appraised market valuation," could not be discounted for lack of control and marketability. BigInch reinforces the distinction between divorce and other business litigation valuation principles and expands the rejection of discounts in a range of compulsory transactions, following trends in Indiana and other jurisdictions.

8. *Story v. Story*, 148 N.E.3d 1155 (Ind. Ct. App. 2020). In October 1992, husband and wife married. In May 2017, husband "left the U.S. Army Reserves" after multiple deployments and more than 30 years of service. The next month, husband filed a petition for dissolution of marriage. In February 2018, husband and wife entered into a mediated settlement agreement that provided in relevant part that wife would receive 50% of husband's approved vested monthly benefits from the military reserve annuity retirement and that wife would be treated as surviving spouse for the purpose of any pre-retirement survivors benefits and be entitled to receive her military reserve survivor pension. The settlement agreement also provided that wife should be treated as husband's irrevocable beneficiary for husband's military reserve annuity retirement and that husband would make the necessary election in a timely manner to effectuate survivor coverage for wife. Husband was a member of the U.S. Army Reserves until May 2017. Unlike active duty members of the U.S. military who generally receive their military retirement pay upon retirement, reservists who leave the military prior to reaching retirement age must wait to receive their military retired pay. Husband was 51 years of age and was not entitled to reach his military retired pay until he reached 57 years of age. Husband executed "DB Form 2656-1," which was entitled "Survivor Benefit Plan ("SVP") Election Statement for Former Spouse Coverage." The SVP was optional and provided survivor benefits to wife should husband predecease her. The premiums for the SVP were to be deducted from husband's military retired pay. Because the SVP started before husband would receive his military retired pay, premiums for survivor coverage during the pre-retirement period "accrue" and would be due when husband started receiving his military retirement pay. That coverage could cost as much as $100,000.00 during husband's life. Husband attempted to implement the Qualified Domestic Relations Order ("QDRO"). Wife's counsel later prepared an addendum to the mediated settlement agreement for the parties' signatures "and included the necessary information to meet the DFAS requirements" of calculating the division of husband's military retired pay. Despite his initial cooperation, husband refused to sign the addendum because the cost of the premiums for the SVP had not been accounted for in the settlement agreement. In December 2018, wife filed a request for the trial court's intervention to secure husband's cooperation in signing the addendum. On May 29, 2019, a hearing occurred. The trial court ordered that each party should pay one-half of the premium. On June 3, 2019, husband filed a motion to clarify the trial court's order. After a change of judge, the trial court ruled on husband's motion and clarified that wife was entitled to receive a portion of husband's post-retirement divided asset, or SVP, as well as the pre-retirement RC-SVP. Husband appealed and the Indiana Court of Appeals affirmed. Husband first contended that the dissolution court erred when it interpreted the parties' settlement agreement to require that he maintain survivor coverage for wife after having reached retirement age. The parties' mediated settlement agreement was ambiguous, but the trial court looked at extrinsic evidence to resolve an ambiguity under the agreement. After reviewing the record, the erroneous use of the term "survivor pension" rather than "survivor annuity" in the settlement agreement does not affect the analysis. Husband correctly testified that pre-retirement survivor coverage and post-retirement survivor coverage were "not severable" when an election for pre-retirement coverage was made. Reviewing the QDRO, the Court of Appeals determined that husband survivor coverage to wife was effective during husband's pre-retirement period, and that coverage continued until husband's death and provided survivor benefit coverage for

wife whether husband died before or after his retirement age. Husband also contended that the trial court erred in its allocation of the premiums. The Court of Appeals concluded that the trial court properly interpreted the settlement agreement and, with the consent of the parties, only modified the agreement to provide for how the survivor benefit coverage premiums would be paid.

9. *Bringle v. Bringle*, 2020 WL 3526021 (Ind. Ct. App. June 30, 2020). Prior to the parties' marriage, husband formed Center Line Precision Technology ("the Company"). The Company was organized for tax purposes as an S Corporation in which husband was sole shareholder. During the marriage, and prior to filing the petition for dissolution of marriage, the Company "sold" husband the real estate where the Company was located for $480,000.00. In 2017, the Company transferred the real estate to Bringle Properties, LLC, an entity owned by husband and his son from a previous marriage. The Company also paid various personal expenses for husband. Those transactions would later appear as a $659,707.00 receivable "due from shareholder" on the Company's balance sheet. On October 31, 2017, wife filed a petition to dissolve the parties' marriage. In October 2019, at the final hearing, husband acknowledged that he had "mingled personal and business expenses." Husband testified that during the marriage and while the divorce case was pending he paid personal bills "out of the company" and explained that it was advantageous to "run bills through the company" because those payments were treated as "dividends" rather than earned income subject to payroll taxes. Husband testified that the transfer of the business real estate and personal expenses paid by the Company were shown as "shareholder debt" on the Company's balance sheet "for tax purposes" to avoid having to pay income taxes "at that time." Husband also testified that the shareholder debt would "be paid whenever." In connection with the divorce case, husband and wife jointly retained Houlihan Valuation Advisors ("Houlihan") to appraise the fair market value of the company. Houlihan arrived at a $1,050,000.00 value of the Company using a combination of market-based and income-based valuation methods. In its valuation, Houlihan stated that the $659,707.00 note due from shareholder would be deemed a non-operational asset and should be included on the marital balance sheet since the receivable was included in the value of the Company. The trial court awarded the Company to husband, valued the Company at the Houlihan appraised value of $1,050,000.00, but did not recognize the $659,707.00 receivable due from shareholder or shareholder debt as a liability of the marital estate. The trial court ordered husband to pay wife a reconciliation payment of $361,998.56, gave husband 60% of the marital estate and wife 40% of the marital estate, and ordered each party to pay his and her own attorneys' fees. Each party appealed and the Indiana Court of Appeals affirmed. As to their shareholder debt to the Company, the Court of Appeals rejected husband's contention that the trial court misunderstood the Houlihan valuation and that the trial court was confused or failed to consider husband's debt to the Company. As to the Houlihan footnote in the business valuation which indicated that the liability should be included in the marital balance sheet, the Court of Appeals found that comment to reflect routine accounting practice but concluded that did not end the trial court's responsibility as to the division of marital property. The Court of Appeals stated that a division of property does not require the mechanical, robotic application of accounting principles. In its review, the Court of Appeals recognized the limiting conditions on the Houlihan valuation and rejected husband's explanation

and opinion of the Company's value. However, husband's valuation was significant because his valuation would eliminate the shareholder debt as a company asset. As to husband's contention that the trial court overstated the value of the marital estate when it included $659,707.00 receivable due from shareholder as an asset of the company but not showing the corresponding debt, the Court of Appeals focused on the Company being an S Corporation, which husband was the sole shareholder. The Court of Appeals determined that the "due from shareholder" item was not a current asset and was mischaracterized on the husband's balance sheet. While it might have been recorded as a "other asset," the Court of Appeals noted that the receivable was an obligation that husband owed to only owned company and, hence, to himself. Husband could not be both a debtor and a creditor with respect to the same debt. In summary, husband created most of the shareholder debt merely by transferring the real estate from one closely-held, related company to another. Because husband was both the debtor and creditor, the liability was inherently unenforceable. The Court of Appeals then added that the "shareholder debt" was a contingent liability. The Court of Appeals recognized that there was little relevant Indiana case law regarding the disposition of a contingent liability in divorce proceedings. The Court of Appeals defined a "contingent liability" as a "liability that will occur only if a specific event happens;" it is a "liability that depends on the occurrence of a future and uncertain event." The record revealed no assurance or certainty that husband would pay the shareholder debt. As such, that debt was a potential or contingent liability that may or may not become due. The Court of Appeals then looked to financial accounting standards and referenced to a contingent liability as a "loss contingency" and indicated that a trial court must determine that it is probable or more likely than not that a party will pay a debt. In this case, the collectability of the receivable "due from shareholder" was questionable. A party who retains control over when or whether a condition will be fulfilled has an implied obligation to make a reasonable and good faith effort to satisfy that condition. *See Indiana State Highway Comm' v. Curtis*, 704 N.E.2d 1015, 1019 (Ind. 1998). Husband's testimony and his valuation of the company revealed an ambivalence toward when, if ever, the shareholder debt would be repaid. The Court of the Appeals also concluded that the evidence showed that the "due from shareholder" was a contingent liability in which the parties did not have a vested present interest. The mere possibility that husband would pay the "debt" at some time in the future, in his discretion and at his convenience, rendered the "due from shareholder" entry remote and speculative with respect to the division of marital property. As such, the trial court acted within its discretion when it determined that the "due from shareholder" was an uncertain obligation rather than a current liability to be included on the marital balance sheet and divided. Husband controlled both sides of the transaction and, thus, owned both the asset and the contingent liability just as he did before the "sale." It was husband's burden to establish that the receivable "due from shareholder" was a present, unconditional, and absolute liability of the marriage. As such, husband appealed from a negative judgment. To prevail on appeal, husband needed to demonstrate that the trial court erred as a matter of law when it concluded, in effect, that personal expenses paid by the company and the husband's "sale" of the business real estate from one closely-held, related entity to another, while characterized as shareholder debt for tax purposes, did not create a current marital liability that should be attributed to the marital estate. The Court of Appeals declined to substitute its judgment for that of the trial court. The ultimate question was whether it would be just and

reasonable to include husband's purported shareholder debt in the marital estate and the trial court acted within its discretion and was not clearly erroneous in declining to include the debt in the marital estate. The Court of Appeals also rejected wife's contention that she should have received 50% of the marital estate and that husband should contribute to payment attorneys' fees.

B. PROCEDURAL ISSUES

1. *B.K. v. Indiana Department of Child Services*, 136 N.E.3d 284 (Ind. Ct. App. 2019). Kindred filed federal and state law claims against the Indiana Department of Child Services ("DCS"), DCS employees, DCS service providers, and other individuals who were alleged to have reported information to DCS. Kindred filed those claims in three different complaints in three separate Owen County, Indiana cases. These complaints involved Kindred's challenge to DCS's investigation into his care of his son, B.K., and its filing of petitions alleging B.K. to be a CHINS. The appeal involved Kindred's third complaint. On March 22, 2018, Kindred filed his first complaint. On May 21, 2018, Kindred filed his second complaint. On October 29, 2018, Kindred filed his third complaint. Several procedural motions followed. In late-December 2017 and early-January 2018, motions were filed to dismiss the third complaint under Ind. Trial Rule 12(B)(8) because the same action was pending in another state court. Specifically, the argument was that the same action was pending under the first complaint filed by Kindred. Kindred then filed a motion to disqualify the state of Indiana's counsel and motions to strike or deny each of the motions to dismiss. The trial court denied Kindred's motion to disqualify the state's counsel and granted the three motions to dismiss, thereafter entering judgment as a final judgment for purposes of appeal. Kindred appealed and the Indiana Court of Appeals affirmed. Kindred argued that the trial court erred by granting the motions to dismiss under Ind. Trial Rule 12(B)(8). The Court of Appeals held that, for purposes of Ind. Trial Rule 12(B)(8), "another" court includes actions filed in the same court but pending before different trial judges. Furthermore, the Court of Appeals noted that the two actions at issue involved the same or substantially the same parties, subject matter, and remedies. Additionally, Kindred sought the same relief. Based on the facts and circumstances, the Court of Appeals concluded that the trial court did not err by granting the three motions to dismiss pursuant to Ind. Trial Rule 12(B)(8). The Court of Appeals also concluded that there was no abuse of discretion by the trial court's denial of Kindred's motion to consolidate the third action into the first action. Finally, The trial court did not abuse its discretion in denying Kindred's motion to disqualify the state's counsel.

2. *Smith v. Smith*, 136 N.E.3d 656 (Ind. Ct. App. 2019). In 1986, the parties married. On November 2, 2018, wife filed a petition for dissolution of marriage. On December 19, 2018, the trial court set the final hearing for March 5, 2019, at 9:00 a.m. On March 4, 2019, husband's attorney filed a motion to withdraw indicating a breakdown in the attorney-client relationship. Husband's attorney did not move to continue the final hearing. That same day, the trial court granted husband's attorney's motion to withdraw. On March 5, 2019, husband appeared *pro se* at the final hearing and wife appeared with her counsel. Husband moved to continue the final hearing and the trial court denied the motion. Husband appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted that if good cause is shown for

granting a continuance motion, denial of a continuance is deemed to be an abuse of discretion. *See F.M. v. N.B.*, 979 N.E.2d 1036, 1039 (Ind. Ct. App. 2012). The Court of Appeals assessed that the trial court impeded husband's ability to show good cause when it denied husband's motion to continue without hearing any argument. Shortly after denying husband's motion without argument, the trial court predetermined the outcome of the case by telling husband that it was going to "split" the marital assets "right down the middle." The Court of Appeals viewed the trial court's actions as a "myopic insistence upon expeditiousness." *See Ungar v. Sarafite*, 376 U.S. 575, 576 (1964). Husband demonstrated good cause as to why the motion to continue should have been granted. There was no evidence in the record that husband was attempting to prolong the case or engage in dilatory tactics. The final hearing was held a mere 4 months after the petition for dissolution of marriage was filed. Husband argued that he had surgery on February 19, 2019 – roughly 2 weeks before the final hearing. The trial court denied husband's motion to continue despite its knowledge that husband's counsel withdrew the prior day. While the unexpected and untimely withdraw of counsel does not necessarily entitle a party to a continuance, that consideration is relevant when looking at whether the trial court its discretion in denying a continuance motion. Husband was prejudiced by all of these circumstances and the denial of husband's motion to continue was an abuse of discretion which infringed on husband's due process rights.

3. *In the Matter of the Guardianship of Xitumul*, 137 N.E.3d 945 (Ind. Ct. App. 2019). Shirla resided in Guatemala until October 2017 when, at 14 years of age and with her mother's support, she began her journey to the United States. Shirla left Guatemala because she had a violent relationship with her father. When Shirla arrived in the United States, she initially lived in a shelter for immigrants in Chicago, Illinois. In October 2018, she came to live with Hernandez and his family Decatur County, Indiana. Hernandez had lived in Indiana since 2007 and worked in construction. He was a Guatemala citizen and an illegal immigrant to this country. Shirla's only other relatives in Guatemala were on her father's side of the family. Hernandez thought living in the United States was in Shirla's best interest because she could get an education, have better opportunities, and be protected. Hernandez supported Shirla emotionally and financially and wanted to be her guardian. At some point after Shirla came to live with Hernandez, Shirla's parents signed a document effectively renouncing parental authority. On January 2, 2019, Hernandez filed a petition seeking to be named guardian of Shirla, then 16 years old and unmarried with no dependents. The trial court held a hearing at which both Hernandez and Shirla testified. At the conclusion of the hearing, the trial court expressed concern over whether it had jurisdiction to entertain a petition by a non-citizen to be granted guardianship over another non-citizen. Following the hearing, the trial court denied the petition. Hernandez appealed and the Indiana Court of Appeals reversed. The Court of Appeals recognized that Congress created the Special Immigrant Juvenile Status "to protect abused, neglected, and abandoned immigrant youth through a process allowing them to be legal permanent residents" despite their unauthorized entry to or unlawful presence in the United States. *Matter of Guardianship of Luis*, 114 N.E.3d 855, 857 (Ind. Ct. App. 2018). State juvenile courts determine whether the evidence supports the required findings, but the final decision regarding Special or Immigrant Juvenile Status rests with the federal government. 8 U.S.C. § 1101(a)(27)(J)(iii). Because the care and custody of a child is determined in a guardianship

action in Indiana, the trial court qualified as a "juvenile court" able to make Special Immigrant Juvenile Status findings. Under the relevant guardianship statute and definitions, neither citizenship of the proposed guardian nor the citizenship of the minor impacts whether a petition for guardianship can be filed or granted. The trial court already found that Shirla had met 2 of the 3 requirements to apply for Special Immigrant Juvenile Status, though without the specificity required of a predicate order. Accordingly, the Court of Appeals reversed and remanded to the trial court with instructions to reconsider the request for guardianship in light of Indiana law and the request for Special Immigrant Juvenile findings and, if the guardianship were granted, to issue a predicate order with appropriate findings.

4. *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020). The United States District Court for the Southern District of Indiana ("trial court") issued an injunction requiring Indiana to treat children born into female-female marriages as having two female parents who under the injunction must be listed on the birth certificate. *Henderson v. Box*, 209 F. Supp. 3d 1059, 1079-80 (S.D. Ind. 2016). Because Indiana lists only two parents on a birth certificate, this effectively prevented the state from treating as a parent the man who provided the sperm, while it requires the identification as parent of one spouse who provided neither sperm nor egg. The trial court concluded that that approach was required by the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, which is understood in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), oblige governmental bodies to treat same-sex couples identically to opposite-sex couples. Because Indiana lists a husband as a biological parent (when child is born during a marriage) even if he did not provide sperm, the trial court concluded it must treat a wife as a parent even if she did not provide an egg. The trial court's understanding of *Obergefell* had been confirmed by *Pavan v. Smith*, 137 S. Ct. 2075 (2017), which held that same-sex and opposite-sex couples must have the same rights with respect to the identification of children's parentage on birth certificates. Plaintiffs contended that *Pavan* was equally applicable to them. The state argued that *Obergefell* and *Pavan* did not control. The appeal depended on the resolution of a dispute about the meaning of Indiana law. The trial court found forbidden discrimination by putting together three of Indiana's statutes: Ind. Code §§ 31-9-2-15 (defining "child born in wedlock"), 31-9-2-16 (defining "child born out of wedlock"), and 31-14-7-1 (regarding a man presumed to be a child's biological father). The trial court treated the presumption in Ind. Code § 31-14-7-1(1)(A) as the principal problem: A husband is presumed to be a child's biological father so that both spouses are listed as parents on the birth certificate and the child is deemed to be born in wedlock. The state argued that more weight should be given to the "birth worksheet" rather than the statute. The United States Court of Appeals for the Seventh Circuit recognized that there was a paucity of state decisions interpreting the three statutes at issue, but noted that those statutes were inactive long before *Obergefell* and *Pavan*. The Circuit Court agreed with the trial court that, after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock while denying an equivalent presumption to parents in same-sex marriages. Because Ind. Code § 31-14-7-1(1) does that, its operation was properly enjoined. The trial court's remedy, however, was inappropriate. Not all parts of the statutes were invalid. However, the Circuit Court, having expressed concerns, made clear that the trial court's order requiring Indiana to recognize the children of the plaintiffs as legitimate children born in wedlock and to identify both wives in

each union as parents was affirmed. The injunction and declaratory judgment were affirmed to the extent they provided that the presumption in Ind. Code § 31-14-7-1(1) violated the Constitution. The remainder of the judgment was vacated and the case remanded for proceedings consistent with the opinion.

5. *S.H. v. D.W.*, 139 N.E.3d 214 (Ind. 2020). In 2016, wife sought an order of protection against her husband during pending divorce proceedings. Wife alleged that three days earlier she returned to the marital residence in Bartholomew County, Indiana to collect some of her belongings. To her surprise, husband was home. Husband grabbed wife by the neck, forced her from her car, and slammed her face into the car door. Wife tried to escape, but husband grabbed her shoulders and threw her onto the concrete floor. Wife got to her feet and quickly entered the house. Husband followed wife and threw a table and printer at her. Fearing for her life, wife called the police. Once the police arrived, the situation deescalated. The day after wife filed her petition, husband sought his own order of protection against her. Soon after that, the trial court held a hearing on both petitions. Husband disputed the allegations of wife's petition but did not object to the entry of a two-year protective order against him. Husband voluntarily dismissed his petition in exchange for wife agreeing to a restraining order against her in their separate dissolution of marriage action. Under the parties' agreement, the trial court entered a two-year protective order against husband and a restraining order against wife. The parties introduced no exhibits or summary testimony supporting either the protective order or the restraining order. In 2018, a few days before the 2016 protective order was to expire, wife petitioned the trial court for another protective order against husband alleging that he had tried to contact her indirectly through relatives' social media accounts. After hearing, the trial court issued another two-year protective order through 2020. Husband appealed and the Indiana Court of Appeals affirmed. *See S.H. v. D.W.*, 114 N.E.3d 898 (Ind. Ct. App. 2018). In a 3-2 decision, the Indiana Supreme Court vacated the Court of Appeals' decision and reversed. The majority held that there was insufficient evidence that husband posed a present, credible threat to wife to justify the 2018 protective order. The Supreme Court recounted the provisions of the Indiana Civil Protection Order Act (Ind. Code § 34-26-5-1 *et seq.*) in detail. Entering one protective order does not, by itself, justify entering a second protective order or renewing or extending the first protective order. In this scenario, there were no episodes of physical violence with no follow up act, no threat that violence would recur, and no other reasonable grounds to believe that husband presently intended to harm wife or her family. Under these circumstances, there was no basis for the reissuance, renewal, or extension of the 2016 protective order. As to the 2018 protective order, wife did not show that husband was a present threat to her safety or that of her family. Justice Goff dissented in a separate opinion in which Justice Massa joined. The dissent viewed the requirement of new evidence of conduct by husband to justify extending a protective order as putting wife at risk of further harm. The dissent questioned whether it was necessary for trial courts to wait for an act of violence to be committed or another violation of an original order of protection. The "single episode of physical violence" perpetrated by husband against wife was extremely violent and the trial court was in the best position to weigh parties' evidence and to judge the credibility of witness. The dissent noted Indiana General Assembly expressly directed courts to construe the statute to promote the victim's safety and protection, and contended the majority opinion ran contrary to this intent.

6. *R.H. v. S.W.*, 142 N.E.3d 1010 (Ind. Ct. App. 2020). In July 2017, S.W. and R.H. began dating. In May 2018, the parties flew to Florida for a vacation. In September 2018, the relationship ended. On March 20, 2019, S.W. filed a petition for an order of protection against R.H. alleging that on multiple dates she was or had been a victim of domestic or family violence and of stalking, she and R.H. resided together in an intimate relationship, and R.H. attempted to cause physical harm to her, did cause physical harm to her, placed her in fear of physical harm, caused her to involuntarily engage in sexual activity by force, threat of force, or duress, and committed stalking against her. On March 21, 2019, the trial court issued an *ex parte* order of protection. On May 10, 2019, the trial court held a hearing at R.H.'s request at which S.W. appeared telephonically, R.H. appeared in person, and the trial court heard testimony from each party. Regarding the May 2017, allegation, S.W. testified that the parties were drinking, R.H. started yelling and cussing at her, and R.H. grabbed her wrist. Regarding the February 27, 2019 allegation, S.W. testified that R.H. was in front of her when she dropped her daughter off at school. During cross-examination, S.W. indicated her relationship with R.H. continued after the May 2018 incident and she moved into his house the next week. The trial court entered a permanent order of protection which would remain in effect through May 10, 2021. On June 10, 2019, R.H. filed a motion to correct error. On July 30, 2019, the trial court began a hearing at which R.H. presented argument and S.W. indicated that she did not have any new evidence to submit. On August 26, 2019, the trial court continued the hearing and on that same day entered a modified order of protection which expired on March 20, 2021, permitted R.H. to attend his children's sporting events, and indicated that S.W. had shown by a preponderance of the evidence that domestic or family violence, stalking, a course of conduct involving repeated or continuing contact with S.W. that was intended to prepare or condition S.W. for sexual activity, repeated acts of harassment had occurred sufficient to justify the order of protection. The trial court denied the motion to correct error in an order also issued that day. R.H. appealed and the Indiana Court of Appeals reversed. R.H. argued that insufficient evidence supported the trial court's finding that the May 20, 2018 incident amounted to an act of domestic or family violence. The Court of Appeals noted that the Indiana Supreme Court recently considered for the first time the meaning and application of Indiana Civil Protection Order Act in *S.H. v. D.W.*, 139 N.E.3d 214 (Ind. 2020). Noting the definitions under Ind. Code § 34-6-2-34.5 as to "domestic or family violence," Ind. Code § 35-45-10-1 as to "stalking," and Ind. Code § 35-45-10-2 as to "harassment," the Court of Appeals concluded that R.H. had presented a case of *prima facie* error that there was insufficient evidence to support the issuance of an order of protection.

7. *In re Name and Gender Change of R.E.*, 142 N.E.3d 1045 (Ind. Ct. App. 2020). R.E. was a transgender male, born female but identifying as a male. On February 4, 2019, R.E. filed, *pro se*, a petition for change of name and gender. On March 5, 2019, the trial court held a hearing on R.E.'s request to waive publication and seal the record. The trial court engaged R.E. in a long colloquy regarding the reasons for non-publication. The trial court denied the request to seal the record and the request for waiver of publication. In June 2019, after R.E. had satisfied the trial court's demand to publish notice of his petition, the trial court held a second hearing on his petition to change his name and gender marker. Following the June 2019, hearing and prior to a July 2019, hearing that had been scheduled to allow R.E. to attempt to obtain his medical records, R.E. filed a statement with the trial court in which he attached both

his physician statement that R.E. "has had the appropriate clinical treatment for gender transitions of a new gender, male" and the physician's affirmation to the Indiana Bureau of Motor Vehicles of R.E.'s gender change. R.E. asked the trial court to inform him if his submissions would not be admissible at the upcoming July 20, 2019, hearing. One week later, the trial court informed R.E. that "the documents submitted are not admissible" because they "fail to comply with Rule 702, [703], 704, 705, and 803" of the Indiana Rules of Evidence. The trial court then converted the July 2019 hearing on R.E.'s petition into a status hearing on R.E.'s request for a continuance. At the hearing, the trial court informed R.E. that his medical records went to the ultimate fact and that his treating physician was not permitted to express an opinion. The trial court then informed R.E. that it needed to know what information and procedures R.E.'s treating physician was "relying on to make that determination, of R.E.'s new gender identity in order for the court to accept his physician's opinion." The trial court then continued the hearing on R.E.'s petition to October 2019. Shortly after the July 2019, hearing, R.E. obtained counsel to assist him with his petition. On August 19, 2019, R.E.'s counsel moved to seal the trial court records of the proceedings based on the need to prevent harm to R.E. At the ensuing October 2019, hearing, R.E. once again testified that he sought to seal the trial court records in order to avoid the potential for harm that he might face as a transgender person. The trial court and R.E.'s counsel engaged in a lengthy exchange. At the close of the October 2019, hearing, the trial court refused to seal the record and found insufficient evidence to support the change of gender, and denied the name change request. R.E. appealed and requested the Indiana Court of Appeals to seal the appellate and trial court records. The Court of Appeals granted that request shortly thereafter and subsequently reversed the trial court. The Court of Appeals found it apparent, from the proceedings, that the trial court would not grant R.E.'s petition to change the gender marker on his birth certificate based on R.E.'s testimony alone, but instead wanted some form of medical evidence that R.E. had actually undergone a physical sex change. In 2014, the Court of Appeals considered another trial court's similar belief and expressly rejected it. *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 709-10 (Ind. Ct. App. 2014). R.E.'s requests were made in good faith and not for a fraudulent or unlawful purpose. The Court of Appeals reversed and remanded with instructions to the trial court to grant R.E.'s petition to change his name on government-issued identifying documents and the gender marker on his birth certificate without further delay. Addressing the trial court's refusal to seal R.E.'s court records, the Court of Appeals determined that the trial court's decision was clearly against the Court of Appeals' unambiguous precedent and that the trial court was specifically informed of the relevant case law. The Court of Appeals reversed and remanded with instructions that the case remain sealed. The Court of Appeals also felt obliged to address the fact that the trial court failed to treat R.E. with the respect R.E. deserved and that was expected from fellow judicial officers; and noted that this was not the first such occasion where it had to publicly admonish one of Indiana's trial courts for such derision.

8. *Ferrill v. Ferrill*, 143 N.E.3d 350 (Ind. Ct. App. 2020). In March 1972, the parties married. Husband was on active duty in the United States Army until 1995 when he elected to leave active duty prior to accumulating the 20 years of service required for a military pension. In exchange for leaving active duty before qualifying for a military pension, husband was to receive Voluntary Separation Incentive ("VSI") payments based on his pay grade when

separating from the military and for "twice the number of years of service." In January 2003, the parties separated and filed a petition for dissolution of marriage. On February 9, 2004, the trial court entered a decree of dissolution of marriage that incorporated their property settlement agreement. As to personal property, the settlement agreement provided that husband would keep his military retirement pension. The settlement agreement provided as to the VSI payments that husband was receiving that he would pay to wife the sum of $11,000.00 annually from his VSI account within 10 days from the date he received payment. Should the VSI account be converted to any other form of payment, the settlement agreement provided that husband would pay the $11,000.00 obligation from the source *pro rated* as received. After the decree of dissolution of marriage was entered, husband made $1,000.00 monthly payments to wife pursuant to the VSI provision in the settlement agreement. Husband returned to active duty and received active duty pay in lieu of VSI payments but continued paying $1,000.00 per month to wife. In 2011, husband learned he was no longer eligible to receive VSI payments because he had accumulated the 20 years of active duty service required to receive the full amount of the military pension. Around that time, husband also learned he would have to repay all VSI monies he had received, which totaled $386,730.11. Nevertheless, husband continued to make the $1,000.00 monthly payments to wife. On February 28, 2016, husband wrote to wife and informed her that he had received no VSI payments for five years but had continued making monthly payments to her as a courtesy. Husband indicated to wife that those payments would cease after March 2016. On March 14, 2017, wife filed a petition for rule to show cause. On June 11, 2018, the trial court held an evidentiary hearing. On July 20, 2018, the trial court entered an order granting wife's petition, found husband in contempt, and illustrated future payments that husband was to make to wife. Husband appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted that a divorce settlement agreement is a contract to be interpreted like any other contract, and applied a *de novo* standard of review to the trial court's interpretation. At issue was the alleged conflict between the two provisions of the settlement agreement stating that husband received his military retirement pension as his sole and separate property and the VSI provision. The Court of Appeals identified that the trial court agreed that husband's VSI payments "converted to" a military retirement pension. The Court of Appeals noted that courts in other jurisdictions had held that when a divorce settlement agreement or divorce decree had given a percentage of a spouse's military retirement to the other spouse, if the receiving spouse thereafter unilaterally forfeited military retirement payments by accepting VSI payments the other spouse was entitled to receive the expected monies from the VSI payments. The Court of Appeals interpreted wife's request as the inverse – that her entitlement to a portion of husband's VSI payments under the settlement agreement converted into an entitlement to a portion of husband's military pension when husband became eligible for the pension instead of VSI. The Court of Appeals distinguished this case, noting that the settlement agreement contained provisions that disposed separately of military pension and VSI payments, and declined to follow the other cases. Because the settlement agreement stated that husband's military retirement pension was "his sole and separate property" the trial court erred in ordering husband to pay any of those pension monies to wife. Additionally, the trial court abused its discretion by finding husband in contempt.

9. *In re Paternity of C.B. and S.B.*, 144 N.E.3d 759 (Ind. Ct. App. 2020). Mother and father never married but had two children. In 2015, father petitioned to establish paternity of the children. Father was represented by counsel and mother was represented by counsel. The parties stipulated that father was the father of the children, and a hearing was eventually held on the remaining issues. On October 3, 2017, the trial court issued an order awarding mother sole legal and primary physical custody of the children, with father to have parenting time. In addition, the trial court ordered father to pay $25,000.00 over and above the amounts he had already paid to mother's attorney. The trial court reduced that amount to judgment in favor of mother's attorney and against father. Thereafter, father appealed and mother cross-appealed. In January 2018, mother filed a petition for appellate attorneys' fees. The trial court did not rule on mother's petition at the time. In February 2018, while briefing in the first appeal was continuing, father sought a second appeal. Mother filed a motion to dismiss the second appeal, arguing that the interlocutory orders father was attempting to appeal were not before the Indiana Court of Appeals under Ind. Appellate Rule 14. In April 2018, the Court of Appeals granted mother's motion to dismiss. Mother then filed a second petition for appellate attorneys' fees that the trial court did not rule on. In October 2018, the Court of Appeals issued a decision in the first appeal, affirming the trial court's custody and parenting time rulings and remanding on child support. In March 2019, the trial court held a hearing on mother's petitions for appellate attorneys' fees. Again, the trial court did not rule the fee petitions at that time. Thereafter, mother fired her counsel. On April 12, 2019, mother's counsel filed a motion to withdraw which the trial court granted. That same day, mother's counsel filed a motion to intervene. On May 3, 2019, mother and father filed a "Verified Agreed Order on All Pending Petitions and Matters." The agreed order covered several topics, including how much father would pay toward mother's appellate attorneys' fees. Specifically, father agreed to pay $7,500.00 of mother's attorneys' fees for the two appeals, also dismissed all petitions and motions to further allocate claimed fees. On May 10, 2019, the trial court held a hearing on mother's counsel's motion to intervene. In June 2019, the trial court issued an order in which it granted mother's counsel's motion to intervene "for the limited purpose of presenting evidence on various issues and attorneys' fees owed." The trial court approved all parts of the parties' agreed order except for the part about mother's counsel's attorneys' fees. Specifically, the trial court ordered father to pay all of mother's attorneys' fees and costs of the first appeal, which amounted to $26,908.40, with mother's attorneys' fees and costs incurred for the second appeal, which amounted to $3,277.50. The trial court also determined that mother incurred $19,735.00 in other attorneys' fees from October 31, 2017, to March 5, 2019, and ordered father to pay 93% or $18,253.78 of them. Father appealed and the Court of Appeals reversed. The Court of Appeals rejected mother's counsel's contention that she could request attorneys' fees in her own name. When mother's counsel sought to intervene the trial court had not yet ruled on mother's petitions for appellate attorneys' from father. And before the trial court ruled on mother's counsel's petition to intervene, mother withdrew her petitions for appellate attorneys' fees from father. Mother was no longer asking the trial court to order father to pay her fees, and mother's counsel did not have a right "separate and apart" from mother, to request them from father. The trial court erred by allowing mother's counsel to intervene, ordering father to pay all of mother's appellate attorneys' fees, and ordering father to pay a portion of mother's trial court

fees from October 31, 2017, to March 5, 2019. The Court of Appeals vacated the trial court's June 2019, order and remanded the case to the trial court. On remand, the trial court was instructed to approve all parts of the agreed order, including the $7,500.00 from the two appeals for mother's attorneys' fees. To the extent mother's counsel was still owed attorneys' fees for her services in the paternity case, she could seek them from mother.

10. *In re De.B.*, 144 N.E.3d 763 (Ind. Ct. App. 2020). In June 2018, De.B. was born. On February 13, 2019, and officer with the Columbus, Indiana Police Department stopped parents' car after receiving a report that a theft had just occurred at a nearby Target. During the stop, mother said that she "committed the theft so that she could…sell the items that she had stolen, to get food." The officer searched the car and found several electronic items from Target, some syringes, and a bent spoon. Both parents were arrested and transported to the Columbus Police Department to be interviewed. A detective interviewed father, who admitted that he was the "getaway driver" of the Target theft and that they planned to sell the stolen items "to pay for baby supplies." Father also told the detective that the syringes and spoon were mother's and that "he prefers to snort his" methamphetamine. De.B. was with parents when they were arrested and there was no other caregiver available to De.B. The police officers contacted the Indiana Department of Child Services ("DCS"). DCS filed a petition alleging that De.B. was a CHINS. On April 5, 2019, the CHINS fact-finding hearing began. DCS moved to admit lab reports showing the results of parents' oral fluid drug test under Ind. Evid. Rule 803(6), the business records exception. Father's attorney objected and argued that the lab reports were "specifically created for DCS" and that they did not qualify as a business records. The trial court overruled parents' objection and admitted the lab reports. On June 6, 2019, the trial court issued an order adjudicating De.B. as a CHINS. On June 24, 2019, the trial court held a dispositional hearing. At the end of the hearing, the trial court adopted DCS's recommendations and ordered the parents to participate in services. Only father appealed and the Indiana Court of Appeals affirmed. Father contended that the trial court erred by admitting the lab reports. The Court of Appeals noted that a different panel of that Court had held in *In re L.E.S.*, 125 N.E.3d 628 (Ind. Ct. App. 2019) that lab reports did not fall under the business records exception and were inadmissible. This panel of the Court of Appeals respectfully disagreed with the holding since the lab depended on the lab reports to operate and was a certified lab. This panel also noted that the *L.E.S.* panel did not consider the other two indicators of reliability articulated by the Indiana Supreme Court in *In re D.T.*, 808 N.E.2d 639 (Ind. 2003). To the extent that there was any error, it was harmless. The Court of Appeals also rejected father's argument as to the sufficiency of the evidence, noting that father did not challenge certain findings that made it clear that De.B. was a CHINS.

11. *In re L.T.*, 145 N.E.3d 864 (Ind. Ct. App. 2020). Mother and father had four children. The Indiana Department of Child Services ("DCS") became involved with this family prior to the last child's birth. In June 2017, the then-three children of the parties were adjudicated CHINS due to physical abuse to one child and domestic violence between the parents. Multiple allegations ensued and, on November 27, 2018, DCS filed a petition alleging that a fourth child was a CHINS because there was physical abuse in the home directed to the child's siblings. The petition also alleged that father smoked marijuana and was abusive toward

the mother. On January 25, 2019, the trial court conducted a fact-finding hearing. On June 27, 2019, the trial court entered its order adjudicating the fourth child to be a CHINS. The parents appealed and the Indiana Court of Appeals affirmed. The parents contended that the trial court abused its discretion by allowing a physician to testify by phone and by admitting evidence of father's past domestic violence charges. As to permitting the pediatrician to testify telephonically at the CHINS fact-finding hearing, Ind. Admin. R. 14(B) provides a procedure for telephonic testimony. DCS did not dispute that its motion for telephonic testimony was filed less than 30 days before the hearing and that the trial court did not enter written findings of fact and conclusions of law in an order granting DCS's request to present the pediatrician's testimony via telephone. While the trial court erred in permitting the pediatrician to testify telephonically, DCS presented other evidence of probative value to support the CHINS determination and the trial court's error in that regard was harmless. As to father's prior criminal history, the Court of Appeals recounted at length the criminal history of father and concluded that the trial court properly admitted the investigative report of father's 2010 criminal conviction. The trial court properly adjudicated child to be a CHINS. Judge Tavitas concurred in the result but parted ways with the majority's conclusion that the 2010 probable cause affidavit was properly admitted into evidence. The concurrence found Ind. Evid. R. 803(8)(B) specifically prohibited an admission of a probable cause affidavit. The concurrence also noted that the probable cause affidavit contained hearsay within hearsay which was not admissible under Ind. Evid. R. 805 since each part of the combined statements did not conform to an exception to the rule. However, the concurrence found that the admission of the probable cause affidavit was harmless error due to the overwhelming evidence that supported child was a CHINS.

12. *Penley v. Penley*, 145 N.E.3d 874 (Ind. Ct. App. 2020). In 1988, the parties married. In August 2017, wife filed a petition for dissolution of marriage. On December 18, 2017, the trial court issued a decree of dissolution of marriage. The trial court also set a final hearing to determine distribution of the marital estate. The Chronological Case Summary contained an entry showing that the trial court clerk sent electronic notice of the decree to the parties' named attorneys. On September 18, 2018, the trial court held the final hearing. The parties discussed their marital assets and liabilities. One of their assets was their house, which they had already sold for over $97,000.00. The parties put the proceeds in a trust account pending the final order. One of their debts was a personal loan that the couple had obtained from a friend when they had purchased their house. Wife testified that she and husband had borrowed $65,000.00 from the friend in September 2011 or 2012 and that they had made monthly payments to the friend at the time of the provisional hearing in December 2017. Husband testified that he and wife signed a contract with the friend and that the friend had a copy of the contract. The friend did not appear for the hearing or submit anything to show the amount that husband and wife still owed on their personal home loan. The balance owed on the personal home loan was disputed by the parties. Wife testified and presented exhibits suggesting the amount owed was either $13,190.00 or $6,580.00. Husband testified that he disagreed and thought the amount owed was closer to $14,000.00. On November 8, 2018, the trial court ordered the proceeds from the sale of the parties' house to be used to pay the friend $13,190.00, to reimburse wife for some previous payments she had made on behalf of husband, and to cover other debts, including wife's $19,000.00 student loan. The trial court also determined that

husband had dissipated marital assets during the marriage and ordered that the remaining home sales proceeds, totaling close to $60,000.00, be distributed 70% to wife and 30% to husband. The Chronological Case Summary did not contain any notation to indicate that this order was sent to the parties. On February 11, 2019, husband filed a copy of a release of general claims. On March 25, 2019, wife's counsel notified husband's counsel that the Chronological Case Summary indicated that the trial court had entered the final order. On March 26, 2019, husband filed a motion for leave and to reconsider, which he treated as a motion seeking leave to file a motion to correct error. On May 16, 2019, the trial court held a hearing on husband's motion. On July 18, 2019, the trial court issued an order finding the husband had failed to timely file a motion to correct error and that no good cause had been shown that would justify relief. Husband appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted that the Indiana Supreme Court had held that Ind. Trial Rule 72 is the "sole vehicle" for a party to obtain relief when seeking to expand a filing deadline based upon a claim of failure to receive notice of a final judgment. Here, the trial court held the final dissolution hearing on September 18, 2019, and then issued the final dissolution order on November 8, 2019. Pursuant to Ind. Trial Rule 72(D), the trial court clerk, upon noting the decree in the Chronological Case Summary, had a duty to "immediately" serve a copy of the decree on the parties and "make a record of such service." It was undisputed that husband did not receive of the notice of the decree. The trial court abused its discretion by denying husband's request for leave to file a belated motion to correct error since husband did not receive notice of the decree and the Chronological Case Summary contained no record that the clerk had served notice of the decree.

13. *In re Name Change of Jane Doe*, 148 N.E.3d 1147 (Ind. Ct. App. 2020). Petitioners were transgender men who were born in Mexico and brought to the United States by their respective families around the age of 5. On December 7, 2018, and March 1, 2019, petitioners individually filed with the trial court verified petitions for a change of name. On May 15, 2019, the trial court heard Doe's amended petition. On July 10, 2019, the trial court heard the other party's petition. In August 2019, the trial court issued orders denying the petitions for name change based on each petitioner's inability to provide proof of United States citizenship under Ind. Code §34-28-2-2.5(a)(5). Each petitioner appealed and the appeals were consolidated. On February 18, 2020, pursuant to Ind. Code § 34-33.1-1-1, the Indiana Court of Appeals issued an order notifying the Attorney General of Indiana that the constitutionality of a statute had been called into question and granting the Attorney General permission to intervene on behalf of the State of Indiana as an appellee. The State of Indiana intervened and timely filed a brief in which it argued that the statutory provision at issue was facially constitutional, but unconstitutional as applied. Petitioners filed a reply brief, arguing that the Court of Appeals should construe the statute to avoid unconstitutional results. The Court of Appeals reversed. Ind. Code §34-28-2-2.5(a)(5) provides a list of information to be submitted with a name change petition for an individual who is at least 17 years of age. The Court of Appeals interpreted that provision as requiring submission of the enumerated information whenever possible. Petitioners were unable to provide proof that they were United States citizens and were absolved of providing such proof. The trial court made abundantly clear in its finding that the petitioners seeking a name change in good faith and not for fraudulent or unlawful purposes, The trial court further indicated that it could easily grant the petitions if it

were not for the citizenship requirement that it believed existed in Ind. Code §34-28-2-2.5(a)(5). The Court of Appeals concluded that the applicable statutes did not require United States citizenship in order to obtain a name change and remanded with instructions for the trial court to grant petitioners' respective petitions for a name change.

14. *Trowbridge v. Estate of Trowbridge*, 2020 WL 3088810 (Ind. Ct. App. July 11, 2020). In 2003, Trowbridge and Christal married. They divorced in 2012. According to the property settlement agreement, Christal agreed to quitclaim her interest in a house to Trowbridge. Following the divorce, Christal never executed the quitclaim deed and Trowbridge never demanded that she do so. On June 5, 2018, Trowbridge died leaving behind his father and brother. Trowbridge's brother filed a petition for issuing letters and other administration, asserting that Trowbridge died intestate. On July 16, the trial court granted Trowbridge's brother's petition and appointed him personal representative. On November 13, 2018, Christal filed a petition asserting that Trowbridge died testate pursuant to a will executed about two months after their divorce. In January 2019, the trial court conducted a hearing. Trowbridge's brother testified that he went to Trowbridge's house and opened the safe, but found no will. Trowbridge's lawyer testified that in October 2018, he had a meeting with Christal, at which Christal said she had a copy of Trowbridge's will and indicated that the will was in the safe. Trowbridge's lawyer focused on the case of Estate of *Fowler v. Perry*, 681 N.E.2d 739 (Ind. Ct. App. 1997) which dealt with the revocation of a lost will. Trowbridge's lawyer explained the results of his research and said he would not be offering the will for probate. In October 2019, the trial court held another hearing. Christal testified that Trowbridge said he wanted to leave her property to her. Trowbridge's attorney testified that he took notes during his October 15, 2018, meeting with Christal. In November 2019, the trial court again denied the probate of the will. The trial court entered extensive findings, and determined that the absence of the original will and that Christal had failed to prove by a preponderance of the evidence that the proffered will was the original will and that Christal had not overcome the presumption of revocation. The Indiana Court of Appeals affirmed in part, reversed in part, and remanded. Christal first contended that the trial court erred in refusing to probate the will. Ample evidence in the record supported the trial court's findings that Trowbridge retained possession or control of the original will, that Christal had a photocopy, and that the original will was not found in Trowbridge's safe. The Court of Appeals affirmed the trial court's conclusion that the estate was entitled to the presumption that Trowbridge destroyed the will with the intent to revoke it. Christal then argued that the trial court did not engage in the proper analysis to determine whether she rebutted the presumption that the original will was destroyed with the intent to revoke it. The Court of Appeals agreed. The trial court did not engage in the proper analysis and had not had the opportunity to determine, whether in the first place, the facts were sufficient to support revocation. The Court of Appeals reversed and remanded with instructions that the trial court enter a new order applying the proper analysis without any new hearing.

15. *Berg v. Berg*, 2020 WL 3982838 (Ind. Ct. App. July 15, 2020). Husband and wife participated in mediation and negotiated a settlement agreement. Under the settlement agreement, each party retained all stock accounts held in her or her own name and husband retained all stock accounts the parties held jointly. The settlement agreement disposed of other

property and obligated husband to make a property equalization payment to wife. At one point, the parties made mutual representations and warranties that all assets had been correctly and truly revealed and reflected in the settlement agreement. The settlement agreement also provided for a full disclosure of all assets and liabilities, and stated that it was in final and complete settlement of all property rights. On April 16, 2018, the trial court approved the settlement agreement and incorporated its terms into a decree of dissolution of marriage. On April 15, 2019, wife filed a verified Ind. Trial Rule 60(B) motion focused on a stock account husband held which was valued at about $122,000.00. Wife alleged that the settlement agreement "did not reference and therefore omitted the stock account." Wife noted that husband's counsel had disclosed that account to her lawyer. Wife alleged that her lawyer inadvertently omitted the account from a marital balance sheet and that the parties used that balance sheet at mediation. Husband filed a motion to strike, challenging the admissibility of the evidence attached to wife's motion. He argued that any evidence concerning "what went on during mediation, what became part of the mediation agreement" was inadmissible. The trial court overruled husband's objection and eventually entered an order summarily denying husband's motion to strike and declining to grant wife relief. Wife filed a motion to correct error. In its written order, the trial court found that wife's balance sheet "was utilized during the mediation" and did not contain husband's account. The trial court found that "(1) fraud, constructive fraud, mutual mistake, or misrepresentation had occurred and (2) husband had breached a warranty." The trial court ultimately awarded wife half of the value of the account. Husband appealed and the Indiana Court of Appeals, in a 2-1 decision, reversed. The majority noted that, as husband pointed out, the trial court adopted wife's proposed findings verbatim. While that weakens confidence that the findings were the result of considered judgment, a trial court is not prohibited from adopting the parties' proposed findings verbatim. As to mediation, the Court of Appeals noted that mediation is a "confidential process." Evidence discoverable outside of mediation should not be excluded merely because it was discussed or presented in the course of mediation. Ind. Alternative Dispute Resolution Rule 2.11(B)(2). However, mediations are settlement negotiations governed by Ind. Evid. Rule 401. Ind. Evid. Rule 408 has an exception that allows evidence to be admitted for another purpose, such as proving a witness's bias or prejudice, negating and contention of undue delay, or approving an effort to obstruct a criminal investigation or prosecution. The Court of Appeals noted the seminal opinion of the Indiana Supreme Court in *Horner v. Carter*, 981 N.E.2d 1210 (Ind. 2013). Wife offered evidence of what transpired at mediation, contending the parties relied on an incomplete marital balance sheet. Husband argued that the judgment cannot stand without evidence of what occurred at mediation. The Court of Appeals agreed. Since the mediation evidence was essential to the judgment, the judgment could not stand. The trial court also found that, under the circumstances, wife could not avoid the settlement agreement due to fraud, constructive fraud, mutual mistake, misrepresentation, or other misconduct. Again, without the mediation evidence, there is insufficient evidence to find that wife could avoid the settlement agreement. To the extent the judgment in favor of wife was based on principles of contract avoidance, the trial court also erred. The trial court also found that wife was entitled to relief because husband breached a warranty in the settlement agreement. Reviewing warranty law, the Court of Appeals determined that wife could not avoid the settlement agreement. In the settlement agreement,

wife asserted that all assets had been disclosed and reflected in the terms. Wife was estopped from claiming that her assertions were untrue. There was not proper basis to uphold the trial court's judgment on a theory that husband breached a warranty. Judge Crone dissented, noting that wife submitted ten exhibits to substantiate her claim that husband's stock account had been omitted from the marital estate. Husband did not dispute that omission occurred as a result of either mutual mistake or fraud. The dissent found that husband's argument fell far short of establishing that the trial court abused its discretion in relying on wife's exhibits. Ind. Appellate Rule 46(A)(8)(a) provides that an appellant's argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning and citation from relevant authorities. The dissent found husband's argument on that issue waived for lack of cogency. The dissent also found no merit in husband's remaining argument and would have affirmed the trial court.

16. *Parker v. State*, 2020 WL 4357077 (Ind. Ct. App. July 30, 2020). On March 19, 2019, Lafayette, Indiana Police Sergeant Michael Zambon learned that Parker was wanted on a warrant from another jurisdiction and was possibly in the area. Lafayette, Indiana Police Sergeant Brandon Withers obtained a photo of Parker from the Indiana Bureau of Motor Vehicles ("BMV") and asked Sergeant Zambon to use social media platforms to help locate Parker. Sergeant Zambon found Parker's profile on Facebook, which had Parker's name and date of birth. He ran Parker's name and date of birth through a national database, confirmed Parker was wanted on a warrant, and verified his physical appearance through the BMV. On March 20, 2019, Sergeant Zambon used a fictitious profile on Facebook under the name "Kris Johnson" to initiate a conversation with what appeared to be a profile under Parker's name by sending a message expressing an interest in selling a vehicle. Sergeant Zambon communicated with the user under Parker's name, discussed the vehicle and tattoos, and, at some point during the conversation, received a message asking if he did "Go" which he knew to be a street name for methamphetamine. The user under Parker's profile solicited Sergeant Zambon to help sell methamphetamine, and they arranged to meet "at the area of 4th and Romig, the Shell gas station down there" for that purpose and the vehicle inspection. The profile under Parker's name sent a message stating to look down Broadway, and law enforcement identified an address for Parker on Broadway. At about 1:00 a.m., Lafayette, Indiana police apprehended Parker. Parker had several small bags of methamphetamine in his pockets, a pencil sharpener containing small bags of methamphetamine, and a digital scale with white residue on it. Parker also had his cell phone with him, and Sergeant Zambon, who had maintained consistent communication through the Facebook Messenger App until Parker was arrested, made a phone call from the "Kris Johnson" profile to Parker's profile, and Parker's phone rang. On March 20, 2019, the State of Indiana charged Parker with multiple felony and misdemeanor counts. At a jury trial, the trial court admitted a photo of Parker from the BMV as a State's exhibit. Later, the State offered photos from Parker's Facebook profile and Parker's counsel objected on the basis of authentication. The trial court admitted these exhibits over objection. Later, the trial court admitted Facebook messages over objection. The trial court found that the evidence was "sufficient enough to establish to the Court that there is a reasonable probability that these messages did come from Mr. Michael Parker's Facebook account." The jury found Parker guilty on three counts. The trial court found Parker guilty on three counts. The trial court sentenced

Parker to concurrent sentences of 12 years and 60 days and enhanced the sentence by 9 years for Parker's status as a habitual offender. Parker appealed and the Indiana Court of Appeals affirmed. Ind. Evid. Rule 901(a) provided the grounds for authenticating or identifying an item of evidence. Ind. Evid. Rule 901(b) provides a list of examples of evidence that satisfied the requirements for authentication for identification, and that included testimony that an item is what it is claimed to be by a witness with knowledge and that the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances, authenticated the item of evidence. Absolute proof of authenticity is not required. Rather, the proponent of the evidence must establish only a reasonable probability that the evidence is what it is claimed to be. Once that reasonable probability is established, inconclusiveness goes to weight rather than admissibility. The Court of Appeals noted that the language in Ind. Evid. Rule 901(b)(4) is similar to the Federal Rule of Evid. 901(b)(4). The Court of Appeals also noted that the Texas Court of Criminal Appeals had issued an extensive opinion addressing this issue. *Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012). The record revealed that the trial court found the photo on the Facebook message was similar to the BMV photo of Parker and that it appeared to be the same individual in the photo of the Facebook texts. Any lingering doubts about whether Parker wrote the messages went to evidentiary weight, not admissibility. The evidence was sufficient to authenticate the messages as being authored by Parker.

C. CHILD SUPPORT

1. *T.R. v. E.R.*, 134 N.E.3d 409 (Ind. Ct. App. 2019). In April 2015, mother and father married. They subsequently had two children. In July 2016, the Indiana Department of Child Services ("DCS") filed a CHINS petition. On January 16, 2017, while the CHINS case was still open, mother filed a petition to dissolve the parties' marriage. On February 24, 2017, the trial court held a preliminary hearing on the petition and refused to enter any order on custody or parenting time until the CHINS case was closed or the trial court was authorized by the juvenile court to proceed. On April 24, 2017, the trial court ordered assignment of the divorce case to the Marion County Family Court Project so that it could be bundled with the CHINS case. On July 26, 2017, the juvenile court entered an order on custody and parenting time under the divorce cause number. On May 3, 2018, the trial court approved a partially-mediated agreement regarding marital assets and liabilities and reserved all issues regarding the children for a final hearing. On December 6, 2018, the trial court held a final hearing. On December 14, 2018, the trial court entered its decree of dissolution of marriage. The trial court granted the mother sole legal and physical custody of the children, with father having supervised parenting time two hours per week at Kids' Voice of Indiana. Father appealed and the Indiana Court of Appeals affirmed and remanded. Father first contended that the trial court erred by ordering that his parenting time occur at an agency at his expense. The Court of Appeals found that the trial court had received sufficient evidence to determine that father's parenting time should take place at an agency. The Court of Appeals further inferred that the trial court concluded that father's finances were not the primary barrier between father and his parenting time. Father also contended that the trial court erred by ordering him to participate in a 26-week domestic violence program. Ind. Code § 31-34-20-3 provides that a juvenile court may order a

parent to, among other things, "[o]btain assistance in fulfilling the obligations as a parent" and "[p]articipate in a mental health…program." A domestic violence program falls into both of these categories. While the Court of Appeals acknowledged that the wording of the statute was unclear, the juvenile court stated that the trial court would be assuming primary jurisdiction "to address all *other* issues" and inferred that the juvenile court's order regarding custody and/or parenting time would survive. The Court of Appeals remanded with instructions to the trial court to clarify its order in that regard. Father also contended that the trial court erred by ordering him to undergo a psychological evaluation. While father was correct that there is no specific statutory authority for a trial court to mandate a psychological evaluation as part of a divorce, the Court of Appeals "has previously held that trial courts have discretion to set reasonable restrictions and conditions upon a parent's parenting time…" *Pitcavage v. Pitcavage*, 11 N.E.3d 547, 561 (Ind. Ct. App. 2014). The Court of Appeals inferred that the trial court's intent was to condition father's parenting time on his completion of a psychological evaluation but remanded so that the trial court could clarify its findings and the nature of its order. The Court of Appeals also asked that on remand the trial court consider to whom proof of completion of a psychological evaluation should be provided and asked that the trial court consider whether that should be a condition of his right to exercise parenting time and clarify the order. Finally, father contended that the trial court erred in its calculation of the amount of child support he owed. Father's relevant work history showed that he could earn from $36,000.00 per year to $43,000.00 per year. Although father had an Associate Degree in Applied Science, in November 2018, he began working for the United States Postal Service for up to 8 hours per week at $17.78 per hour. The evidence supported the trial court's conclusion that father was voluntarily unemployed since he could earn significantly more than $36,000.00. The Court of Appeals found it eminently reasonable that the trial court chose to impute that amount to father. As to preschool expenses, mother was working during the hours that the parties' children attended preschool and there was no error in ordering the parties to include childcare expenses in the child support calculation. The evidence showed that mother earned a weekly amount of $532.00, but the trial court calculated mother's weekly income to be $420.00 with no explanation for the deviation from the evidence in the record. The Court of Appeals remanded with instructions to either explain the deviation or recalculate child support with mother's weekly income at $532.00.

2. *Scott v. Corcoran*, 135 N.E.3d 931 (Ind. Ct. App. 2019). In 2002, mother and father married. They subsequently had two children. During the marriage, mother was primarily a homemaker and father was employed as an operation manager for Scrap Metal Services ("SMS"). In 2013, father's annual base salary from SMS was approximately $150,000.00. Father was a minority shareholder in SMS, in which he once owned a 20.65% interest. Father was also a shareholder in SMS Realty and other SMS entities (collectively, "the subsidiary companies"). In addition to his salary, father received distributions from SMS and the subsidiary companies in profitable years. Father filed a petition for dissolution of marriage. On November 26, 2013, the trial court approved an agreed decree of dissolution of marriage that incorporated the parties' settlement agreement and settled outstanding issues of property division, custody, parenting time, and child support. Father was to pay $235.00 per week in child support, plus 12% of all irregular income earned by husband in excess of $2,903.79 per week. Father also agreed to execute an authorization to allow mother to obtain his federal tax

return directly from the IRS annually and to provide his complete federal and state tax returns and all attachments, schedules, and related forms. In 2012 and 2013, father paid $37,230.00 for irregular child support. In 2014, father did not pay irregular child support. The parties' settlement agreement also assigned to mother father's interest income from a promissory note for approximately $1,155,000.00 between father and SMS. Mother was to receive monthly interest payments of approximately $9,000.00 on the promissory note and the principal when it was due. In 2015, SMS temporarily ceased making interest payments to mother because of financial difficulties. The settlement provided that mother could seek a modification of child support when the interest income mother received on the promissory note terminated. In 2015, father did not pay any irregular child support. On August 12, 2015, mother filed a petition for modification of child support. In April 2016, father paid a lump-sum payment of $108,021.00 for irregular child support. On April 26, 2016, father filed a petition to modify child support in which he asked the trial court to deviate from the recommended child support and asked for an accounting by mother. The trial court conducted a multi-day hearing on mother's petition to modify child support and later-filed motion for rule to show cause and father's petitions. On January 29, 2019, the trial court entered its order (1) denying mother's petition to modify child support, (2) granting mother's petition for rule to show cause for father's failure to timely submit his tax returns to mother, (3) recognizing father's withdrawn petition for accounting, (4) denying mother's petition for rule to show cause regarding alleged failure to pay child support and found that father actually overpaid child support by $23,483.23, (5) denying father's petition for modification of child support, (6) denying each party's request for attorneys' fees, (7) determining a $3,000.00 sanction against father for his failure to timely produce his tax returns and credited the $3,000.00 sanction toward father's overpayment of child support, and (8) awarding a money judgment of $20,483.33 against mother. The trial court also rejected mother's recalculation of father's income for purposes of child support by using father's amended tax returns that reflected his losses carried back. The trial court found that redoing child support due to the loss carry-back constituted a modification of the terms of the settlement agreement. The trial court also identified two errors in mother's calculations. Mother appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded with instructions. The first issue related to mother's claim that the trial court erred in denying her request for additional time to submit proposed findings. On December 13, 2018, mother's counsel moved for an initial extension of time to submit proposed findings. The trial court granted that extension with no objection from opposing party. On January 15, 2019, mother's counsel subsequently moved for a further extension of time. The trial court denied that motion and the Court of Appeals determined that the trial court did not abuse its discretion by denying mother's motion for further extension of time. The Court of Appeals reversed the trial court's denial of mother's petition for rule to show cause and determined that the trial court abused its discretion. The settlement agreement provided a detailed formula for calculating child support. Father complicated the case by failing to timely produce his tax returns to mother. Each party had accountants who agreed that carrying back 2015 losses resulted in a tax refund and additional money in father's pocket, but not additional income. The trial court and mother, however, could not determine the impact of father's amended tax returns as it related to the calculation of father's irregular child support obligation until father produced his amended tax returns. When father delayed production of his

2013, 2014, 2015, and 2016 tax returns, he violated the settlement agreement. Father failed to abide by the settlement agreement stipulation regarding his irregular child support obligation. Father was bound by the express terms of the settlement agreement with mother, and the amended tax returns did not change the amount of child support that was due mother. For these reasons, the evidence did not support the trial court's denial of mother's petition for rule to show cause for father's failure to timely pay irregular child support nor did it support the trial court's failure to find father in contempt for his willful violation of the settlement agreement. The Court of Appeals found clear error and reversed and remanded to the trial court with instructions to (1) enter a contempt finding against father for his failure to abide by the terms of the settlement agreement regarding irregular child support in 2013, 2014, 2015, and 2016, and (2) determine whether contempt sanctions were appropriate. Mother also argued that the trial court clearly erred in finding that father overpaid child support to mother and entering a money judgment against mother for $20,483.23. Father's child support payments did not comply with the settlement agreement. The evidence established that father paid only 5% of his child support obligation on a timely basis. Mother contended that father's overpayment should be treated as voluntary contributions because father made non-conforming payments pursuant to the settlement agreement. The evidence supported the trial court's findings that father's payments of irregular child support were non-conforming, but by the time of the hearing father was current in his child support payments and had actually overpaid irregular child support to mother. Under the unique facts and circumstances of this case, the Court of Appeals could not say that the trial court clearly erred that father was entitled to relief for his overpayment where father "actually paid" and mother received the full amount of irregular child support that was in dispute at this time. However, the Court of Appeals disagreed with the trial court as to the appropriate way to treat father's overpayment. The proper remedy for father's overpayment of child support was a credit and not a money judgment against mother. Thus, the Court of Appeals found that father was entitled to a credit in the amount of his overpayment toward his future irregular child support obligation and vacated the trial court's entry of a money judgment against mother. As to the final issue, the trial court did not clearly err in denying mother's request for attorneys' fees regarding father's withdrawn petition for an accounting.

3. *Cunningham v. Barton*, 139 N.E.3d 1081 (Ind. Ct. App. 2019). On December 31, 1997, mother and father married. The parties had twin children born on December 5, 1999. In January 2001, the parties separated. On June 26, 2001, the trial court entered a decree of dissolution of marriage awarding mother custody of the children and ordering father to pay child support. In 2004, father voluntarily ceased exercising parenting time with the children. Father remarried and had two other children. On September 26, 2009, father's child support was increased to $220.00 per week by agreement. When children were 10 years old, their paternal great-grandmother died. Father disallowed them from attending their great-grandmother's funeral. Also, at the age of 10, the children requested that their surname be changed from father's to mother's surname. There was no contact between father and children until December 31, 2013, when father telephoned children seeking to reestablish contact with them. On January 1, 2014, children returned father's telephone call and told them he should not contact them further and that they wished to have nothing to do with him. Thereafter, there was no communication between father and children. Children planned to attend Indiana State

University. On February 6, 2018, mother filed a petition for contribution to post-secondary educational expenses. Both children had contacts with the criminal justice system prior to graduating high school. On son graduated with a 3.80 GPA. The other son graduated with a 3.30 GPA. On May 24, 2018, father filed a motion for emancipation and termination of child support. The trial court held three hearings on this issue. On November 19, 2018, the trial court entered its order granting mother's petition for post-secondary educational expenses. The trial court ordered children to each pay one-third of their respective educational expenses, and that father pay 66% and mother pay 34% of the remainder. On December 19, 2018, father filed a motion to correct error. On April 8, 2019, the trial court denied father's motion to correct error. Father appealed and the Indiana Court of Appeals affirmed. The Court of Appeals conducted a detailed analysis of the concept of repudiation and concluded that the trial court correctly focused on the children's actions after they reached adulthood and the fact that they did not repudiate father. Accordingly, the Court of Appeals concluded that the trial court's educational order denying father's repudiation defense was not clearly erroneous. Likewise, the Court of Appeals rejected father's argument that the children did not display sufficient aptitude for attending college and declined father's invitation to reweigh the evidence. The Court of Appeals also rejected father's argument that the trial court erred by ordering post-secondary education "back support" without giving father credit for paying maximum child support during that same time period. Nothing in Ind. Code § 31-16-6-2(b) restricts a trial court from ordering a parent to pay child support and educational expenses for the same time period, as the trial court only ordered father to pay his proportional share of room, board, and miscellaneous living expenses for children beginning after his child support obligation ceased. There were no expenses duplicated in the trial court's educational order. The Court of Appeals also rejected father's argument that the trial court erred when it failed to provide him with a $75.00 credit on the Child Support Obligation Worksheet attached to the educational order for the health insurance premium he paid weekly for the children. Likewise, the Court of Appeals rejected father's challenge to the sufficiency of evidence supporting two findings related to the amounts awarded by the trial court in the educational order. Finally, the Court of Appeals rejected father's challenge to the educational order that the trial court erred when it failed to impute mother's boyfriend's income to mother for purposes of computing her weekly adjusted income and proportional share of children's educational expenses.

4. *Anselm v. Anselm*, 146 N.E.3d 1042 (Ind. Ct. App. 2020). On May 31, 2014, the parties married. They had two children. During the marriage, father's work schedule required him to work three overnights per week one week and four overnights per week the next week on rotating nights. Mother worked as an office manager for her parents' company. On March 20, 2018, mother filed a petition for separation and temporary custody of the children and child support. At a hearing on mother's petitions, the parties signed and submitted a Child Support Obligation Worksheet on which the parties agreed that father earned $900.00 per week and mother earned $543.00 per week. On August 17, 2018, mother converted her legal separation action into a divorce action. The trial court appointed a Guardian *Ad Litem* ("GAL"). On December 25, the GAL submitted her report to the trial court. In her report, the GAL recommended that mother have primary physical custody based on the fact that mother "is the primary caregiver for doctors' appointments and routine daily needs" of the children. At the

conclusion of the final hearing, the trial court dissolved the parties' marriage. The trial court found that the parties should share joint legal custody of the children, with mother awarded physical custody. The trial court ordered father to pay mother child support in the amount of $173.00 per week. As to real estate that the parties owned in Remington, Indiana that was owned by father prior to the marriage, the trial court found that there was $33,000.00 of equity in that real estate and the mother should receive 50% of the equity. Father appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded with instructions. As to physical custody, the Court of Appeals noted that trial courts must consider all relevant factors under Ind. Code § 31-17-2-8. Trial courts are not required to enter a finding as to each statutory factor it enters in making a custody determination. The plain language of the statute only requires that trial courts to "consider" the factors, and not to make a finding regarding each factor. The evidence supported the findings and the trial court did not abuse its discretion in awarding mother primary physical custody of the children. As to the trial court's reliance on an unsigned child support worksheet, father did not object to that worksheet or otherwise dispute the content so he could not complain that the trial court improperly relied on that exhibit. Father also did not demonstrate that the trial court failed to properly credit him for the children's health insurance premiums. As to uninsured medical expenses, the trial court's order required father to pay for uninsured medical expenses twice – a prepayment when he paid his child support obligation (the 6% Rule amount) and the actual, full payment when the uninsured healthcare expenses were incurred. Such double payments were precisely the scenario the 6% Rule was designed to prevent. Here, the trial court neither awarded father a credit for the 6% of the healthcare expenses that he was already paying nor explained why such a credit would be inappropriate on the facts. As to the equity in the real estate, the Court of Appeals reversed and remanded with instructions for the trial court to divide the correct amount of the equity ($10,367.97) between the parties equally.

5. *In re Paternity of A.J.*, 146 N.E.3d 1075 (Ind. Ct. App. 2020). During their marriage, father and mother used a surrogate to become the parents of child. Thereafter, father and mother dissolved their marriage through a separate paternity proceeding and sought to establish their respective custody and support rights. Following several fact-finding hearings, the trial court made extensive findings and conclusions, awarded mother custody, and ordered father to pay child support. Father appealed and the Indiana Court of Appeals affirmed. The Court of Appeals noted that, as to custody, that judgment is reviewed under a clearly erroneous standard. The evidence most favorable to the trial court's judgment supported its award of custody to mother. The Court of Appeals further concluded that father was estopped from his attempt to discount and disparage mother's relationship to child. As to child support, the Court of Appeals also rejected father's assertion that the trial court erred when it ordered him to pay child support when there was no evidence of either party's income in the record. Father also asserted that the trial court abused its discretion when it declined to draw a more serious negative inference against mother for her deletion of some Facebook posts. According to father, his attorney spent $1,937.00 to prove mother's exfoliation of the Facebook posts. The trial court's assessment was within the logic and effect that the circumstances before it as it concluded that the deleted Facebook posts would not have been significant and would have likely shown nothing more than unkind commentary about father, as each party had throughout the course of

the case. The trial court also did not abuse its discretion when it declined father's request that mother pay his attorneys' fees.

6. *Eldredge v. Ruch*, 2020 WL 2971708 (Ind. Ct. App. June 4, 2020). In May 1994, mother and father married. In December 1997, the parties had one child. The parties' marriage subsequently was dissolved in North Carolina. Pursuant to the North Carolina decree and child support order entered on July 10, 2000, father paid to mother $650.00 per month in child support. On November 9, 2009, the parties filed an agreement to modify child support which the trial court granted. On June 1, 2012, father filed another petition to modify child support. On September 17, 2012, the trial court approved the parties' agreement on this issue. In Spring 2016, child graduated from high school in Indiana and was admitted to both Purdue University and the University of Findlay in Ohio. In fall 2016, child began to attend the University of Findlay. On December 14, 2016, mother filed a petition for college expenses in the trial court. On April 4, 2017, father filed a motion to dismiss mother's petition for college expenses, arguing that (1) the trial court was without authority to issue an order for post-secondary educational expenses that was unrelated to the existing child support order, and (2) an order for post-secondary educational expenses was impermissible under North Carolina law absent agreement of the parties. Following a hearing on father's motion to dismiss, the trial court denied the motion and entered an order requiring mother, father, and child to contribute toward child's education expenses. The trial court permitted child to satisfy her obligation by way of scholarships she had received, with mother and father contributing the remaining 46% and 54%, respectively. The trial court also ordered that the parents' obligation to be limited to the cost of a public, in state university. Father appealed the order, arguing that the trial court erred in ordering him to be responsible for a portion of child's college expenses. A panel of the Indiana Court of Appeals held that Indiana law, not North Carolina law, applied and that, under Indiana law, an award of post-secondary educational expenses was permissible. *See Eldredge v. Ruch*, 12A02-1710-DR-2352, 2018 WL 2092931 (Ind. Ct. App., May 1, 2018). On July 2, 2019, mother filed a motion requesting an income withholding order that the trial court granted the father the following May. On August 1, 2019, father filed a motion to set aside the income withholding order and later filed an amended motion and request to stay the income withholding order. On November 15, 2019, the trial court held a hearing on these motions and denied father's motions that day. Father appealed and the Court of Appeals affirmed. Father first claimed that the trial court lacked statutory authority to enter an income withholding order for post-secondary educational expenses. Father was correct that Indiana law generally makes a distinction between a "child support order" and "educational support order." However, child support orders and education support orders are closely related and overlapping in that they can both include awards for educational expenses. Ind. Code § 31-9-2-58(a) provides that an income withholding order is not limited to "child support" but more generally to "support," which includes an order for educational expenses. Even if relevant statutes were strictly construed, father's argument failed. Ind. Code § 31-16-6-2(a) provides explicit statutory authority for the entry of educational support orders for post-secondary education. The trial court had authority to enforce its educational support order by issuing an income withholding order. The Court of Appeals also rejected father's contention that 15 U.S.C. § 1673 limited the amount on

garnishments and income withholdings in this situation. The income withholding order was for the support of "any person," who was not subject to the limitations found in the general rule.

7. *Hill v. Cox*, 2020 WL 4357331 (Ind. Ct. App. July 30, 2020). In February 2001, child was born. In 2002, father and mother divorced. The parties' decree of dissolution of marriage ordered father to pay child support but he was inconsistent in making payments and accrued an arrearage. On October 31, 2014, the trial court issued an order modifying father's child support obligation to $45.00 per week. In December 2015, father applied for Social Security disability benefits. On February 27, 2018, the Social Security Administration ("SSA") determined that father was disabled. The SSA then paid father a lump-sum amount representing the benefits he was entitled to receive while his disability application was pending and the SSA also paid a portion of this lump-sum payment to child through mother as child's representative payee. On May 14, 2018, child received a lump-sum payment of $14,306.00. Thereafter, the SSA also made monthly payments to child until child turned 18 in February 2019. For the remaining seven months of 2018, SSA paid child $502.00 per month. For the first two months of 2019, SSA paid daughter $512.00 per month. As of May 14, 2018, father had accumulated an arrearage of $9,225.00 in past-due child support. At that time, father also owed $3,174.37 for uninsured medical expenses. In 2018, child had two hip surgeries that resulted in father incurring responsibility for an additional $1,904.76 of medical debt. On July 2, 2019, father filed a petition to reduce his child support obligation and reduce his arrearage by the dependent benefits child received from SSA. On August 27, 2019, the trial court held a hearing. At the hearing, father argued that a medical support obligation is part of a child support obligation and that such money child received from the SSA should be credited toward the amount he owed for past-due child support and for child's uninsured medical expenses. Consequently, father argued he had more than satisfied his child support arrearage and existing medical expense obligations. On October 3, 2019, the trial court issued an order determining that daughter received, of the $14,306.00 lump-sum disability payment, eliminated father's back-support arrearage of $9,225.00 and resulting in father overpaying his back-child support obligation by $5,081.00. The trial court concluded that the overpayment covered the $3,174.37 in uninsured medical expenses and the remaining $1,906.63 from the lump-sum payment constituted a gift from father. Next, the trial court determined the monthly disability payments the child received for seven months in 2018 and two months in 2019 resulted in a $2,660.00 overpayment of child support. The trial court determined that it retained discretion whether to credit that overpayment towards the $1,904.76 in medical debt. The trial court chose not to credit this overpayment toward medical debt and reasoned that its order "was rather generous to Father whose child support obligation had only been $45/week and it costs much more than $45/week to financially support a child which means that Mother was covering the extra expense plus the child support [amount] that father failed to pay for years." Father filed a motion to correct error and the trial court denied that motion. Father appealed and the Indiana Court of Appeals reversed and remanded. The issues were the trial court's treatment of both the lump-payments child received in May 2018 and the nine monthly payments child received between the lump-sum payment at her 18th birthday on February 2019. As to the lump-sum payment, both father and the State of Indiana argued that remand was necessary in light of Ind. Child Support Guideline 3(G)(5)(b)(1), which addressed credits for retroactive lump-sum social security payments. Father and the State

agreed that father's unpaid medical debt as of the date of the lump-sum payment should be considered part of father's then-existing child support arrearage. The trial court refused to consider whether to apply the remaining surplus of $1,906.63 from the lump-sum payment as a credit against the medical expenses for child's two hip surgeries. The Court of Appeals remanded and said that the child's uninsured medical expenses accrued before May 14, 2018, and that $1,906.63 surplus could again be denominated a gift from father to child. If only some of those expenses in 2018 accrued before May 14, 2018, and after those expenses were paid from the lump-sum and remaining money was a gift from father to daughter. As to the nine-month overpayment of child support that occurred, to the extent father overpaid his monthly child support obligation after daughter incurred a 2018 medical debt, that overpayment must be credited toward any medical debt that existed on the date of the overpayment. To the extent father made the overpayment after any portion of the medical debt accrued, the overpayment should be credited toward the medical debt. The trial court erred by not first determining when in 2018 child incurred medical debts related to her two hip surgeries. Father's responsibility for that medical debt made up part of father's child support arrearage as of the dates when child accrued the debts. Consequently, any overpayment of father's child support obligation that occurred after daughter incurred the 2018 medical debt was to be credited towards father's obligation for the medical debt.

D. CUSTODY/PARENTING TIME

1. *In re Ay.H.*, 121 N.E.3d 149 (Ind. Ct. App. 2019). In October 2010, child was born. Shortly after birth, child began living with guardians who were his maternal great aunt and uncle. From February 2011 through February 2012, father was incarcerated. In October 2011, guardians filed a petition for permanent guardianship and mother signed a consent to the appointment. In November 2011, the trial court issued a permanent guardianship order. In February 2012, mother and father dissolved their marriage. In the ensuing three years, neither mother nor father visited or provided financial support for child. In 2015, father filed a petition to terminate the guardianship. That petition remained unresolved until November 2017, when father and guardians executed an agreed order pursuant to which guardians agreed to forgo pursuing adoption of the child and the parties agreed that the guardianship would continue until child's 18th birthday. The agreed order also provided that father would have phased-in parenting time that would eventually result in parenting time pursuant to the Indiana Parenting Time Guidelines with overnight and alternate weekend parenting time. On November 5, 2018, father filed a second petition to terminate the guardianship. On July 3, 2019, the trial court denied father's petition to terminate the guardianship. Father appealed and the Indiana Court of Appeals affirmed. The parties submitted proposed findings of fact and conclusions of law pursuant to Ind. Trial Rule 52(A). The trial court's findings supported the judgment. The Court of Appeals noted that a third party must present clear and convincing evidence sufficient to overcome the presumption in favor of a natural parent. The Court of Appeals pointed out that a trial court's determination must rest on "whether the important and strong presumption that a child's interests are best served by placement with the natural parent is clearly and convincingly overcome" by the third party's evidence concerning the child's best interests. *See In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002). Father did not cite a case that supported the proposition that

the trial court must specify the standard of proof in its findings and conclusions. The trial court's findings and conclusions supported the strong presumption that the trial court follow the applicable law and employed the presumption favoring the natural parents over the third parties, but simply rendered a decision that was contrary to father's desired outcome. The trial court did not abuse its discretion in denying father's petition to terminate the guardianship.

2. *T.R. v. E.R.*, 134 N.E.3d 409 (Ind. Ct. App. 2019). In April 2015, mother and father married. They subsequently had two children. In July 2016, the Indiana Department of Child Services ("DCS") filed a CHINS petition. On January 16, 2017, while the CHINS case was still open, mother filed a petition to dissolve the parties' marriage. On February 24, 2017, the trial court held a preliminary hearing on the petition and refused to enter any order on custody or parenting time until the CHINS case was closed or the trial court was authorized by the juvenile court to proceed. On April 24, 2017, the trial court ordered assignment of the divorce case to the Marion County Family Court Project so that it could be bundled with the CHINS case. On July 26, 2017, the juvenile court entered an order on custody and parenting time under the divorce cause number. On May 3, 2018, the trial court approved a partially-mediated agreement regarding marital assets and liabilities and reserved all issues regarding the children for a final hearing. On December 6, 2018, the trial court held a final hearing. On December 14, 2018, the trial court entered its decree of dissolution of marriage. The trial court granted the mother sole legal and physical custody of the children, with father having supervised parenting time two hours per week at Kids' Voice of Indiana. Father appealed and the Indiana Court of Appeals affirmed and remanded. Father first contended that the trial court erred by ordering that his parenting time occur at an agency at his expense. The Court of Appeals found that the trial court had received sufficient evidence to determine that father's parenting time should take place at an agency. The Court of Appeals further inferred that the trial court concluded that father's finances were not the primary barrier between father and his parenting time. Father also contended that the trial court erred by ordering him to participate in a 26-week domestic violence program. Ind. Code § 31-34-20-3 provides that a juvenile court may order a parent to, among other things, "[o]btain assistance in fulfilling the obligations as a parent" and "[p]articipate in a mental health…program." A domestic violence program falls into both of these categories. While the Court of Appeals acknowledged that the wording of the statute was unclear, the juvenile court stated that the trial court would be assuming primary jurisdiction "to address all *other* issues" and inferred that the juvenile court's order regarding custody and/or parenting time would survive. The Court of Appeals remanded with instructions to the trial court to clarify its order in that regard. Father also contended that the trial court erred by ordering him to undergo a psychological evaluation. While father was correct that there is no specific statutory authority for a trial court to mandate a psychological evaluation as part of a divorce, the Court of Appeals "has previously held that trial courts have discretion to set reasonable restrictions and conditions upon a parent's parenting time…" *Pitcavage v. Pitcavage*, 11 N.E.3d 547, 561 (Ind. Ct. App. 2014). The Court of Appeals inferred that the trial court's intent was to condition father's parenting time on his completion of a psychological evaluation but remanded so that the trial court could clarify its findings and the nature of its order. The Court of Appeals also asked that on remand the trial court consider to whom proof of completion of a psychological evaluation should be provided and asked that the trial court consider whether that

should be a condition of his right to exercise parenting time and clarify the order. Finally, father contended that the trial court erred in its calculation of the amount of child support he owed. Father's relevant work history showed that he could earn from $36,000.00 per year to $43,000.00 per year. Although father had an Associate Degree in Applied Science, in November 2018, he began working for the United States Postal Service for up to 8 hours per week at $17.78 per hour. The evidence supported the trial court's conclusion that father was voluntarily unemployed since he could earn significantly more than $36,000.00. The Court of Appeals found it eminently reasonable that the trial court chose to impute that amount to father. As to preschool expenses, mother was working during the hours that the parties' children attended preschool and there was no error in ordering the parties to include childcare expenses in the child support calculation. The evidence showed that mother earned a weekly amount of $532.00, but the trial court calculated mother's weekly income to be $420.00 with no explanation for the deviation from the evidence in the record. The Court of Appeals remanded with instructions to either explain the deviation or recalculate child support with mother's weekly income at $532.00.

3. *Monasky v. Taglieri*, 140 S. Ct. 719 (2020). In 2011, Monasky and Taglieri were married the United States. Two years later they relocated to Italy where they both found work. Neither of them had definite plans to return to the United States. During the first year in Italy, Monasky and Taglieri lived together in Milan, but the marriage soon deteriorated. Taglieri became physically abusive and, according to Monasky, "forced himself upon [her] multiple times." In May 2014, Monasky became pregnant. Taglieri took up new employment in Lugo, Italy, while Monasky remained about three hours away in Milan. The long-distance separation and a difficult pregnancy further strained their marriage. Monasky looked into returning to the United States, applied for jobs there, asked about U.S. divorce lawyers, and obtained cost information from moving companies. In February 2015, the parties' daughter was born. Shortly thereafter, Monasky told Taglieri that she wanted to divorce him and that she anticipated returning to the United States. Later, however, she agreed to join Taglieri with their daughter in Lugo. On March 31, 2015, Monasky fled with the parties' daughter to the Italian police and sought shelter in a safe house. In April 2015, Monasky and the parties' daughter left Italy for Ohio where they moved in with Monasky's parents. Taglieri sought recourse in the courts. With Monasky absent from the proceedings, an Italian court granted Taglieri's request to terminate Monasky's parental rights. On May 15, 2015, Taglieri petitioned the United States District Court for the Northern District of Ohio for return of the parties' daughter to Italy under the Hague Convention on the grounds that Italy was her "habitual residence." After a four-day bench trial, the District Court granted Taglieri's petition. In line with its findings, the District Court ordered the parties' daughter's prompt return to Italy. The United States Court of Appeals for the Sixth Circuit and the United States Supreme Court denied Monasky's request for stay and the return order pending appeal. Monasky's appeal of the District Court's order proceeded. A divided three-judge panel of the Sixth Circuit affirmed the District Court's order, and a divided *en banc* District Court adhered to that disposition. The Supreme Court granted *certiorari* to clarify the standard for "habitual residence," an important question of federal and international law, in view of the differences in emphasis among the federal circuits. The first question presented concerned the standard for habitual residence. The Supreme Court held the determination of "habitual residence" did not turn on the existence of an

actual agreement. Because locating a child's home is a fact-driven inquiry, courts must be "sensitive to the unique circumstances of the case and informed by common sense." The Supreme Court's conclusion that a child's habitual residence depends on the particular circumstances of each case is bolstered by the views of treaty partners to the Hague Convention. The Supreme Court said that the bottom line that there were no categorical requirements for establishing a child's habitual residence – least of all an actual agreement requirement for infants. The Hague Convention has a mechanism for guarding children from the harms of domestic violence. The second question presented was what was the appropriate standard of appellate review of an initial "habitual residence" determination. Absent a treaty or statutory prescription, the appropriate level of deference to a trial court's "habitual residence" determination depends on whether that determination resolves a question of law, a question of fact, or a mixed question of law and fact. Generally, questions of law are reviewed *de novo* and questions of fact, for clear error, while the appropriate standard of appellate review for a mixed question "depends…on whether answering it entails primarily legal and factual work." The Supreme Court reasoned that clear error review has a particular virtue in Hague Convention cases, as a deferential clear error standard of review speeds up appeals and thus serves the Hague Convention's premium of expedition. The Supreme Court found that a remand would consume time and swift resolution with the Hague Convention's objective. In the exhaustive record before the District Court, the absence of any reason to anticipate the District Court's judgment would change on remand that neither party sought, and the protraction of proceedings, the Supreme Court affirmed the judgment of the Sixth Circuit. Justice Thomas concurred in part in the judgment, finding that the Supreme Court correctly concluded that an actual agreement between parents is not necessary to establish the habitual residence of an infant who was too young to acclimatize. He also agreed that the Supreme Court's conclusion that the habitual residence inquiry was intensely fact-driven. He wrote separately because he decided this case principally on the plain meeting of the treaty's text. Justice Alito also concurred in part and concurred in the judgement, agreeing with the majority, but also agreeing with Justice Thomas that the Supreme Court must independently interpret the meaning of "habitual residence." Justice Alito's concurrence interpreted "habitual residence" as not a pure question of fact but rather involving a heavily factual inquiry. He concluded that the standard of review was abuse of discretion and not clear error.

4. *Rasheed v. Rasheed*, 142 N.E.3d 1017 (Ind. Ct. App. 2020). In November 2011, mother and father married. They had two children. In November 2017, mother filed a petition for an order for protection against father alleging domestic or family violence. The trial court issued an *ex parte* order for protection. In December 2017, mother filed a petition for dissolution of marriage. In January 2018, the trial court issued a preliminary order that the parties share joint legal custody, mother have primary physical custody, and father have parenting time according to the Indiana Parenting Time Guidelines. The trial court also issued a permanent order for protection against father stating it expired on December 31, 2019. In March 2018, mother filed a petition for the appointment of a Guardian *Ad Litem*. The trial court appointed Kids' Voice of Indiana as Guardian *Ad Litem*. In June, July, and August 2018, father filed petitions for contempt. In August 2018, father also filed a petition to modify parenting time. On August 29, 2018, Kids' Voice of Indiana filed a motion for the appointment of a

parenting coordinator. On September 17, 2018, the trial court issued an order stating it had held a status hearing and appointed a parenting coordinator. On March 22, 2019, the Guardian *Ad Litem* filed a report stating mother continued to have significant concerns about one of the children's anxiety and trauma associated with father and his safety in eating at father's house. On April 1, 2019, the trial court held a final hearing. In June 2019, the trial court entered a Decree of Dissolution of Marriage that provided in part that the parties share joint legal custody of their children with mother having primary physical custody. Mother appealed and the Indiana Court of Appeals reversed as to the joint legal custody determination. Mother claimed that the trial court abused its discretion in awarding the parties joint legal custody. The Court of Appeals focused on Ind. Code § 31-17-2-15(2) as to whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare. The Court of Appeals noted that factor was of particular importance in making legal custody determinations, and that where the parties have made child-rearing a battleground, joint legal custody is not appropriate. Based on the record, and in light of the parties' history of non-cooperation, the Court of Appeals concluded that the trial court erred in ordering the parties to share joint legal custody. The Court of Appeals reversed and remanded for entry of a modified decree of dissolution of marriage providing that mother have sole legal custody of the parties' children.

5. *Hecht v. Hecht*, 142 N.E.3d 1022 (Ind. Ct. App. 2020). In 2012, mother and father married. They had two children. In October 2017, the parties divorced. The parties' settlement agreement provided that they would share joint legal and physical custody of the children. Mother was entitled to parenting time during the school week and on the first weekend of every month. Father was entitled to parenting time on all other weekends and on every Wednesday evening, with the exception of the weeks proceeding mother's weekend when father was entitled to have the children Tuesday and Thursday evenings. The parties agreed to a summer parenting time schedule that consisted of alternate weeks, with the parent not having the children for the week entitled to a midweek visit. One of the parties' children, T.H., was diagnosed with Williams Syndrome. That diagnosis compelled particular educational and medical needs. The parties' request for a change in legal and physical custody of the children arose from their inability to agree on T.H.'s educational path and whether T.H. should be medicated to control her impulsivity. The parties' disagreement in these areas resulted in in action on their part and a delay in crucial decision-making regarding T.H.'s needs. Educationally, the parties disagreed on whether T.H. should matriculate to the second grade. T.H.'s educational team agreed that she was not intellectually prepared to matriculate to second grade. Nevertheless, the educational team recommended that T.H. continue to matriculate with her classmates to second grade and through high school. The educational team further recommended waiting until high school before holding T.H. back a grade so that she could maximize her credit hours to secure a graduation certificate. Mother disagreed with that recommendation. Father agreed with that recommendation. The parties also disagreed as to whether T.H. should be medicated to control her impulsivity. T.H.'s geneticist recommended that she take Abilify. Weight gain was a common side effect of that drug and for Williams Syndrome patients. However, failure to regularly take Abilify as prescribed increased the risk of harmful side effects such as the possibility of seizures and death. Mother desired that T.H. take Abilify. Father opposed that T.H. take Abilify. He preferred that T.H. try behavioral therapy

before resorting to medication. The geneticist wrote a prescription for the medication and mother filled the prescription. However, mother did not administer the drug to T.H. In June 2018, mother filed a motion to modify custody and parenting time. In July 2018, father filed a petition to modify custody and parenting time. On May 31, 2019, and June 14, 2019, the trial court held an evidentiary hearing. On July 16, 2019, the trial court entered its order determining that mother should have sole legal custody of T.H. Father appealed and the Indiana Court of Appeals affirmed. Neither party filed an Ind. Trial Rule 52(A) request for special findings and conclusions. The Court of Appeals treated the trial court's order as *sua sponte* findings of fact. Father claimed that the trial court applied the wrong legal standard and that the trial court abused its discretion when it awarded mother sole legal custody of T.H. As to the legal standard, the trial court correctly cited Ind. Code §§ 31-17-2-13, 31-9-2-67, and 31-17-2-15. Consideration of both statutes was made clear by *Julie C. v. Andrew C.*, 924 N.E.2d 1249 (Ind. Ct. App. 2010). Although the trial court did not specifically reference §§ 8 and 21, it applied the correct legal standard and considered all of the required statutory factors and determined that mother should have sole legal custody of T.H. As to the sufficiency of the evidence, the Court of Appeals heard witnesses first hand, observed their demeanors, and ultimately decided that mother should have sole legal custody of T.H. Under the facts and circumstances of this case, the Court of Appeals could not second guess that decision.

6. *Anselm v. Anselm*, 146 N.E.3d 1042 (Ind. Ct. App. 2020). On May 31, 2014, the parties married. They had two children. During the marriage, father's work schedule required him to work three overnights per week one week and four overnights per week the next week on rotating nights. Mother worked as an office manager for her parents' company. On March 20, 2018, mother filed a petition for separation and temporary custody of the children and child support. At a hearing on mother's petitions, the parties signed and submitted a Child Support Obligation Worksheet on which the parties agreed that father earned $900.00 per week and mother earned $543.00 per week. On August 17, 2018, mother converted her legal separation action into a divorce action. The trial court appointed a Guardian *Ad Litem* ("GAL"). On December 25, the GAL submitted her report to the trial court. In her report, the GAL recommended that mother have primary physical custody based on the fact that mother "is the primary caregiver for doctors appointments and routine daily needs" of the children. At the conclusion of the final hearing, the trial court dissolved the parties' marriage. The trial court found that the parties should share joint legal custody of the children, with mother awarded physical custody. The trial court ordered father to pay mother child support in the amount of $173.00 per week. As to real estate that the parties owned in Remington, Indiana that was owned by father prior to the marriage, the trial court found that there was $33,000.00 of equity in that real estate and the mother should receive 50% of the equity. Father appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded with instructions. As to physical custody, the Court of Appeals noted that trial courts must consider all relevant factors under Ind. Code § 31-17-2-8. Trial courts are not required to enter a finding as to each statutory factor it enters in making a custody determination. The plain language of the statute only requires that trial courts to "consider" the factors, and not to make a finding regarding each factor. The evidence supported the findings and the trial court did not abuse its discretion in awarding mother primary physical custody of the children. As to the trial court's reliance on an

unsigned child support worksheet, father did not object to that worksheet or otherwise dispute the content so he could not complain that the trial court improperly relied on that exhibit. Father also did not demonstrate that the trial court failed to properly credit him for the children's health insurance premiums. As to uninsured medical expenses, the trial court's order required father to pay for uninsured medical expenses twice – a prepayment when he paid his child support obligation (the 6% Rule amount) and the actual, full payment when the uninsured healthcare expenses were incurred. Such double payments were precisely the scenario the 6% Rule was designed to prevent. Here, the trial court neither awarded father a credit for the 6% of the healthcare expenses that he was already paying nor explained why such a credit would be inappropriate on the facts. As to the equity in the real estate, the Court of Appeals reversed and remanded with instructions for the trial court to divide the correct amount of the equity ($10,367.97) between the parties equally.

7. *In re Paternity of I.P.*, 148 N.E.3d 1098 (Ind. Ct. App. 2020). In February 2012, mother and father became the parents out-of-wedlock of child in Ohio. That same month, father established paternity of the child by way of a paternity affidavit in Ohio. Neither mother nor father ever petitioned any court for orders regarding custody, parenting time, or child support regarding child until the State of Indiana initiated a child support action. Although mother and father never wed, they lived together with child at maternal grandfather's home for approximately one year after child's birth. In 2013, mother, father, and child moved to California and lived in two different California residences. In November 2017, mother, father, and child decided to return to Indiana to be closer to family and to enroll child in Franklin County, Indiana schools. After moving back to Indiana, mother and father remained together for approximately one year in their home in Fayette County, Indiana. In November 2018, mother and child moved out of father's home. Mother and child then began living with maternal grandfather in Franklin County, Indiana, again. In early-2019, child stayed with father for a portion of time while mother recovered from a car accident. Mother also spent some time living with father so she could see child. Father testified child lived with father for two months. Otherwise, child resided with mother. Father regularly exercised parenting time with child every Wednesday night and every other weekend pursuant to an informal agreement between mother and father. Mother applied for benefits for child through the State of Indiana. On May 13, 2019, the State of Indiana filed a Title IV-D action to seek a court order obligating father to pay child support to mother. On May 29, 2019, father filed a petition for custody of child. On September 5, 2019, the trial court held an evidentiary hearing on father's petition for custody. At the end of father's presentation of evidence, mother moved for judgment on the evidence. The trial court denied that motion. On November 5, 2019, the trial court granted father's petition for custody without issuing findings or conclusions. Mother appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted the difference in standards between an initial custody order and a modification of custody order. Ind. Code § 31-14-13-1 provides that a biological mother of a child born out-of-wedlock has sole custody of the child unless a statute or court order provides otherwise. Ohio had a similar statute. For the entirety of child's life, mother had legal and physical custody of the child. In order for father to obtain custody of the child after mother's seven years of sole physical and legal custody, father's petition should have been construed as a petition to modify custody with father required to meet

the requirements of Ind. Code § 31-14-13-6. The Court of Appeals first addressed whether there had been a substantial change in one or more of the factors articulated in Ind. Code 31-14-13-2. The Court of Appeals determined that father failed to present evidence to show a substantial change in at least one of the Ind. Code §31-14-13-2 factors. The Court of Appeals also concluded that no evidence existed in the record for which it could conclude that modification of custody to father was in the child's best interest. The trial court abused its discretion in granting custody of child to father.

8. *Jones v. Gruca*, 2020 WL 3282524 (Ind. Ct. App. June 18, 2020). In 1999, the parties married. They had two children. In May 2018, the trial court held a final hearing on mother's petition for dissolution of marriage, after which it entered its order dissolving the parties' marriage and establishing custody, parenting time, and child support for the children. Following the final hearing, but prior to the entry of the decree of dissolution of marriage, mother agreed to modify custody. In September 2019, the trial court entered its order denying mother's motion. In relevant part, the trial court found and concluded that Ind. Code § 31-17-2-21 allows a court to modify custody only if the modification is in the children's best interests and if there is a substantial change in one of several factors that courts may consider in initially determining custody. The trial court entered extensive findings in denying mother's modification motion. Mother appealed and the Indiana Court of Appeals affirmed. The Court of Appeals noted that mother bore the burden of proof on her motion in the trial court and that her appeal from the trial court's denial of that motion was an appeal from a negative judgment. The Court of Appeals rejected mother's initial argument that the trial court's judgment was not supported by sufficient evidence. The Court of Appeals also rejected mother's assertion that the trial court denied her constitutional right to bring issues before the court by ordering that future issues regarding custody, support, or parenting time to go to a parenting coordinator before bringing those issues to the trial court. Going to the parenting coordinator as a prerequisite for future filings did not constitute the trial court improperly delegating its judicial power by requiring the parties to first try to resolve their disputes out of court with a parenting coordinator.

9. *McDaniel v. McDaniel*, 2020 WL 3968085 (Ind. Ct. App. July 14, 2020). In April 2013, the parties divorced. They had one child born in May 2008. Mother was granted primary physical custody of child and the parties shared joint legal custody. In April 2018, mother filed a notice of intent to relocate. On May 7, 2018, father filed his objection to relocation and request for an evidentiary hearing. On June 14, 2018, the trial court held an evidentiary hearing. During the hearing, mother stated that she had already sold her Dearborn County, Indiana residence and moved to Richmond, Indiana. Father's counsel emphasized that father lived in northern Kentucky and that the move would increase father's travel time to see child by more than 1 ½ hours. Father did not file a written petition to modify custody or seek an injunction against mother although father's counsel represented those options to the trial court. The trial court took the relocation matter under advisement pending a report from a court-appointed Guardian *Ad Litem* ("GAL"). In the interim, mother filed multiple *pro se* motions for contempt against father. Following a hearing on those motions, the trial court found the motions unsubstantiated and declined to find father in contempt. The trial court noted that the parties had difficulties with communication. The trial court advised the parties that the GAL report was

complete and scheduled the hearing on the relocation issue. In November 2018, the trial court held a hearing regarding mother's relocation request. On December 21, 2018, the trial court denied mother's request. Acknowledging that mother had already sold her house and moved out of child's previous school district, the trial court encouraged the parties to reach an agreement on the issue and, if not, the trial court would set the matter for hearing upon motion. On January 16, 2019, mother filed a motion to correct error. On September 9, 2019, the trial court conducted a hearing on mother's motion to correct error and father's petition to modify child custody, visitation, and child support. The trial court entered extensive findings, considering the statutory factors regarding child custody provided in Ind. Code § 31-17-2-8, and concluded that child's best interests would be served by a modification of custody to father having primary physical and sole legal custody. Mother was granted parenting time pursuant to the Indiana Parenting Time Guidelines. Mother appealed and the Indiana Court of Appeals affirmed. Mother first contended that the trial court's modification order was clearly erroneous and an abuse of discretion. Ind. Code § 31-17-2-21 provides that the trial court may not modify an existing custody order unless (1) a modification is in the best interest of the child, and (2) there has been a substantial change in one or more statutory factors outlined in Ind. Code § 31-17-2-8. Interpreting Ind. Code §31-17-2-21, the Court of Appeals had held that "all that is required to support modification of custody…is a finding that a change would be in the child's best interests, a consideration of the factors listed in I.C. § 31-17-2-8, and the finding that there has been a substantial change in one of those factors." Father presented ample evidence that since the original custody order there had been a substantial change in the interaction and interrelationship of child with others, including father and child's extended family. Moreover, father presented additional evidence in changed circumstances that, along with moving child to Richmond, mother had recently married an individual that had significant involvement with the legal system (13 criminal cases and 17 civil cases). Mother also suggested that the trial court lacked the authority to "*sua sponte*" modify joint legal custody because father did not request that in his petition to modify. Trial courts are not precluded from entering a custody arrangement not specifically advanced by either party so long as that custody arrangement is in the child's best interest. Mother cited *In re Paternity of W.R.H.*, 120 N.E.3d 1039 (Ind. Ct. App. 2019), in which a divided panel of the Court of Appeals reversed the trial court's modification of legal custody, concluding that the issue of legal custody was not properly before the trial court. The majority concluded that, pursuant to the Indiana Relocation Statute (Ind. Code § 31-17-2.2-1), legal custody is not necessarily at issue at the hearing on a party's request to relocate and mother did not have notice that the trial court could modify legal custody. The Court of Appeals determined *W.R.H.* inapplicable in this case because *W.R.H.* involved a hearing on a request to relocate as a petition for custody, and modification directly stemmed from that request. The Court of Appeals agreed with the reasoning of the dissent in *W.R.H.* that the child's best interests is the touchstone of any custody determination and that the trial court's discretion is "unfettered by the contents of a party's motion for the hearing." The Court of Appeals declined to reweigh the evidence as mother requested. The trial court's modification order was neither clearly erroneous nor an abuse of discretion. The trial court also did not abuse its discretion in denying mother's request to relocate, determining that issue effectively was moot as a finding that the trial court abused its

discretion on the relocation issue would have zero effect on the fact that mother no longer had primary physical custody of child.

10. *Madden v. Phelps*, 2020 WL 4211564 (Ind. Ct. App. July 23, 2020). On January 20, 2011, B.P. was born to mother and father. Parents, B.P., and mother's two children from a prior relationship resided at a home in New Castle, Indiana, which had been left in trust to mother's two older children by their deceased father. After parents terminated their relationship, mother continued to reside in New Castle and father resided Bloomington, Indiana. On April 9, 2012, father's paternity was established by an entry of a judgment that provided that parents would share joint legal custody but that mother would have primary physical custody of B.P. At the age of 3, B.P. was diagnosed with a language disorder and development delay. When B.P. was 4 years old, he was diagnosed with Autism Spectrum Disorder. It was recommended at the time that B.P. receive more intensive school services than he was currently receiving, that he continue with outpatient occupational and speech therapy, and that the parents receive education or support to assist with consistent parenting. B.P. had an Individual Education Plan at his public school. B.P.'s therapist recommended that he engage in group activities outside of school to assist in his social development. The parents' attempts to co-parent B.P. were not without conflict. In 2018, parents agreed to the use of a parenting coordinator. On February 5, 2018, after further litigation between parents, the trial court entered an order appointing Dr. Erica Kane as a parenting coordinator, whose mandate was to assist parents to resolve their issues without court intervention. Dr. Kane was to make binding recommendations but she was not to serve as a custody evaluator or offer a binding recommendation for a change in B.P.'s primary physical residence. On March 16, 2018, more litigation between the parties began. In the Spring 2018, parents did not agree whether B.P. should participate in basketball and soccer. Dr. Kane issued a binding recommendation that B.P. should participate because those activities would assist in his socialization. B.P. attended all practices and games when he was in father's care, but mother did not take B.P. to sports when he was with her. In May 2018, mother was notified by the trustee that the trust holding the New Castle home that she would require to vacate within 30 days. In June 2018, mother vacated the New Castle home, but did not file a notice of intent to relocate. The parties' disagreed about father's summer parenting time. Father timely submitted his proposed dates, but mother disagreed with his selected schedule. In July 2018, Dr. Kane made a binding recommendation that the parents follow father's selected schedule for parenting time. On August 1, 2018, father filed a contempt motion against mother alleging mother had not followed Dr. Kane's binding recommendations on summer parenting time. On August 28, 2018, the trial court found mother in contempt and ordered her to serve 30 days in jail. The trial court allowed mother to purge herself of contempt by providing father with 34 days of consecutive parenting time and paying $750.00 to father's attorney. On January 22, 2019, father filed a motion for contempt and mediation seeking payment of uninsured dental expenses that mother had previously been ordered to pay, mediation of his March 16, 2018, parenting time modification motion, and payment of the $750.00 in attorneys' fees mother had been ordered to pay after she was found in contempt. The parties engaged in mediation. On March 18, 2019, the mediator filed a mediated partial agreement. In May 2019, father moved to a home in New Castle that was located approximately 8 miles from his previous home. Father notified his attorney of his move in April 2019, but his attorney did not file a notice of intent to relocate with

the trial court. Father's move did not result in any changes in B.P.'s care. Father did not alert mother to his change of address, which resulted in mother calling law enforcement when she attempted to retrieve B.P. at father's old address and was informed that father had moved. In May 2019, father contacted mother about B.P.'s participation in summer soccer and baseball. Mother responded via e-mail that she would have to consult with her attorney about the matter. Mother never provided father with further input on B.P.'s summer sports, so father enrolled him and provided mother with the schedule. Mother did not take B.P. to summer sports when he was in her care. On May 6, 2019, father filed a verified motion to address issues regarding custody and parenting time, as well as other issues. On June 25, 2019, father filed a belated notice of intent to relocate. On June 26, 2019, mother filed a contempt motion against father alleging he not followed the required procedures for making medical and extracurricular activity decisions and then moved without filing a proper notice of intent to relocate. On June 27, 2019, father filed a contempt motion against mother for failing to provide him with a previously ordered utility bill and proof of payment for the New Castle home. On July 3, 2019, the trial court held a hearing on mother's motion to have Dr. Kane removed as parenting coordinator. Dr. Kane testified that she had a personal bias against mother as a result of the allegations made by mother at her removal petition. On July 9, 2019, the trial court entered an order allowing Dr. Kane to withdraw and directing her to file a final report with the court. On August 5, 2019, Dr. Kane submitted her final report to the trial court, which was highly critical of mother. On August 14, 2019, the trial court held a hearing on all pending motions. Joint legal custody was not mentioned as an issue. On October 21, 2019, the trial court entered its order on all pending matters in which it awarded primary physical and sole legal custody of B.P. to father. Mother appealed and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded. As to legal custody, mother first challenged that the issue of the trial court's award of sole legal custody to father was not properly before the trial court. The Court of Appeals examined the substance of the parents' motion and revealed that their dispute pertained only to the physical custody of B.P. Legal custody never was mentioned by either party. The parties also did not consent to try the issue of joint legal custody during the hearing. The Court of Appeals reversed the portion of the trial court's order granting sole legal custody to father. As to physical custody, mother challenged various findings. Mother failed to meet her burden of persuasion on appeal to show that the evidence "positively required the conclusion" that she have primary physical custody of B.P. As to the contempt issue and the trial court's award of $1,000.00 in attorneys' fees to father, the Court of Appeals agreed that there was no evidence in the record to support the trial court's award. The Court of Appeals vacated the portion of the trial court's order awarding father $1,000.00 in attorneys' fees in relation to his contempt motion. Finally, as to Dr. Kane's fees, mother argued that the portion of the trial court's order directing her to pay $3,645.50 was clearly erroneous. Father had been ordered to pay $593.75 in parenting coordinator fees. Mother overlooked the fact that the parenting coordinator appointment order provided that Dr. Kane had the authority to "charge either party separately for individual contacts with that party or joint contacts made necessary by that party's behavior." The trial court was within the parameters of its previous order in determining that mother should pay $3,645.50 in parenting coordinator fees, and that order was supported by the record and was not clearly erroneous. Judge Tavitas concurred in the result but wrote separately

regarding Dr. Kane's recommendation that the child's "needs may be best met with Father as the primary custodian." She indicated that not only did Dr. Kane exceed the scope of her duties as outlined in the trial court order, but she also became an advocate. When parties work with a court-appointed parenting coordinator, they expect to be aided by a neutral official in resolving disputes. The parties do not expect the parenting coordinator to simultaneously assess the parties for the court or to advocate regarding such matters as custody. Judge Tavitas deemed this as the first step down a slippery slope because such conflation of roles can sabotage the parenting coordination process.

E. ADOPTION/PATERNITY

1. *In re D.H.*, 135 N.E.3d 914 (Ind. Ct. App. 2019). Child was born in April 2015 to mother and father. Mother and father never married, but they lived together for over one year in Greene County, Indiana. At birth, child's meconium tested positive for Hydrocodone, and mother tested positive for opiates and benzodiazepines. On May 7, 2015, the Greene County Office of the Department of Family and Children ("DCS") entered an informal adjustment and assessed K.W. for substance abuse. On July 22, 2015, DCS filed a CHINS petition due to mother's non-compliance with the informal adjustment. During the pendency of the CHINS action, mother tested positive for various substances, including THC, Tramadol, and Hydrocodone. In September 2015, mother moved out of father's residence and left child with father filing a domestic violence incident. In October 2015, on two occasions, mother asked father to bring child to visit mother at work and at her sister's home, and father obliged. In a subsequent paternity action, the parties were granted joint legal custody and father was awarded primary physical custody with mother having supervised parenting time pursuant to the Indiana Parenting Time Guidelines. In November 2015, father and stepmother began dating. On December 16, 2015, the trial court approved father's and mother's joint stipulated order regarding pick-ups and drop-offs and potential adjustments to mother's parenting time. That month, mother moved approximately 90 miles away to Johnson County, Indiana. After mother moved, her contact with child was sporadic and inconsistent. On September 11, 2016, mother participated in a supervised visit with child and did not visit again with child until February 3, 2018. During this period, mother appeared to have worked to achieve sobriety. Mother passed drug screens to secure employment, maintain gainful employment, secured stable housing, and obtained means of transportation. Thereafter, mother resumed her request to schedule supervised visits with child. On April 2, 2018, stepmother filed a petition to adopt child. Stepmother alleged that mother's consent was not required because mother had not financially supported the child and had only limited contact with child. Stepmother further alleged that mother was "unfit" to parent child. On April 12, 2018, mother filed an objection to the adoption petition. On February 1, 2019, following a hearing, the trial court concluded, following a hearing, that mother's consent was not required for stepmother's adoption of the child. On March 12, 2019, the trial court entered a decree of adoption. Mother appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted that, as to biological parents, "[t]he most protected status in any adoption proceeding is that of the natural parent. Recognizing the fundamental importance of the parent-child relationship, our courts have strictly construed the adoption statute to preserve that relationship." (*quoting In re Adoption of M.W.*, 933 N.E.2d 909, 913 (Ind.

Ct. App. 2010), *adopted by* 941 N.E.2d 1042 (Ind. 2011)). The Court of Appeals recited Ind. Code § 31-19-9-8(a) when consent to adoption is not required and cited *In re Adoption of E.B.F.*, 93 N.E.3d 759 (Ind. 2018). As to abandonment, the record revealed that mother had testified that she had never intended to abandon the child and the circumstances of her breakup with father tended to support her claim that she did not intend to abandon child. Based on *E.B.F.*, the Court of Appeals concluded that the trial court's finding that mother abandoned or deserted the child was clearly erroneous. As to failure to communicate, the Court of Appeals found that this case was factually akin to *E.B.F.* with respect to the acuteness of mother's addiction, mother's reasons for moving away, and the resulting justifiable cause analysis. Mother's February 13, 2018, visit, coupled with her other contacts, sufficed for purposes of preserving her right to consent to the adoption. Mother's attempts to achieve sobriety supplied justifiable cause for her failure to maintain significant contact for over one year. Guided by *E.B.F.*, the Court of Appeals found that under the totality of the circumstances mother had justifiable cause for her failure to communicate with child for a time exceeding one year such that it was clear error to dispense with her consent for purposes of stepmother's adoption. As to mother's failure to support child, the Court of Appeals again followed *E.B.F.* and noted that no child support order was in effect and that mother offered financial assistance that was refused by father. The trial court's finding was clearly erroneous and mother's consent was necessary to grant stepmother's adoption petition.

2. *D.T.* v. *J.M.*, 136 N.E.3d 323 (Ind. Ct. App. 2019). Mother and father had two children, born in August 2008 and December 2009. Mother and father married some time in 2009. In late-2010 or early-2011, mother and father separated. In April 2011, father was arrested and charged with a Class A Felony dealing in methamphetamine. Father later pled guilty and was sentenced to 40 years in the Indiana Department of Correction. After father's arrest, mother filed a petition for dissolution of marriage. In June 2011, the divorce was final. According to the decree of dissolution of marriage, mother was awarded sole legal and physical custody of the children with any visitation by father subject to her approval. Father was not ordered to pay any child support while he was incarcerated. When father was first incarcerated, mother brought the children to visit him. After mother met adoptive father, the visits stopped. In 2013, mother and the children moved in with adoptive father. In September 2014, mother and adoptive father married. Father tried to stay in contact with the children, including sending them cards and letters and calling mother's phone, but mother did not give the cards and letters to the children or answer his phone calls. In October 2017, father filed a petition for parenting time with the children which the trial court denied. In November 2017, adoptive father filed a petition to adopt the children. Father objected and a hearing was held. The trial court first addressed the issue of whether consent by father was required. The trial court ruled that father's consent was required. Subsequently, the trial court issued an order granting adoptive father's petition to adopt the children. Father appealed and the Indiana Court of Appeals reversed and remanded. Ind. Code § 31-19-11-1(a) lists the prerequisites to granting an adoption petition, including that "the adoption requested is in the best interest of the child" and "proper consent, if consent is necessary, has been given." The trial court specifically found that father's consent to the adoption was required, and in making that finding the adoption could not proceed. The trial court failed to make the specific findings required by Ind. Code § 31-19-9-8(a)(11) as to what

constituted an "unfit parent." The trial court's order conflated the first best interest inquiry under Ind. Code § 31-19-9-8(a)(11) to dispense with father's consent and the best interest analysis for adoption under Ind. Code § 31-19-11-1(a). The Court of Appeals remanded with instruction for the trial court to first determine whether father was an unfit parent and, if so, whether it was in the best interest of the children to dispense with his consent. Only if the trial court made the first two determinations was it to move on to the best interest analysis required under Ind. Code § 31-19-11-1(a).

3. *J.F. v. L.K.*, 136 N.E.3d 624 (Ind. Ct. App. 2019). In December 2009, J.F. and E.F. married. In November 2010, child was born. On July 30, 2012, a different court ordered child's maternal grandparents to be child's guardians. On May 28, 2014, adoptive parents filed a petition for adoption of child. The petition stated that J.F. and E.F. had been separated since child's birth, E.F. and child had resided at adoptive parents' home since J.F. and E.F. separated, and child had been adoptive parents' care and custody all of her life. Adoptive parents alleged that E.F. consented to their adoption of child and that J.F.'s consent was not required because, for a period of at least one year, he knowingly failed to provide for the care and support of child when able to do so and had only made token efforts to support or communicate with child. On July 28, 2014, E.F. filed a petition for dissolution of marriage. On March 5, 2015, in the guardianship action and divorce action, an agreed entry signed by J.F., E.F., and adoptive parents was entered that provided J.F. with supervised parenting time. Following several filings in each of the 3 cases, the trial court in the adoption case found that J.F.'s consent to the adoption was not necessary. On June 7, 2016, in the divorce case, E.F. appeared in person *pro se*, J.F. appeared in person *pro se*, and the parties notified the trial court that the minor child of the parties had been adopted. On June 21, 2017, J.F. filed a motion for relief from judgment in the adoption case, challenging the August 10, 2015, decree of adoption. On March 5, 2019, the trial court entered an order dismissing J.F.'s motion for relief from judgment. J.F. appealed and the Indiana Court of Appeals affirmed. J.F. acknowledged that he did not meet the strict deadline imposed by Ind. Code §§ 31-19-14-2 and 4 but argued that statutes were not an absolute bar. J.F. filed his motion for relief from judgment on June 21, 2017, which was well after the deadline set forth in Ind. Code § 31-19-14-2. J.F. had notice of the adoption and that, in light of the time period set forth in the relevant statutes in Ind. Trial Rule 60(B) and J.F.'s knowledge of the adoption, his motion for relief from judgment was not timely filed and the trial court did not abuse its discretion.

4. *In re Adoption of C.A.H.*, 136 N.E.3d 1126 (Ind. 2020). In 2015, child was born to mother and father. Since March 2016, child's maternal grandparents cared for child. In June 2016, maternal grandparents were appointed child's guardians. In May 2017, maternal grandparents filed a petition to adopt child. The petition claimed that father's consent to the adoption was unnecessary under Ind. Code §§ 31-19-9-8(a)(1)-(2), 31-19-9-8(a)(11), and 31-19-9-8(b). Specifically, grandparents claimed that for a period of at least six months preceding the filing of the petition, father had "abandoned and deserted" child, and that for a period of at least one year preceding the filing of the petition, father had failed to communicate with or provide financial support for child. Father filed a motion contesting the adoption. In September 2017, father failed to appear for a deposition. Maternal grandparents filed a motion to dismiss father's

motion to contest the adoption and father responded that he failed to appear because he was incarcerated. In April 2018, the trial court issued orders establishing paternity in father. At a July 18, 2018, hearing, father appeared and mother withdrew her consent to adoption. The final hearing was rescheduled to January 4, 2019. Father failed to appear the morning of the final hearing, although father's counsel informed the trial court that she had had "multiple" phone calls with father the day before and he had indicated he would attend. The trial court denied father's counsel's oral motion for continuance and entered a decree of adoption. The Indiana Court of Appeals affirmed in a divided opinion. *Matter of Adoption of C.A.H.*, 132 N.E.3d 403 (Ind. Ct. App. 2019). The majority found that the case was similar to *K.S. v. D.S.*, 64 N.E.3d 1209 (Ind. Ct. App. 2016). Chief Judge Vaidik dissented. The Indiana Supreme Court reversed and remanded for a hearing on the merits of father's motion to contest the adoption. The trial court's decree of adoption cited only to the fact that father failed to appear at the final hearing and concluded that father's consent to child's adoption was not required. Father's failure to attend the final hearing, one that had been rescheduled at his request and three times at the request of other parties, was insufficient to overcome the important liberty interests at stake by finding him in default. Father's failure to appear at a single hearing also was insufficient to support a finding of implied consent when he appeared at other hearings, maintained contact with his attorney, and otherwise participated in the proceedings. The Supreme Court indicated that the reversal of the trial court's order did not mean that father necessarily would succeed in rebutting the allegations on remand; it simply provided father the opportunity to try. A parent's implied consent to the adoption of a child may not be based solely on the parent's failure to appear at a single hearing.

5. *In re M.A.M.*, 137 N.E.3d 1019 (Ind. Ct. App. 2019). In September 2014, child was born out-of-wedlock. Child lived with mother in Miami County, Indiana. In November 2018, alleged father applied for Title IV-D child support services through the Miami County Prosecutor's office. After receiving alleged father's application, the prosecutor filed a Verified Petition to Establish Paternity. In January 2019, at an initial hearing, the trial court ordered genetic testing. The testing established a 99.99999996% probability that alleged father was child's father. Shortly thereafter, mother filed a motion to dismiss, for judgment on the pleadings, and for summary judgment. Mother asserted, in part, that alleged father was barred from bringing the action by Ind. Code § 31-14-5-3, which provided that a man claiming to be a child's father must generally file a paternity action within two years of the child's birth. The prosecutor filed a response, acknowledged that the original petition was erroneous filed with alleged father as the petitioner rather than by the State of Indiana on behalf of the child. The prosecutor also filed an amended petition to establish paternity. Mother moved to strike the amended petition, arguing that Indiana's paternity statutes do not authorize prosecutors to bring paternity actions. After hearing oral argument from counsel, the trial court granted mother's motion to strike. The prosecutor appealed and the Indiana Court of Appeals, in a 2-1 decision, reversed. The sole issue before the Court of Appeals was whether the prosecutor was statutorily authorized file an amended paternity petition. Mother did not dispute that the prosecutor was operating a contract to address child support issues, but contended that the authority granted by Ind. Code § 31-14-4-1(7)(B) was strictly limited by Ind. Code § 31-14-4-3. Mother contended that the latter statute identified the only circumstances in which prosecutors could file paternity

actions. The Court of Appeals acknowledged that there was tension between these statutes as to the breadth of the authority of prosecutors to file paternity actions, but indicated that it thought that the Indiana General Assembly had established a tie-breaker. In Ind. Code § 31-14-1-1, the legislature explicitly stated that it "favors the public policy of establishing paternity under this Article of a child born out of wedlock." To the extent the statutes were at odds, this express policy indicated that the ambiguity should be resolved in favor of allowing a paternity action to proceed. The majority opinion also dismissed three other arguments by mother, including that she had a "constitutional right" to raise child as she saw fit. Judge Riley dissented, finding that the authority and the constraints on a prosecutor's obligation to act as a child's next friend in bringing a paternity action emanated from state statutes rather than the Title IV-D program or Federal grants initiatives. Accordingly, the state could not bring a paternity action as a child's next friend at an alleged father's request.

6. *Young v. Davis f/k/a Brummet*, 139 N.E.3d 1099 (Ind. Ct. App. 2019). In mid-2012, mother engaged in sexual relationships with both Young and Faunce. Around that time, mother became pregnant. On April 24, 2013, child was born. On October 29, 2015, Young filed a petition to establish paternity of child. At a November 13, 2015, hearing, Young and mother indicated that Young was child's father. Young and mother also claimed to have executed a paternity affidavit shortly after child's birth but neither party provided a copy of the paternity affidavit to the trial court. On August 9, 2016, while the paternity actions was pending, the trial court entered an order establishing Young as child's father. Mother filed a motion for genetic testing and Young objected, claiming that mother was not entitled to genetic testing because they had executed a paternity affidavit. Young did not support his claim by providing the trial court with a copy of the paternity affidavit. On September 6, 2016, Faunce filed a motion to intervene and for genetic testing. On October 26, 2016, the trial court issued an order granting Faunce's request for genetic testing. On or about November 28, 2016, the trial court issued an order granting Young's petition to establish paternity. Mother, Faunce, and Young subsequently filed a joint petition requesting that the trial court enter an agreed order for genetic testing. On February 1, 2018, the trial court granted that joint petition. On April 20, 2018, the results of genetic testing were filed with the trial court indicating a 99.99% probability that Faunce was child's biological father. On May 14, 2018, mother filed a motion to vacate the November 28, 2016, paternity order. Mother subsequently petitioned the trial court to enter an order establishing paternity in Faunce. On September 26, 2018, at a hearing on all pending motions, Young for the first time provided the trial court with a copy of the paternity affidavit that he and mother executed. On December 26, 2018, the trial court issued an order in which it found that mother knew that Young was not child's biological father when she and Young executed the paternity affidavit, and that, although mother had initially falsely informed Faunce that he was not child's biological father, genetic testing had subsequently confirmed otherwise. The trial court also found that mother admittedly gave false testimony, vacated the November 28, 2016, order establishing paternity in Young, and established paternity Faunce. Young appealed and the Indiana Court of Appeals affirmed. The parties agreed that mother's motion was essentially an Ind. Trial Rule 60(B) motion for relief from judgment. The Court of Appeals rejected Young's argument that the trial court abused its discretion in granting mother's motion to vacate the November 28, 2016, order establishing his paternity. Both mother and Faunce had

standing to challenge the November 28, 2016, order establishing paternity in Young, and the presumption of paternity based on a paternity affidavit may be rebutted pursuant to Ind. Code § 16-37-2-2.1(l).

7. *In re Support of J.O.*, 141 N.E.3d 1246 (Ind. Ct. App. 2020). On April 26, 2017, child was born. Mother had previously told father that he was child's biological father, but father had questions as to the truth of her assertion. While he was at the hospital, father asked for a DNA test but was told that he would have to go somewhere else for the test. Father "apparently liked the idea of being a father," so when mother allegedly told him he would not be able to see child if he did not sign the paternity affidavit he agreed to sign even though he suspected that he was not child's biological father. Father did not read the paternity affidavit before he signed it. In May 2017, father obtained a home DNA test from a local pharmacy. The result of the DNA test allegedly showed that father was not child's biological father. Father informed mother of the result but she denied that it was accurate. In April 2018, father submitted genetic samples to a certified laboratory. The test also showed that father was not child's biological father. Mother again denied that the test was accurate. At some point in 2018, mother asked the St. Joseph County, Indiana prosecutor to initiate a child support action. Mother stated she took this action because she wanted a court-sanctioned genetic test which she believed would show that father was child's biological father. In November 2018, the prosecutor's office filed a petition to establish child support. On January 7, 2019, father moved to dismiss the child support petition to have his name removed from child's birth certificate. On March 6, 2019, the trial court ordered the parties to submit to genetic testing. The trial court based this order on a finding that there was a mistake of material fact in connection with the execution of the paternity affidavit – mother's mistaken belief that father was child's biological father. The trial court found that father did not show duress or fraud in connection with the paternity affidavit, specifically noting that the evidence in the record did not support a conclusion that mother "made a knowing misrepresentation of fact concerning the biological father of the child…" On August 7, 2019, the trial court granted father's motion to dismiss because the genetic test results showed that father was not child's biological father. The state of Indiana appealed and the Indiana Court of Appeals reversed. The state suggested that father's motion to dismiss the child support petition was akin to a motion to dismiss for failure to state a claim under Ind. Trial Rule 12(B)(6). The Court of Appeals agreed, but noted that an evidentiary hearing occurred so that the motion should be treated as a summary judgment motion under Ind. Trial Rule 56. Father's request to rescind the paternity affidavit took place more than 60 days after the execution of the paternity affidavit, so he was required to establish fraud, duress, or material mistake of fact in connection with the execution. *See* Ind. Code § 16-37-2-2.1(l). The trial court found no evidence of fraud or duress, and the Court of Appeals agreed that the evidence in the record did not support such claims. Father suspected at the time he signed child's paternity affidavit that he was not the biological father. He even requested a DNA test at the hospital, but was told that he would have to do that elsewhere. The Court of Appeals noted prior decisions that recognized, in a similar situation where setting aside paternity would leave a child fatherless, the child would be "a *filius nullius*." The paternity statute was created to avoid such an outcome and the trial court erred by granting father's motion to dismiss. Father was child's legal father with all attendant legal consequences, and it was too late to find otherwise.

8. *In re Paternity of C.B. and S.B.*, 144 N.E.3d 759 (Ind. Ct. App. 2020). Mother and father never married but had two children. In 2015, father petitioned to establish paternity of the children. Father was represented by counsel and mother was represented by counsel. The parties stipulated that father was the father of the children, and a hearing was eventually held on the remaining issues. On October 3, 2017, the trial court issued an order awarding mother sole legal and primary physical custody of the children, with father to have parenting time. In addition, the trial court ordered father to pay $25,000.00 over and above the amounts he had already paid to mother's attorney. The trial court reduced that amount to judgment in favor of mother's attorney and against father. Thereafter, father appealed and mother cross-appealed. In January 2018, mother filed a petition for appellate attorneys' fees. The trial court did not rule on mother's petition at the time. In February 2018, while briefing in the first appeal was continuing, father sought a second appeal. Mother filed a motion to dismiss the second appeal, arguing that the interlocutory orders father was attempting to appeal were not before the Indiana Court of Appeals under Ind. Appellate Rule 14. In April 2018, the Court of Appeals granted mother's motion to dismiss. Mother then filed a second petition for appellate attorneys' fees that the trial court did not rule on. In October 2018, the Court of Appeals issued a decision in the first appeal, affirming the trial court's custody and parenting time rulings and remanding on child support. In March 2019, the trial court held a hearing on mother's petitions for appellate attorneys' fees. Again, the trial court did not rule the fee petitions at that time. Thereafter, mother fired her counsel. On April 12, 2019, mother's counsel filed a motion to withdraw which the trial court granted. That same day, mother's counsel filed a motion to intervene. On May 3, 2019, mother and father filed a "Verified Agreed Order on All Pending Petitions and Matters." The agreed order covered several topics, including how much father would pay toward mother's appellate attorneys' fees. Specifically, father agreed to pay $7,500.00 of mother's attorneys' fees for the two appeals, also dismissed all petitions and motions to further allocate claimed fees. On May 10, 2019, the trial court held a hearing on mother's counsel's motion to intervene. In June 2019, the trial court issued an order in which it granted mother's counsel's motion to intervene "for the limited purpose of presenting evidence on various issues and attorneys' fees owed." The trial court approved all parts of the parties' agreed order except for the part about mother's counsel's attorneys' fees. Specifically, the trial court ordered father to pay all of mother's attorneys' fees and costs of the first appeal, which amounted to $26,908.40, with mother's attorneys' fees and costs incurred for the second appeal, which amounted to $3,277.50. The trial court also determined that mother incurred $19,735.00 in other attorneys' fees from October 31, 2017, to March 5, 2019, and ordered father to pay 93% or $18,253.78 of them. Father appealed and the Court of Appeals reversed. The Court of Appeals rejected mother's counsel's contention that she could request attorneys' fees in her own name. When mother's counsel sought to intervene the trial court had not yet ruled on mother's petitions for appellate attorneys' from father. And before the trial court ruled on mother's counsel's petition to intervene, mother withdrew her petitions for appellate attorneys' fees from father. Mother was no longer asking the trial court to order father to pay her fees, and mother's counsel did not have a right "separate and apart" from mother, to request them from father. The trial court erred by allowing mother's counsel to intervene, ordering father to pay all of mother's appellate attorneys' fees, and ordering father to pay a portion of mother's trial court

fees from October 31, 2017, to March 5, 2019. The Court of Appeals vacated the trial court's June 2019, order and remanded the case to the trial court. On remand, the trial court was instructed to approve all parts of the agreed order, including the $7,500.00 from the two appeals for mother's attorneys' fees. To the extent mother's counsel was still owed attorneys' fees for her services in the paternity case, she could seek them from mother.

9. *In re Paternity of A.J.*, 146 N.E.3d 1075 (Ind. Ct. App. 2020). During their marriage, father and mother used a surrogate to become the parents of child. Thereafter, father and mother dissolved their marriage through a separate paternity proceeding and sought to establish their respective custody and support rights. Following several fact-finding hearings, the trial court made extensive findings and conclusions, awarded mother custody, and ordered father to pay child support. Father appealed and the Indiana Court of Appeals affirmed. The Court of Appeals noted that, as to custody, that judgment is reviewed under a clearly erroneous standard. The evidence most favorable to the trial court's judgment supported its award of custody to mother. The Court of Appeals further concluded that father was estopped from his attempt to discount and disparage mother's relationship to child. As to child support, the Court of Appeals also rejected father's assertion that the trial court erred when it ordered him to pay child support when there was no evidence of either party's income in the record. Father also asserted that the trial court abused its discretion when it declined to draw a more serious negative inference against mother for her deletion of some Facebook posts. According to father, his attorney spent $1,937.00 to prove mother's exfoliation of the Facebook posts. The trial court's assessment was within the logic and effect that the circumstances before it as it concluded that the deleted Facebook posts would not have been significant and would have likely shown nothing more than unkind commentary about father, as each party had throughout the course of the case. The trial court also did not abuse its discretion when it declined father's request that mother pay his attorneys' fees.

10. *In re Paternity of J.G.*, 2020 WL 2963330 (Ind. Ct. App. June 4, 2020). In 2009, mother and husband married. On September 18, 2013, mother gave birth to child. On August 2, 2018, the State of Indiana, as child's next friend, filed a petition to establish paternity. In that petition, the State asserted that child was born to mother out-of-wedlock and that putative father was child's father. Thereafter, mother filed a motion to dismiss the State's petition on the grounds that the State had failed to name husband as a party and had not timely filed a petition within two years of child's birth, and that putative father had not registered with the putative father registry. Shortly thereafter, putative father registered with the putative father registry. On November 15, 2018, without having ruled on mother's motion to dismiss, the trial court ordered the parties to submit to DNA tests. The result of those tests indicated that there was a greater than 99% chance that putative father was child's biological father. At a June 9, 2019, review hearing, putative father asserted that, based on the results of the DNA tests, he was child's father. On May 17, 2019, the trial court held an evidentiary hearing on both the State's paternity petition and mother's motion to dismiss. On July 19, 2019, the trial court entered an order noting that it was treating mother's motion as a motion for summary judgment. The trial court concluded that it could not "overlook the fact that DNA establishes" that putative father was the father and could not disregard the filing where husband denied being the

father. Accordingly, the trial court found by clear and convincing evidence that putative father was the father of the child. On August 2, 2019, putative father filed a motion to dismiss husband as a party to the action, which the trial court granted. Husband appealed and the Indiana Court of Appeals affirmed. As to the issue of the dismissal of husband as a party, the Court of Appeals determined that mother and father had not met their burden on appeal to demonstrate that the trial court abused its discretion when it dismissed husband as a party. Mother next contended that the trial court did not provide her with reasonable opportunity to present relevant materials after converting her motion to dismiss to a motion for summary judgment. While the Court of Appeals acknowledged that the trial court did not inform the parties in advance that it intended to treat mother's motion to dismiss as a motion for summary judgment, mother had several months' notice that the trial court would hear evidence and, as such, had not shown that she was prejudiced by the trial court's failure to provide explicit notice of its intent to treat her motion as a motion for summary judgment. Finally, mother contended that the trial court erred when it denied her motion for summary judgment. The Court of Appeals determined that the trial court did not err when it denied mother's motion for summary judgment on the ground that putative father had not registered with the putative father registry.

11. *Sevilla v. Lopez*, 2020 WL 3478701 (Ind. Ct. App. June 26, 2020). In June 2015, child was born. Later, child was found to be a CHINS. During the CHINS case, child was placed in the care and custody of grandparents. While the CHINS case was ongoing, the trial court ordered father to complete a DNA test so that paternity could be established. Before that occurred, father was killed. Grandparents ensured that a vial of father's blood was collected and submitted for DNA testing. The DNA test confirmed that father was child's biological father. On May 4, 2016, mother filed a petition to establish paternity. On December 6, 2017, child was returned to mother's care and custody. On March 21, 2018, the trial court closed the CHINS case because mother had successfully completed all required services. In the paternity action, the trial court noted that DNA testing had been completed. The trial court then transferred the cause to paternity court for completion of the paternity process. No paternity order was entered. On October 23, 2018, grandparents filed a petition to intervene and request for grandparent visitation in the paternity case. The paternity court granted the petition to intervene. In February 2019, mother and grandparents informed the paternity court that they had reached an agreement that allowed grandparents to have visitation with child. On February 11, 2019, the paternity court entered an agreed order summarizing that visitation agreement. On February 20, 2019, mother filed a motion to dismiss the paternity case and requested to stay the temporary order permitting grandparent visitation. Grandparents objected. On April 1, 2019, following a hearing, the paternity court granted mother's motion to dismiss the paternity case. Grandparents appealed and the Indiana Court of Appeals reversed and remanded. The Court of Appeals determined that the issue presented was solely on a matter of law and applied a *de novo* standard of review. Ind. Trial Rule 41(A)(1)(a) provides that a plaintiff may dismiss her action without order of the court by filing a notice of dismissal. In this case, grandparents filed a petition to intervene in the paternity case. When the trial court granted their petition to intervene, grandparents formally became part of the paternity case. Upon becoming part of the case, the grandparents pursued their claim for the grandparent visitation and mother eventually contested that claim. While paternity cases do not generally include

counterclaims or cross-claims, the Court of Appeals could only conclude that the substantive nature of the request for a grandparent visitation equated to the same. To permit mother to dismiss the paternity case after grandparents had already intervened would substantially prejudice, if not extinguish, their right to pursue visitation with their grandchild. The Court of Appeals reversed and remanded with instructions to enter a paternity order showing that father was child's biological father and for further proceedings on the request for grandparent visitation.

12. *In re Adoption of I.B.*, 2020 WL 40457497 (Ind. Ct. App. July 20, 2020). On November 10, 2010, child was born. In May 2014, the parents divorced and the trial court granted legal and physical custody of child to mother and parenting time to father. On March 6, 2017, father filed a motion for emergency modification of custody based on mother's alleged drug use and instability. On July 25, 2017, the trial court granted legal and physical custody of child to father, ordered that mother would have supervised parenting time and pay child support. On July 17, 2019, father's wife filed a petition for step-parent adoption of child and father consented. The petition alleged that mother's consent was not required under Ind. Code § 31-19-9-8(a)(1), (2), and (11) because mother had abandoned child, failed to communicate or pay support for child for at least one year, and was unfit to parent child. On September 3, 2019, mother contested the adoption. On November 8, 2019, the trial court conducted a hearing on the adoption petition, including the issue of whether mother's consent was required. On December 23, 2019, the trial court concluded that mother's consent was not required for the adoption and entered an adoption decree. Mother appealed and the Indiana Court of Appeals reversed. The Court of Appeals reiterated that "the most protected status in any adoption proceeding is that of the natural parent. Recognizing the fundamental importance of the parent-child relationship, our courts have strictly construed the adoption statute to preserve that relationship." The trial court's finding that mother failed, without justification significantly communicate with child in both the six-month and one-year time periods prior to the filing of the adoption petition, was based upon its finding that within those time periods mother had not exercised supervised parenting time, written to child, or recognized child's birthday, or spent any significant time on the telephone with child. Here the trial court clearly erred when it found that the telephone records of mother's calls to child were admitted into evidence. The records to which the trial court referred were offered into evidence but never were admitted into evidence. Moreover, the trial court clearly erred in placing complete emphasis on the "average number of minutes" mother called child each month. Step-mother presented no evidence that there was not one "significant" communication in mother's multiple telephone calls to child within the relevant six-month and one-year time period. The trial court's finding to that effect was not supported by the evidence. Mother also appealed the trial court's findings and conclusions regarding failure to pay child support. The undisputed evidence was that mother was required to pay child support. There was no evidence to support the trial court's finding that mother could have paid child support during her brief periods of employment. To the extent the trial court relied on its findings that mother did not use student loan money to pay child support, it clearly erred in two respects. First, there was no evidence in the record that mother was permitted to use student loan money to pay child support. Second, even if mother were permitted to use student loans to pay child support, there is no evidence in the record that the student loans were in an amount sufficient to allow her to

make such payments or that any student loan money was remaining after mother used it for her education-related and/or necessary living expenses.

13. *In re Adoption of K.H.*, 2020 WL 4343157 (Ind. Ct. App. July 29, 2020). On April 24, 2017, K.H. was born. On April 27, 2017, the Indiana Department of Child Services ("DCS") filed a petition alleging K.H. was a CHINS. In that same cause number, in a CCS Entry dated September 13, 2018, the record indicated that the State of Indiana would be filing to add an alleged father as a party. The trial court appointed counsel for alleged father and counsel requested a DNA test. On October 24, 2018, CCS Entry stated that father had a DNA test done to confirm that he was father and that there was no objection to alleged father to be named as father. On November 7, 2018, M.M. and C.M. filed a petition to adopt K.H. under a different cause number. On June 11, 2019, that court held a hearing and counsel for M.M. and C.M. argued that alleged father's consent to the adoption was not necessary. The trial court considered substantial evidence over multiple days, and on July 22, 2019, the trial court entered an order finding that alleged father's consent to the adoption was not required. On January 30, 2020, the trial court entered a decree of adoption. Alleged father appealed and the Indiana Court of Appeals affirmed. Ind. Code § 31-19-11.1 provides in part that a trial court shall grant a petition for adoption if it hears evidence and finds in part that the adoption requested is in the best interest of the child and "proper consent, if consent is necessary, to the adoption has been given." Ind. Code § 31-19-9-8(a) provides that a petitioner for adoption may prove by clear and convincing evidence that a parent is unfit to be a parent and the best interest of the child sought to be adopted be served if the trial court dispensed with the parents' consent. The Court of Appeals found that Ind. Code § 31-19-9-8(a) was written in the disjunctive. Ind. Code § 31-19-9-8(b) provides that if a parent has made only token efforts to support or communicate with a child, a court may declare the child abandoned by a parent. The clear and convincing standard is an intermediate standard of proof greater than a preponderance of evidence and less than proof beyond a reasonable doubt. The alleged father did not attend and the record did not reveal that he established paternity by a court proceeding or by executing a paternity affidavit. The termination of parental rights strikes a balance between a parents' rights and the child's best interest, and termination cases provide useful guidance in determining whether a parent is unfit. The trial court was in the best position to judge the facts and the Court of Appeals would not reweigh evidence or assess the credibility of witnesses. Alleged father had not met his burden to overcome the presumption that the trial court's decision was correct or that the evidence led to but one conclusion and that the trial court reached the opposite conclusion.

F. TERMINATION OF PARENTAL RIGHTS/CHINS

1. *In re S.K.*, 124 N.E.3d 1225 (Ind. Ct. App. 2019). On June 30, 2004, S.K. was born. On June 17, 2016, the Indiana Department of Child Services ("DCS") filed a petition alleging S.K. was a CHINS. On June 21, 2016, the trial court held a hearing and father informed the trial court that S.K. was subject to the Jay Treaty and that S.K.'s mother was Canadian. DCS indicated that it had not found the child or mother listed as Native American, and the trial court issued a detention order. In an entry dated July 6, 2016, DCS determined that mother, while being a member of an Indian tribe in Canada, was not covered by the Indian Child Welfare Act

("ICWA"). In an entry dated April 26, 2017, father indicated that he retained counsel and was planning on suing DCS in federal court because DCS never contacted the tribe of which S.K. was a member. In May 2017, DCS filed for termination of father's parental rights but that matter was dismissed due to exceeding statutory timelines. In February 2018, DCS filed a petition for termination of the parent-child relationship. In an entry dated March 14, 2018, the trial court held a hearing and father's counsel stated that S.K. was registered with an Indian tribe out of Canada but DCS checked and concluded that the tribe was not federally recognized in the United States. That termination case also was dismissed due to exceeding statutory timelines. On November 29, 2018, DCS filed a petition for involuntary termination of the parent-child relationship. On December 3, 2018, father filed a motion to dismiss, alleging that S.K. was a member of a Canadian-recognized tribe and that the Jay Treaty and ICWA applied. On February 25, 2019, the trial court held a hearing. Following several motions, on July 8, 2019, the trial court terminated father's parental rights to S.K. The trial court determined that ICWA did not apply to the Canadian tribe and found that father's incarceration, substance abuse, unsuitable housing, instability, criminal involvements, and failure to comply with services led to the conclusion that there was a reasonable probability that the conditions which resulted in S.K.'s removal and continued placement outside of the home would not be remedied and that the continuation of the parent-child relationship posed a threat to S.K.'s well-being. The trial court further determined that termination of father's parental rights was in S.K.'s best interests. Father appealed and the Indiana Court of Appeals affirmed. The Court of Appeals concluded that father had not demonstrated that S.K. was an Indian child as defined by ICWA or that ICWA applied. Father did not challenge the trial court's conclusions as to the termination standard.

2. *In re R.L.*, 126 N.E.3d 864 (Ind. Ct. App. 2019). The Indiana Court of Appeals granted the Indiana Department of Child Services's ("DCS") petition for rehearing to address new guidance issued by the Indiana Supreme Court on the application of the doctrine of *res judicata* to CHINS proceedings. The Supreme Court issued its opinion in *Matter of Eq.W.*, 124 N.E.3d 1201 (Ind. 2019), in which it found that Eq.W.'s mother had waived her claim of *res judicata* by not raising it in the trial court. The Supreme Court also found that the trial court did not commit fundamental error by failing to dismiss the CHINS petition *sua sponte*. However, the Supreme Court clarified that *res judicata*, and specifically claim preclusion, does not apply to CHINS cases. The Supreme Court noted the grave interests at stake and the heightened due process provided in CHINS proceedings and explained that, in order to avoid the preclusive effects of a prior proceeding, in a subsequent CHINS action DCS must allege new material facts separate from what was available to them at the fact-finding hearing in the prior proceeding. In its petition for rehearing, DCS argued that, in light of *Eq.W.*, the Court of Appeals erred when it remanded for reconsideration of the 2018 CHINS petition without reference to the 2017 CHINS action because *Eq.W.* held that evidence of a parent's prior actions can be presented in a subsequent CHINS action as long as DCS presents new allegations. The Court of Appeals rejected DCS's argument and found that its prior opinion was in accord with *Eq.W*. The only argument presented by mother on appeal was that claim preclusion barred DCS from bringing the 2018 CHINS action, which issue *Eq.W.* now has definitively settled, was not a meritorious argument. While it was unclear whether the Supreme Court intended by its decision in *Eq.W.* to allow DCS to relitigate in the subsequent CHINS action all issues previously raised as long as

some new allegations were added, mother had not argued issue preclusion or provided the Court of Appeals with any other reason that DCS may not do so. The Court of Appeals granted rehearing, affirmed the trial court in all respects, and clarified that remand is now not necessary in light of the Supreme Court's holding that DCS may rely on evidence of a parent's prior conduct in filing its subsequent CHINS action and in light of the fact that mother offered only the discredited issue of claim preclusion for consideration on appeal.

3. *In re K.R.*, 133 N.E.3d 754 (Ind. Ct. App. 2019). In June 2004, K.R. was born to mother and father. The parties subsequently had three other children. In April 2017, the Indiana Department of Child Services ("DCS") removed the children from the parents' home because of conditions in the home and domestic violence. On week later, the children were returned to the home for a trial visit. At that time, father was incarcerated. In May 2017, after mother had a positive drug test, DCS removed the children from the home and placed them in foster care. The trial court subsequently adjudicated the children to be in CHINS. In September 2017, following the CHINS adjudication, the trial court made several orders applicable to the parents, including order them to submit to random drug screens. In July 2018, DCS filed petitions to terminate the parent-child relationships. At the June 2019 termination hearing, the evidence revealed that, although the parents had participated in the court-ordered assessments, they had failed to complete any of the court-ordered programs. Also during that hearing, the trial court admitted the parents' drug tests over parents' objections. According to the drug test results, mother tested positive for amphetamine and methamphetamine in August, September, and October 2018, after the termination petitions had been filed. Father also testified that he had used amphetamine, methamphetamine, and marijuana in August, September, and October 2018, and did not dispute the positive drug tests during that time period. Following the hearing, the trial court issued an order terminating parental rights. Each parent separately appealed the terminations. The Indiana Court of Appeals affirmed. The parents argued that the trial court abused its discretion in admitting their drug test results into evidence over objections. They argued that their drug tests results did not fit into the business records exception to the hearsay rule. The Court of Appeals distinguished *Termination of Parent-Child Relationship of E.T.*, 808 N.E.2d 639 (Ind. 2004) since the drug testing agency services were presumably available to any person, public or private, corporate or individual, who wished to pay the lab fees. In addition, the chemical analyses performed by the drug testing agency appeared to be routine procedures done for whomever requested them. The Court of Appeals concluded that these drug test results fit into the business records exception to the hearsay rule. The Court of Appeals added that, even if it had concluded that the trial court had improperly admitted the parents' drug test results, any such error was harmless. The Court of Appeals also concluded that there was sufficient evidence to support the termination of parental rights and that DCS had a satisfactory plan for the children's care and treatment.

4. *In re Ma.H.*, 134 N.E.3d 41 (Ind. 2019). Father and mother had a blended Amish family of nine children. Seven of the children were born during the marriage; the oldest two children were mother's daughters from a prior relationship. In early-Spring 2016, 17-year-old R.W. left home. About one week later, the Indiana Department of Child Services ("DCS") received a report alleging that father had sexually abused R.W. for years and that the condition of

the parents' home was unacceptable. The parent denied both allegations. A detective interviewed R.W., and DCS removed the remaining children from the family home. The children were placed with their maternal uncle and his family, who were also part of the Amish community. DCS alleged the children were CHINS. At the hearing, DCS provided testimony on the home deplorable condition and R.W. testified to numerous and specific instances of sexual abuse by father. The trial court found the children to be CHINS. As a result, the parents were ordered to complete services, including ones to address sexual abuse. Father objected to the sex-offender treatment. He was concerned that completing such a program would involve a polygraph examination, which he argued would require him to waive his Fifth Amendment privilege against self-incrimination. The trial court disagreed. About a month later, father began sex-offender treatment, but because of his continued denial to take a polygraph, little progress was made. The therapist recommended a polygraph test to show that father had done nothing wrong, but when father took the polygraph the results showed he was "deceptive" when asked about the sexual abuse. At that point, the therapist could not continue the program with father unless he admitted wrong-doing. Father refused and stopped attending the program. Mother never wavered in her support of father or in her belief that R.W. lied about the sexual abuse. Father never completed sex-offender treatment, and the parents never created a safety plan. In late-Summer 2017, DCS petitioned to terminate parental rights. A few months later, the trial court terminated parents' parental rights. Mother and father both appealed and a divided panel of the Indiana Court of Appeals reversed. *In re Ma.H.*, 119 N.E.3d 1076 (Ind. Ct. App. 2019). DCS petitioned for a transfer and the Indiana Supreme Court vacated the Court of Appeals opinion and affirmed the trial court. The Supreme Court began by commenting that parents have a fundamental right to raise their children, but that this right was not absolute. To terminate parental rights, Indiana law requires DCS to prove certain elements by clear and convincing evidence. Ind. Code §§ 31-35-2-4(b)(2) and 31-37-14-2. The parents specifically asserted that the trial court violated father's Fifth Amendment privilege against self-incrimination. The Supreme Court's review of the record showed that there was no Constitutional violation because the court never ordered father to admit a crime. It also found that the evidence favorable to the trial court's decision supported its factual findings, which in turn supported its challenge to legal conclusions. The parents failed to show that the trial court's termination decision was clearly erroneous. In any proceeding the Fifth Amendment protects an individual from being compelled to answer questions when the answers might be used in a future criminal proceeding. Yet, in civil proceedings, a court can draw negative inferences from a claim of the Fifth Amendment privilege against self-incrimination. While father attended a program that eventually required an admission of guilt, the trial court's order did not compel father to admit to a crime. The trial court's order simply required father to select and complete a course of sex-offender treatment. The trial court did not violate father's Fifth Amendment privilege against self-incrimination, and it could properly consider evidence of the parents' failure to respond to services addressing the CHINS court finding that father sexually abused R.W. Additionally, the trial court's findings showed that it engaged in the appropriate two-step analysis. The trial court's findings were supported by the evidence, and those findings clearly and convincingly supported the trial court's conclusion that there was a reasonable probability that a primary reason for the children's removal, R.W.'s sexual abuse allegations against father, would not be remedied. The evidence-

based fact findings also supported the trial court's conclusion that termination of parental rights was in the children's best interest. Father did not complete a court-ordered sex-offender treatment program and he testified that he did not need treatment and did not believe he could benefit from it. The trial court also heard testimony from four witnesses who shared a concern for the well-being of the children if they returned home without a safety plan in place and without father having completed treatment. The totality of the evidence supported the trial court's findings, which in turn supported the trial court's best-interest conclusions.

5. *In re J.C.*, 134 N.E.3d 419 (Ind. Ct. App. 2019). Mother was the biological mother to five children, including J.C. and R.C. Mother struggled with addiction since she was a teenager. Mother admitted to having used a slew of illicit drugs, including marijuana, cocaine, spice, and "probably" methamphetamine. On May 28, 2016, mother overdosed on her prescription medication and was found unresponsive in her home. The Indiana Department of Child Services ("DCS") removed the children from the home. On May 31, 2016, DCS filed a CHINS petition. On August 2, 2016, mother admitted the children were CHINS. The trial court entered a dispositional decree that ordered mother to participate in a variety of services, the children were placed in foster care, and a permanency plan with reunification of children with mother was implemented. Mother was initially compliant with her home-based caseworker, who set three goals for mother: housing, employment, and sobriety. Over time, mother became less compliant. Mother ultimately relapsed into drug use and DCS requested that mother's parenting time be suspended. On February 28, 2017, the trial court suspended mother's parenting time. In June 2017, mother's parenting time resumed. Mother then was sporadic in her parenting time with the children. In October 2017, mother was referred to an intensive outpatient alcohol and drug treatment program. On March 22, 2018, mother was arrested after police found her in a truck with her boyfriend in possession of a handgun and illicit drugs. On October 2, 2018, mother pleaded guilty to Level 4 Felony possession of cocaine, Level 5 Felony possession of a handgun without a license, and Class A Misdemeanor resisting law enforcement. On March 15 and 27, 2018, DCS filed petitions to terminate mother's parental rights to R.C. and J.C. On January 14, 2019, the trial court terminated mother's parental rights to the children. Mother appealed and the Indiana Court of Appeals affirmed. Mother argued that the trial court erred by denying her motion to dismiss the petition to terminate her parental rights because the termination hearing was not completed within 180 days of the filing of the petition. While at first blush mother's argument appeared to have merit, it overlooked the fact that mother failed to object to any delay in the hearings. Mother waived any objection to the delay in the hearings. The Court of Appeals distinguished *In re J.R.*, 98 N.E.3d 652 (Ind. Ct. App. 2018) from this case. The Court of Appeals also distinguished *In re T.T.*, 110 N.E.3d 441 (Ind. Ct. App. 2018) and *In re M.S.*, 124 N.E.3d 1234 (Ind. Ct. App. 2019). Those cases involved the time limits in Ind. Code § 31-34-11-1 for CHINS fact-finding hearings. In contrast, the Court of Appeals was addressing the time limits for termination hearings set forth in Ind. Code § 31-35-2-6. The trial court's failure to hold and complete the evidentiary hearings on the termination petitions within the statutory timeframe did not constitute reversible error. The trial court also did not abuse its discretion by admitting evidence of mother's drug screens. Even though the drug screens were not admissible under the business records exception under the hearsay rule, other evidence establishing mother's repeated substance abuse was overwhelming and the admission of the four

positive drug screens did not impair mother's substantial rights. There was sufficient evidence to support the trial court's termination order. Judge Pyle concurred, writing separately to state that he believed that the admission of mother's drug test results was not erroneous as they were properly admitted under the business exception to the hearsay rule. Ind. Evid. R. 803(6).

6. *In re T.W.*, 135 N.E.3d 607 (Ind. Ct. App. 2019). On March 6, 2017, child was born. At the time of child's birth, father was incarcerated in Kentucky and was unable to establish paternity. On March 7, 2017, child was removed from mother's care because mother had substance abuse issues, had unstable housing, and was failing to comply with a CHINS case involving child's older sibling. On March 9, 2017, the Indiana Department of Child Services ("DCS") filed a petition alleging that child was a CHINS. On April 5, 2017, the trial court granted the petition as to father. On that same day, the trial court held a dispositional hearing related to father and ordered him to contact DCS upon his transfer or release from incarceration. Before child was born, father contacted DCS, acknowledged paternity, and requested assistance to be an active participant in the case, knowing that child was likely to be a CHINS because of mother's ongoing substance abuse issues. After child was born, father spoke with a family case manager and requested that child be placed with paternal grandmother in Kentucky. DCS began the process to place a ward out of state, but in the meantime child remained in foster care. On March 23, 2018, father was released from incarceration and placed on probation. On April 6, 2018, father met with the family case manager. At that meeting, the family case manager told father he needed to establish paternity and obtain a substance abuse evaluation. The family case manager agreed to provide parent aide services to assist father in finding employment, housing, and to set up parenting time, but he never made a referral for a parent aide. With respect to paternity, father went to the Vanderburgh County Prosecutor's Office and obtained the necessary paperwork. The week of April 10, 2018, father completed his section of the forms and took the packet to DCS. The family case manager evidently filled out the forms and then called father and told him to retrieve the packet. Father did not retrieve the document and the family case manager put them in his file. The family case manager made a referral for drug screens but did not call father with that information, instead mailing it to the address father had provided in their initial phone call. As father was no longer at that address, he did not receive the paperwork. Father and the family case manager did not have any contact from mid-April 2018 to August 31, 2018, when father was arrested for violating the terms of his probation. On August 14, 2018, two weeks before father's placement in work release, DCS filed a petition to terminate his parental rights. On January 3, 2019, the termination hearing occurred. On February 20, 2019, the trial court granted DCS's petition to terminate father's parent-child relationship. Father appealed and the Indiana Court of Appeals reversed. Ind. Code § 31-35-2-4(b)(2) requires that a petition to terminate parental rights for a CHINS must make certain allegations. "The involuntary termination of parental rights is the most extreme sanction a court can impose on a parent because termination severs all rights of a parent to his or her children." *In re I.A.*, 934 N.E.2d 1127, 1136 (Ind. 2010). Therefore, termination is an extreme measure that should only be utilized as a last resort when all other reasonable efforts to protect the integrity of the parent-child relationship have failed. DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. However, parents facing termination proceedings are afforded due process protections. Although father did not raise a due process

argument to the trial court, the Court of Appeals had discretion to address due process claims when they involve Constitutional rights of which the violation would be fundamental error. When the state of Indiana seeks to terminate parental rights, it must do so in a manner that meets the requirements of due process. For a parent's due process rights to be protected in the context of termination proceedings, DCS must have made reasonable efforts to preserve and/or reunify the family unit in the CHINS case unless the no reasonable efforts exception applies. What constitutes "reasonable efforts" will vary by case, and it does not necessarily always mean that services must be provided to the parents. Father's interest in being involved with child predated child's birth, when he first reached out to DCS. Father then contacted the family case manager within a week of his release from incarceration, and they met shortly thereafter. In the early days of their interactions, there were four relevant DCS efforts to consider "father's establishment of paternity, drug screens, visits, and a referral for a parent aide." As to the establishment of paternity, nothing in the record indicated that father was unwilling or reluctant to do so. Father acknowledged paternity to DCS before child was born. The record made it clear that father was caught between a proverbial rock and hard place, as he received contradictory orders from two different governmental agencies and received no help from his family case manager to sort out the situation. Father did exactly what he was supposed to do to establish paternity. The Court of Appeals found, perhaps most damning of all, that at this extraordinarily early juncture in father's post-incarceration life the family case manager decided the child would be better off with someone else. Rather than offering assistance to father, the family case manager wrote him off and made only limited efforts at reunification from that point forward. As to drug screens, the family case manager was aware that father was homeless and it was unreasonable that he did not call father to inform father about the drug screens. By only mailing the information to an address where father was not actually living, the family case manager was setting father up to fail. As to visits, the family case manager made a referral for agency-supervised visits and a first visit was scheduled. Although the family case manager initially told father he would have visits, he then changed his mind. Here again, the family case manager decided from the outset that child would be better off in foster care and that father did not deserve a chance to be a parent. That course of events set father up to fail. The family case manager's efforts in that regard were unreasonable. Finally, the family case manager did not make a referral to a parent aide. It should have been no surprise to the family case manager that father would at times flounder and be outside of communication. Father should have been given more assistance in this situation; especially since he explicitly asked for it. Instead, the family case manager decided, almost from the outset, that child would be better off in foster care and made no genuine efforts to provide father with the support and services he so desperately needed. When looking at the situation in totality, the Court of Appeals concluded that DCS did not make reasonable efforts to reunify father with child. Likewise, the insufficient process employed in the CHINS case created the risk of the erroneous filing of a petition to terminate father's parental rights to child in violation of father's due process rights.

7. *In re G.F.*, 135 N.E.3d 654 (Ind. Ct. App. 2019). On February 24, 2008, child was born to mother with paternity undetermined. Mother had a lengthy history of criminal behavior and drug abuse both before and after child's birth. In July 2008, the Indiana Department of Child Services ("DCS") became involved with the family. Following an

unsuccessful period of informal adjustment erratic behavior by mother, DCS obtained emergency custody of child and her sibling. Child and her sibling were placed in relative care with their maternal grandmother and the children were adjudicated CHINS. Mother continued using drugs and did not comply with services offered by DCS or with the terms of her probation in a criminal action. Accordingly, in September 2009, grandmother established a legal guardianship over child and her sibling and the CHINS proceedings were subsequently terminated. The guardianship lasted for over 6 years while mother continued her pattern of criminal behavior and drug use. In November 2015, mother was doing well and was drug free, so she and grandmother agreed to dissolve the guardianship. By June 16, 2016, however, child was again adjudicated a CHINS. In August 2016, child was removed from mother's care and placed in foster care. Around July 2017, mother identified father as child's potential father. A DCS family case manager contacted father in Maryland. Father did not initially complete paternity testing, was depressed, attempted suicide, and went into rehabilitation for over 3 months, during which time he took a paternity test that established him as child's biological father. In January 2018, father moved back to Indiana to be part of child's life. On January 31, 2018, father had one supervised visit with child. Child, who was almost 10 years old at the time, was excited to meet her biological father. That was child's one and only visit with father because he turned to methamphetamine and was incarcerated within weeks of the visit. Father continued with extensive criminal activity and, as a result of that, ongoing drug use, and repeated incarcerations, he made no progress toward reunification with child and had no contact with her after the initial visit. On December 10, 2018, DCS petitioned to terminate the parent-child relationship between child and father. On May 9, 2019, following a hearing, the trial court issued its termination order. Father appealed and the Indiana Court of Appeals affirmed. Father argued that the trial court's findings did not establish that the continuation of the parent-child relationship would pose a threat to child's well-being, but it is well-established that "a trial court need not wait until a child is irreversibly influenced by a deficient lifestyle such that her physical, mental, and social growth is permanently impaired before terminating the parent-child relationship." *In re E.S.*, 762 N.E.2d 1287, 1290 (Ind. Ct. App. 2002). As the trial court recognized father was robbed of the chance to develop a relationship with child during her first almost 10 years of life. When given a chance to be a father to child, father failed her. Father's habitual pattern of conduct was highly relevant in determining that the continuation of the parent-child relationship posed a threat to child, as it suggested a substantial probability of future neglect or deprivation. Father's behavior during the 15 months leading up to the termination hearing established that he was not a safe or available option for child and that his parental rights should be terminated.

8. *In re K.L.*, 137 N.E.3d 301 (Ind. Ct. App. 2019). In November 2011, Ko. was born. In April 2013, Ki. was born. No legal father was established for either child. Mother had been diagnosed with and prescribed medication for bipolar disorder. She also had a history of using illegal substances. In mid- to late-2013, mother became overwhelmed caring for the children and asked her sister to care for them. For approximately 9 months after placing the children with her sister, mother did not have any contact with them. In late-2014, mother's sister had Kayla and Derrick Mitchell take over care of Ko. In 2016, the Mitchells filed a petition to establish guardianship over Ko., but the guardianship proceedings were postponed when this case began. On October 29, 2016, the Indiana Department of Child Services ("DCS") received a

report that mother had attempted to commit suicide by overdosing on heroin while her third child was in her care. The children were legally removed from mother's care on November 1, 2016, but Ki. remained with mother's sister in relative placement and Ko. with the Mitchells. In January 2017, the children were adjudicated CHINS. From November 2016 to July 2017, mother had 4 supervised visits and 2 therapeutic visits with the children. Supervised visits occurred before mother was incarcerated in January 2017. Thereafter, visits were suspended while mother was incarcerated and in rehab. On February 14, 2018, DCS filed petitions to terminate mother's parental rights to the children. The termination fact-finding hearing was scheduled to begin on May 4, 2018. On that date, concerns over the service of the termination petitions on the children's fathers prompted the trial court to continue the hearing to May 9, 2018. On May 9, 2018 the trial court granted DCS's motion to dismiss the termination petitions as to the fathers and, as mother had failed to appear, agreed to initiate the termination for mother, allow DCS to "put on enough evidence to secure venue and jurisdiction, and continue the case. When the parties returned to the trial court to continue the termination hearing in August 2018, mother moved for a separation of witnesses. The trial court denied her motion because her "time to move for separation of witness ha[d] passed." Ultimately, the trial court entered orders concluding that there was a reasonable probability that the conditions that resulted in the removal of the children would not be remedied and that DCS's plan of adoption was a satisfactory plan for the children, and that the termination of mother's parental rights was in the children's best interests. Mother appealed and the Indiana Court of Appeals affirmed. As to the motion for separation of witnesses, the Court of Appeals determined that that motion should have been granted but that mother was not prejudiced by the denial of that motion since there was overwhelming evidence supporting the trial court's judgment terminating mother's parental rights to the children.

9. *In re K.T.*, 137 N.E.3d 317 (Ind. Ct. App. 2019). Mother and father had a child who lived with mother. The Indiana Department of Child Services ("DCS") received information that child had sustained various injuries while in mother's care. In a report dated December 29, 2016, DCS found that allegations of neglect by mother were substantiated although allegations of physical abuse were not. DCS found all allegations against father unsubstantiated. The DCS report noted that mother was child's "sole caregiver" and that child had not been in father's care during the time period child sustained injuries. On January 13, 2017, DCS removed child from mother and filed a CHINS petition. On March 14, 2017, a parenting assessment of father was completed that recommended his participation in "Father's engagement program" so that could "learn about his rights as a parent." The assessment also recommended individual therapy to help father "further address his anger," although it noted that his "anger is understandable" given that this was the second CHINS case initiated while child was in mother's care. On April 11, 2017, child was adjudicated a CHINS. On February 28, 2018, the trial court changed child's permanency plan from reunification to termination of parental rights and adoption. At the fact-finding hearing, various service providers and DCS workers testified that father had failed to fully comply with services. The court-appointed special advocate subsequently testified that she did not believe termination of father's parental rights was appropriate because, although visits with child had "progressed well," the visitation supervisor's interference with father's parenting of child and her "personality conflict" with child

had hindered further progress. Father testified that he owned his home and had joint custody of his son. On June 3, 2019, the trial court terminated father's and mother's parental rights. Father appealed and the Indiana Court of Appeals reversed. The Court of Appeals noted that this was in reality a removal from both parents, and articulated that the reasons that child was removed from mother were not relevant to the determination of whether father's parental rights should be terminated. There was no evidence presented to the trial court that father's parental rights should be terminated, and the trial court did not make any findings related to father's alleged issues with anger and alcohol or his alleged criminal history. Rather, in its order the trial court relied solely upon evidence of father's failure to fully participate and complete services. Father's failure to participate in services, alone, could not sustain the termination of his parental rights. The findings that father missed some parenting time with child also were insufficient to support the conclusion that father was not likely to remedy the reasons for child's initial and/or continued removal. While the trial court did not condone or excuse father's failure to comply fully court-ordered services, the trial court's findings that father failed to fully participate in services and parenting time were not, alone, sufficient to support its conclusion that there was a reasonable probability that the conditions that resulted in child's removal would not be remedied by father. The evidence also did not support the trial court's conclusion that the continuation of the parent-child relationship would pose a threat to child. The only evidence of shortcoming in father's relationship with child would be visitation. The supervisor's statements indicated that she believed father's parenting style was too permissive, insufficiently structured, and unrealistic regarding expectations of child. DCS failed to provide clear and convincing evidence that all other reasonable efforts to protect the integrity of the natural relationship between parent and child had failed. The Court of Appeals also noted that Indiana's termination of parental rights statute "sets a high bar for severing th[e] Constitutionally protected [parent/child] relationship." *In re R.S.*, 56 N.E.3d 625, 628 (Ind. 2016).

10. *In re M.S.*, 140 N.E.3d 279 (Ind. 2020). On November 12, 2017, the Indiana Department of Child Services ("DCS") received reports alleging several children, including M.S., were victims of neglect. The allegations stemmed from an incident in which one child received a critical injury that ultimately resulted in that child's death. M.S. was removed from mother's care and placed with her maternal grandmother. On November 14, 2017, DCS filed a CHINS petition. The initial hearing on the CHINS petition took place that same day. On December 13, 2017, a fact-finding hearing was held. At the hearing, both parents waived the requirement that fact-finding be concluded within 60 days of the date the petition was filed and the matter was continued to February 23, 2018. In the meantime, mother requested production of documents from the Danville Police Department relating to the investigation of the death of mother's child. The police department moved to quash mother's subpoena *duces tecum* and the matter was set for hearing on February 16, 2018. At the hearing, mother requested a continuance to resolve the discovery dispute, but the trial court expressed uncertainty over whether it could extend the fact-finding hearing beyond the statutory 120-day deadline. Still, all parties agreed to waive the deadline and the trial court continued the fact-finding hearing and ordered limited discovery of documents from the police department. On March 16, 2018, a full fact-finding hearing was held. On April 17, 2018, the fact-finding concluded. On October 8, 2018, the trial court adjudicated M.S. a CHINS. On October 31, 2018, mother requested that the case be

dismissed in light of recent case law from the Indiana Court of Appeals regarding formal deadlines for CHINS actions. On November 2, 2018, the trial court entered a dispositional order which denied mother's oral motion to dismiss and ordered continued placement of the child with maternal grandmother. After the trial court order was issued, mother renewed her motion to dismiss on grounds that fact-finding was not completed within the statutorily-imposed 120-day limit. The trial court denied the motion and mother appealed. The Indiana Court of Appeals reversed and remanded with instructions to dismiss the case without prejudice. *Matter of M.S.*, 124 N.E.3d 1234 (Ind. Ct. App. 2019). DCS petitioned for transfer and the Indiana Supreme Court reversed and remanded the Court of Appeals' opinion. The Supreme Court noted that Ind. Code § 31-34-11-1 provides that the fact-finding hearing must be completed within 120 days of the date of filing a CHINS petition. The Supreme Court reasoned that that statute was procedural because it includes mechanism for extending the time by which fact-finding hearings should be completed in CHINS proceedings. The Indiana Rules of Trial Procedure trump statutes on matters of procedure. Ind. Trial Rule 53.5 allows extension of the 120-day deadline in Ind. Code § 31-34-11-1(b) provided a party can show "good cause." Allowing a "good cause" continuance by extending the 120-day deadline not only provides fairness for the parties involved but also allows the Indiana General Assembly's intent to prevail over the strict literal meaning of any word or term. The trial court did not abuse its discretion when it granted mother's continuance request.

11. *In re B.F.*, 141 N.E.3d 75 (Ind. Ct. App. 2020). In December 2012, B.F. was born. In May 2014, C.F. was born. Mother also had four older children who were cared for by mother's parents under a guardianship. In June 2015, mother and the children were living in Muncie, Indiana. On June 14, 2015, the Indiana Department of Child Services ("DCS") filed a petition alleging that the children were CHINS. DCS removed the children from mother's custody and placed them in relative care. The children were later moved into kinship care with a close family friend who lived in Lafayette, Indiana. Mother ultimately admitted that she left the children unattended on June 12, 2015, that she was transported to the hospital for a drug overdose, and that she was subsequently arrested and charged with possession of a controlled substance and neglect of a dependent. On August 10, 2015, the trial court found the children to be CHINS. At a later dispositional hearing, mother was ordered to complete parenting, substance abuse, and psychological assessments, comply with any recommendations, submit to random drug screens, obtain stable housing, and participate in supervised visitation with the children. At some point in 2015 mother moved to Lafayette, Indiana. DCS did not transfer the case from Delaware County, Indiana to Tippecanoe County, Indiana. Throughout the end of 2015 and the first half of 2016, mother had sporadic participation and contact with DCS. In June 2016, mother reengaged in services and communicated more regularly with DCS. She began to make slow progress. Sometime in October 2016, mother gave birth to another baby who was not subject to a CHINS petition. By the beginning of 2017, mother was involved with home-based care management, home-based therapy, and individual therapy, and had supervised parenting time. She also secured housing with the help of DCS and her service providers. By December 2017, mother had secured a bigger apartment and had stable employment with Purdue University. She had consistently provided clean drug screens, DCS was no longer concerned about her substance abuse, and her parenting time with the children was going well. In February

2018, despite lingering concerns, the children were placed on a trial home visit with mother and the baby. At some point, mother stopped working for Purdue University. Mother's service providers worked to help her find steady employment. Mother had temporary employment cleaning apartments with Seeds of Hope, where mother and the children were living. On June 16, 2018, DCS again removed the children from mother's care and custody and again placed them in kinship care. After the children were removed from mother's care and custody, she continued to consistently visit them. In April 2019, the termination hearing took place over four days. On July 15, 2019, the trial court denied the termination petition as to father but granted it as to mother. Mother appealed and the Indiana Court of Appeals reversed and remanded. Ind. Code § 31-35-2-4(b)(2) requires that a petition to terminate parental rights for a CHINS must make specific allegations. DCS must prove the alleged circumstances by clear and convincing evidence. Even though mother was not at a place at the time of the termination hearing that she was able to be a safe and appropriate caregiver for the children, the Court of Appeals could not conclude that termination was in the children's best interest so long as reunification with father was an option. There was no reason that mother could not continue to spend time with her children while they were in kinship care or, if they were reunified with father, once they were in his care. If the situation reached a point where reunification with father was no longer an option and permanency for the children could be achieved, the analysis would change, but it was not in the children's best interest to impose the most extreme measure possible when there were less restrictive options available. The trial court's order granting the termination petition as to mother was erroneous.

12. *In re Paternity of C.D.*, 141 N.E.3d 845 (Ind. Ct. App. 2020). Mother and father were the biological parents of daughter, born on September 19, 2017. Mother used marijuana during her pregnancy and daughter tested positive for marijuana when she was born. On September 22, 2017, the Indiana Department of Child Services ("DCS") filed a petition alleging that daughter was a CHINS. The petition alleged that daughter was in need of services because: (1) mother failed to provide the child with a safe, stable, and appropriate living environment free from substance abuse; (2) mother had another child with an active CHINS case; (3) mother used marijuana during her pregnancy with daughter, tested positive for marijuana at the time of daughter's birth, and struggled with depression; and (4) father demonstrated no ability or willingness to parent daughter and was able to ensure the safety of daughter while in mother's care. At a detention hearing on September 23, 2017, the trial court authorized daughter to be removed from mother and father. Daughter was placed in the care of her paternal grandmother and a Guardian *Ad Litem* ("GAL") was appointed. On January 17, 2018, a CHINS fact-finding hearing was held. At the hearing, mother admitted to the allegations in the CHINS petition. The trial court found that father did not have housing, was not employed, and had issues with marijuana use. The trial court also found that father was unwilling to participate in services to address his housing and drug use. The trial court determined daughter to be a CHINS, ordered DCS to prepare a pre-dispositional report, and set a permanency plan of reunification. On February 7, 2018, the trial court held a CHINS dispositional hearing and entered a dispositional order that same day. The dispositional order continued daughter's placement with grandmother and required the parents to participate in a variety of services. During the course of the CHINS case, mother failed to appear for any sessions with her home-

based counselor. In June 2018, mother was discharged from home-based counseling. Mother also failed to participate in in-patient substance abuse treatment referred to her by the family case manager. In February 2019, the service coordinator discharged mother due to mother's noncompliance. Mother underwent a substance abuse assessment and reported a history of abusing marijuana, stimulants, and sedatives. Between February 2018 and February 2019, mother declined to participate in intensive outpatient substance abuse treatment and failed to appear for most of the random drug screens. The drug screens mother took in November 2018 and January 2019 were positive for marijuana use. Mother had not seen daughter since her unauthorized visit at father's home in September 2018. Mother continued with noncompliance. In July 2018, father was referred to visitation services but was discharged the following month because of noncooperation. The trial court subsequently ordered grandmother to supervise parenting time between father and daughter but the trial court rescinded its authority in its order following a June 6, 2018, review hearing. On September 6, 2018, DCS filed a motion requesting that daughter be removed from grandmother's care and placed in the care of foster parents. The trial court granted that motion the same day. At a September 19, 2018, permanency hearing, the trial court denied a request to place daughter with grandmother. On October 10, 2018, DCS filed petitions seeking to terminate mother's and father's parental rights after the trial court changed the permanency plan from reunification to adoption by foster parents. On February 7, 2019, DCS filed a motion requesting that daughter be placed in grandmother's care. On March 11, 2019, foster parents filed an objection to DCS's request to return daughter to grandmother. On March 13, 2019, the trial court heard argument on the motion to place daughter with grandmother and denied it that same day. Also on March 13, 2019, the trial court held the first part of a two-day evidentiary hearing on the petition to terminate parental rights. On April 16, 2019, the GAL filed a motion to reconsider the order denying DCS's request to place daughter with grandmother. On April 21, 2019, that motion was deemed denied. On April 23, 2019, the trial court held the second day of the evidentiary hearing on the termination petitions. On May 23, 2019, the trial court entered an order terminating mother's and father's parental rights to daughter. Mother and father appealed and the Indiana Court of Appeals affirmed. Ind. Code § 31-35-2-4(b)(2) provides what must be alleged in a petition to terminate parental rights. DCS must prove each element by clear and convincing evidence. Mother did not challenge any of the trial court's factual findings as being clearly erroneous. The conditions that led to daughter's removal were mother's drug use while pregnant with child. Mother argued that the conditions that led to daughter's removal were remedied by placing daughter with grandmother. However, the Court of Appeals agreed with DCS that a child's placement is not the focus of the statutory element. The focus is on whether a parent had remedied the conditions such that the child could safely be returned to her care. That clearly was not the case. The Court of Appeals also rejected mother's argument that the trial court clearly erred in concluding that the termination of parental rights was in daughter's best interest. The trial court found that termination was in daughter's best interest because it would allow her to be adopted into a stable and permanent home. Mother made much of the fact that both DCS and the GAL recommended that daughter be placed with grandmother. The GAL testified that termination of parental rights was in daughter's best interest because mother had not completed any of the offered services and failed to address her substance abuse problem. The family case manager also recommended termination of parental

rights due to her lack of stability, failure to participate in services, continued substance abuse, and unwillingness to act as a parent to daughter. Based on that testimony, the trial court reasonably concluded that termination of mother's parental rights was in daughter's best interest. Mother also contended that the trial court clearly erred by concluding that there was a satisfactory plan of care and treatment for daughter. Mother did not deny that adoption was a satisfactory plan and acknowledged that adoption by a non-relative foster family is usually deemed to be satisfactory. Mother admitted that adoption was a satisfactory plan, and that was all that was required at that stage. Lastly, mother and father argued that they had a fundamental right to choose who would adopt daughter. The Court of Appeals agreed that parents have a fundamental right to raise their children. Under normal circumstances, a child's parents have the right to determine whether their child will be adopted and by whom she will be adopted. *See* Ind. Code § 31-19-9-1(a)(2). However, their argument regarding their right to consent to adoption put the "cart before the horse." Termination cannot be improper because it deprived the parents of their right to consent to daughter's adoption. Termination was proper because mother and father failed to address their substance abuse problems and because termination was in daughter's best interest. The result of this is that all of mother's and father's parental rights, including the right to consent to adoption, were terminated. That fact was not grounds for reversing the termination; it was a consequence of the termination. The trial court also did not err by failing to permit grandmother to adopt daughter. Given that the parents no longer had a fundamental right to consent to the adoption of daughter, the question of the proper adoptive home for daughter was a question for the trial court.

13. *In re J.C. and R.C.*, 142 N.E.3d 427 (Ind. 2020). Mother was the biological mother of two children. In March 2018, the Indiana Department of Child Services ("DCS") filed a petitions to terminate mother's parental rights. The evidentiary hearing on the petitions was completed on November 26, 2018, more than 180 days after the petitions were filed. In January 2019, the trial court entered findings of fact and conclusions terminating mother's parental rights. Mother presented three issues on appeal: (1) whether the trial court erred in denying mother's motion to dismiss when the evidentiary hearing was not completed within 180 days after filing of the petitions, (2) whether the trial court abused its discretion by admitting as evidence reports showing the results of her drug screens, and (3) whether sufficient evidence supported the termination of parental rights. The Indiana Court of Appeals addressed each issue, found no reversible error, and affirmed. *In re J.C.*, 134 N.E.3d 419 (Ind. Ct. App. 2019). The Indiana Supreme Court granted mother's petition to transfer to address the first issue, and in a *per curium* opinion affirmed. The Supreme Court noted that a timely hearing on a termination of parental rights petition is required by statute. The statute for hearings in termination of parental rights cases provides that a hearing must occur within 180 days of the date in which the petition is filed under Ind. Code § 31-35-2-6. The hearing in this case was completed more than 180 days after the filing of the termination of parental rights petitions, with the parties waiving the 180-day requirement. When the hearing began on September 26, 2018, mother did not object. After DCS presented some evidence, mother's counsel asked that the hearing being adjourned. The trial court granted mother's request and, after assessing how many witnesses were left, adjourned the hearing until October 10-11, 2018. The hearing resumed on October 10, 2018, but was not completed that day. The trial court adjourned to the hearing to the

next day without objection. When the hearing resumed on October 11, 2018, mother orally moved to dismiss, arguing that the trial court failed to conclude the hearing within the statutory 180-day period. The trial court denied that motion. The Supreme Court distinguished the statutory timeline to complete a fact-finding hearing within 60 days after a CHINS petition is filed (although it may be extended for an additional 60 days if the parties agree) with the statute for termination of parental rights hearings. Those statutes are different, and appellate decisions under the CHINS statute are inapplicable in deciding termination of parental rights cases. The Supreme Court agreed with the Court of Appeals that relief is not available to mother, who affirmedly waived the 180-day statutory timeframe and invited error.

14. *In re R.L.*, 144 N.E.3d 686 (Ind. 2020). On November 2, 2017, R.L. was born. Shortly after his birth, the Indiana Department of Child Services ("DCS") removed R.L. from his parents' care. On November 6, 2017, DCS filed a petition alleging R.L. was a CHINS. On March 1, 2018, the trial court determined R.L. was not a CHINS. On March 2, 2018, DCS contacted mother to complete a home visit and assess the condition of her home. Although the family case manager was aware the CHINS petition had been dismissed, the family case manager did not share this information with mother or indicate that R.L. could have been returned to her care. On March 6, 2018, DCS filed a subsequent petition alleging R.L. was a CHINS. Mother moved to dismiss the petition on claim preclusion grounds and renewed her motion at a March 16, 2018, pretrial hearing. The trial court denied mother's motion and ultimately found R.L. was a CHINS. Mother appealed and the Indiana Court of Appeals reversed. *Matter of R.L.*, 126 N.E.3d 864 (Ind. Ct. App. 2019). After the Court of Appeals issued its opinion, the Indiana Supreme Court handed down *Matter of Eq.W.*, 124 N.E.3d 1201 (Ind. 2019), which prompted the state to file a petition for rehearing. On rehearing, the Court of Appeals concluded that DCS could file the subsequent CHINS petition and the Court of Appeals affirmed the trial court in all respects. Mother sought transfer, which the Indiana Supreme Court granted and reversed. On transfer, mother argued the trial court should have granted her motion to dismiss the second petition because it was barred by claim preclusion. *Eq.W.* held that claim preclusion applies to CHINS proceedings. 124 N.E.3d at 1211. The Supreme Court looked at multiple states and came to a conclusion that the framework of *Eq.W.* straddled the divide between finality and a trial court's determination and the flexibility required in the evolving nature of CHINS cases. For this reason, the Supreme Court agreed that the second CHINS petition pertaining to R.L. should have been barred by the doctrine of claim preclusion.

15. *In re De.B.*, 144 N.E.3d 763 (Ind. Ct. App. 2020). In June 2018, De.B. was born. On February 13, 2019, and officer with the Columbus, Indiana Police Department stopped parents' car after receiving a report that a theft had just occurred at a nearby Target. During the stop, mother said that she "committed the theft so that she could…sell the items that she had stolen, to get food." The officer searched the car and found several electronic items from Target, some syringes, and a bent spoon. Both parents were arrested and transported to the Columbus Police Department to be interviewed. A detective interviewed father, who admitted that he was the "getaway driver" of the Target theft and that they planned to sell the stolen items "to pay for baby supplies." Father also told the detective that the syringes and spoon were mother's and that "he prefers to snort his" methamphetamine. De.B. was with parents

when they were arrested and there was no other caregiver available to De.B. The police officers contacted the Indiana Department of Child Services ("DCS"). DCS filed a petition alleging that De.B. was a CHINS. On April 5, 2019, the CHINS fact-finding hearing began. DCS moved to admit lab reports showing the results of parents' oral fluid drug test under Ind. Evid. Rule 803(6), the business records exception. Father's attorney objected and argued that the lab reports were "specifically created for DCS" and that they did not qualify as a business records. The trial court overruled parents' objection and admitted the lab reports. On June 6, 2019, the trial court issued an order adjudicating De.B. as a CHINS. On June 24, 2019, the trial court held a dispositional hearing. At the end of the hearing, the trial court adopted DCS's recommendations and ordered the parents to participate in services. Only father appealed and the Indiana Court of Appeals affirmed. Father contended that the trial court erred by admitting the lab reports. The Court of Appeals noted that a different panel of that Court had held in *In re L.E.S.*, 125 N.E.3d 628 (Ind. Ct. App. 2019) that lab reports did not fall under the business records exception and were inadmissible. This panel of the Court of Appeals respectfully disagreed with the holding since the lab depended on the lab reports to operate and was a certified lab. This panel also noted that the *L.E.S.* panel did not consider the other two indicators of reliability articulated by the Indiana Supreme Court in *In re D.T.*, 808 N.E.2d 639 (Ind. 2003). To the extent that there was any error, it was harmless. The Court of Appeals also rejected father's argument as to the sufficiency of the evidence, noting that father did not challenge certain findings that made it clear that De.B. was a CHINS.

16. *A.C. v. State*, 144 N.E.3d 810 (Ind. Ct. App. 2020). On May 4, 2019, 17-year-old A.C. was involved in an altercation with his father which led to police being called. Upon being detained in a police vehicle A.C. spit in his father's face. As a result of this incident, the State of Indiana filed a delinquency petition alleging that A.C. had committed one count of battery and one count of battery by bodily waste, both Class B misdemeanors if committed by an adult. A.C. admitted to the battery by bodily waste and the State dismissed the other count of battery. The State and the probation department recommended that A.C. be placed in a residential facility for his behavioral issues, as well as any substance abuse issues and trauma as a result of physical and psychologic abuse, and to be addressed with family counseling required. A.C. agreed with this recommendation. The trial court found A.C. to be a delinquent child, placed him under the supervision of the probation department and be placed in residential treatment, and ordered him to serve a four-month term of probation upon completion of the residential treatment. On June 27, 2019, the State filed a motion to modify supervision alleging that A.C. had violated the dispositional order and the conditions of his probation by leaving the treatment facility without permission and testing positive for marijuana. The State recommended that A.C. remain in the treatment facility and the trial court ordered A.C.'s continued placement at that facility. On September 12, 2019, the State filed a second motion to modify supervision, alleging that A.C. had violated the terms of the dispositional order and the conditions of his probation by assaulting other residents on at least three different occasions and misbehaving in multiple ways. A.C.'s probation officer and the CEO of the treatment facility recommended that A.C. be placed in the Indiana Department of Corrections ("DOC"). The trial court accepted A.C.'s admission and modified its original dispositional order to award wardship of A.C. to the DOC. A.C. appealed and the Indiana Court of Appeals affirmed. The Court of Appeals noted

that once a child is determined to be a delinquent child a trial court is required to hold a dispositional hearing. The trial court had a choice of several dispositions and they choose more than one disposition. One of the dispositions was wardship to the DOC, confinement in a juvenile detention facility, and placement in a shelter care facility. *See* Ind. Code § 31-37-19-6(b). That choice is within sound discretion of the trial court and will be reversed only for an abuse of discretion. The trial court was within its statutory authority when it modified its original dispositional order and ordered wardship of A.C. to the DOC.

17. *In re L.T.*, 145 N.E.3d 864 (Ind. Ct. App. 2020). Mother and father had four children. The Indiana Department of Child Services ("DCS") became involved with this family prior to the last child's birth. In June 2017, the then-three children of the parties were adjudicated CHINS due to physical abuse to one child and domestic violence between the parents. Multiple allegations ensued and, on November 27, 2018, DCS filed a petition alleging that a fourth child was a CHINS because there was physical abuse in the home directed to the child's siblings. The petition also alleged that father smoked marijuana and was abusive toward the mother. On January 25, 2019, the trial court conducted a fact-finding hearing. On June 27, 2019, the trial court entered its order adjudicating the fourth child to be a CHINS. The parents appealed and the Indiana Court of Appeals affirmed. The parents contended that the trial court abused its discretion by allowing a physician to testify by phone and by admitting evidence of father's past domestic violence charges. As to permitting the pediatrician to testify telephonically at the CHINS fact-finding hearing, Ind. Admin. R. 14(B) provides a procedure for telephonic testimony. DCS did not dispute that its motion for telephonic testimony was filed less than 30 days before the hearing and that the trial court did not enter written findings of fact and conclusions of law in an order granting DCS's request to present the pediatrician's testimony via telephone. While the trial court erred in permitting the pediatrician to testify telephonically, DCS presented other evidence of probative value to support the CHINS determination and the trial court's error in that regard was harmless. As to father's prior criminal history, the Court of Appeals recounted at length the criminal history of father and concluded that the trial court properly admitted the investigative report of father's 2010 criminal conviction. The trial court properly adjudicated child to be a CHINS. Judge Tavitas concurred in the result but parted ways with the majority's conclusion that the 2010 probable cause affidavit was properly admitted into evidence. The concurrence found Ind. Evid. R. 803(8)(B) specifically prohibited an admission of a probable cause affidavit. The concurrence also noted that the probable cause affidavit contained hearsay within hearsay which was not admissible under Ind. Evid. R. 805 since each part of the combined statements did not conform to an exception to the rule. However, the concurrence found that the admission of the probable cause affidavit was harmless error due to the overwhelming evidence that supported child was a CHINS.

18. *In re L.H.*, 146 N.E.3d 352 (Ind. Ct. App. 2020). In June 2016, child was born. Soon after child's birth, father moved to Florida to live with his parents. Father planned to move mother and child to Florida once he was settled. In November 2016, father was living in Florida with his other child, and mother was living in Indiana with child and mother's other children. Mother was removed from a homeless shelter and had no housing. Mother contacted the Indiana Department of Child Services ("DCS") and admitted she was unable to care for child

and mother's other children due to her homelessness. On November 17, 2016, DCS filed a CHINS petition. Father sought custody of child when DCS filed the CHINS petition. A family case manager supervisor with DCS instructed father that a home inspection in accordance with the Interstate Compact on the Placement of Children ("ICPC") was required before child could be placed with him. On November 23, 2016, the family case manager supervisor sent the ICPC documents to DCS's Indianapolis office for processing and submission to Florida. On December 29, 2016, with father's home inspection still not completed, child was adjudicated a CHINS. In its order on the CHINS fact-finding hearing, the trial court ordered DCS "to submit an ICPC for father." On March 15, 2017, the family case manager supervisor received a letter from Florida notifying her that they were unable to complete the ICPC process because father advised Florida in early March 2017, that he would be returning to Indiana. Father returned to Indiana some time in March 2017, and began staying with an individual identified by DCS as having substance abuse issues. While in Indiana, father participated in some, but not all, services. On April 9, 2019, DCS filed a petition for involuntary termination of father's parental rights. On June 27, 2019, the trial court held a termination fact-finding hearing. Former family case managers testified as to concerns. One family case manager testified that she followed DCS policy over the law, and that she did not know what the law stated. On July 26, 2019, the trial court entered an order terminating father's parental rights. Father appealed the termination of his parental rights. He did not challenge the findings or specific conclusions, but contended that the termination order must be reversed due to the tainted proceedings. The Indiana Court of Appeals reversed and remanded. Father specifically argued that DCS's failure to place child with father and requiring father to complete the ICPC process, which was not required for natural parents, was a procedural error that resulted in the improper termination of father's parental rights to child. *In re D.B.*, 43 N.E.3d 599 (Ind. Ct. App. 2015) held that the ICPC did not apply to placement with an out-of-state parent. DCS was required to follow the law. The Court of Appeals was dismayed that DCS failed to understand the law regarding the ICPC's inapplicability to natural parents, or, assuming DCS understood the law, it had chosen to ignore it. The Court of Appeals further found it unconscionable that DCS continued to require an ICPC for natural parents despite the Court of Appeals's reiteration that an ICPC was not required for natural parents. DCS's procedural error tainted the proceedings so significantly that the Court of Appeals could not say that father was afforded his due process rights in the CHINS and termination proceedings. The Court of Appeals expressed its sincere hope that, in the future, DCS and the trial court would comply with the law to prevent the need for a decision that had a significant impact on a child.

19. *In re F.A.*, 148 N.E.3d 357 (Ind. Ct. App. 2020). The parties had four children. On September 8, 2016, the Indiana Department of Child Services ("DCS") received a report that three children had excessive absences from school and a home visit revealed sanitary concerns in the home. DCS later found petitions alleging all children to be CHINS. On September 29, 2016, the trial court entered an order finding that the children were CHINS based on the parents' admissions. The trial court issued a dispositional order requiring parents to, among other things, participate in recommended programs, permit family case managers and service providers to make announced and unannounced visits to the home, ensure the children attend school, and maintain suitable and safe housing with adequate bedding and supplies and

food. On December 1, 2016, three children were removed from the home and approved to be placed back in the home on December 29, 2016. A progress report in July 2017 stated that the parents had attended all scheduled visitations and required individual counseling. In 2018, the children were returned to the parents in stages. The progress report dated November 28, 2018, stated that the children appeared to be happy and adjusted to living at home, the permanency plan was reunification, the projected date for the children's permanency was March 15, 2019, and DCS would request a case closure for three of the children. On January 9, 2019, DCS filed a notice of addendum stating that it was requesting case closure for all of the children. Subsequently, disputes ensued and the trial court terminated the home placement. On February 5, 2019, DCS filed a petition to terminate parental rights, but the petition was dismissed. On April 30, 2019, the trial court approved the change in the permanency plan to adoption. On May 1, 2019, DCS filed a petition to terminate parental rights of parents as to all of the children. On October 2, 2019, the trial court terminated parents' parental rights as to all of the children. The trial court concluded that there was a reasonable probability that the conditions that resulted in the children's removal would not be remedied and that the continuation of the parent-child relationship posed a threat to the children's well-being, and that termination of parental rights was in the children's best interests. The Indiana Court of Appeals reversed. Mother argued that the parents regain custody of all of the children by November 2018, and that DCS requested that the trial court close the CHINS case on January 9, 2019. The traditional rights of parents to establish a home and raise their children is protected by the Fourteenth Amendment to the United States Constitution. As a matter of statutory elements, it has been established that DCS is not required to provide parents with services prior to seeking termination of the parent-child relationship. However, parents facing termination proceedings are afforded due process protections. In addition to due process protections, the state bears the burden of proof for establishing the elements of the termination statute in termination cases by "clear and convincing evidence." *See* Ind. Code § 31-37-14-2. The involuntary termination of parental rights is the most extreme sanction a court can impose on a parent. It is the last resort available when all other reasonable efforts fail. The Court of Appeals could not include, in totality and under the circumstances, that DCS made all reasonable efforts to reunify parents with the children.

20. *Indiana Dep't of Child Services v. Morgan*, 148 N.E.3d 1030 (Ind. Ct. App. 2020). On June 23, 2011, Justin Morgan and Meghan Price had a son, Brayson. At the end of 2015, Morgan moved to New Mexico because of financial pressure and fear of Price and Price's boyfriend. Morgan made efforts to spend time with Brayson and attempted to obtain custody and parenting time. Morgan did not see Brayson very much during 2014 or most of 2015. Between July 2014 and November 22, 2016, the Indiana Department of Child Services ("DCS") received twelve preliminary reports of physical abuse and/or neglect regarding Brayson through its hotline. On November 23, 2016, Brayson died. On November 25 and 28, 2016, Mooresville, Indiana Police Detective interviewed Morgan and his parents to express the concerns they had with Price and her boyfriend. They also expressed frustration with DCS. On June 23, 2017, the state of Indiana filed charges against Price and her boyfriend related to Brayson's death. On December 13, 2017, Morgan filed a tort claims notice alleging that DCS knowingly and negligently placed Brayson in a situation that endangered his life and health and

was responsible for his bodily injuries and death. On August 16, 2019, DCS filed a motion for summary judgment and argued in part that Morgan's failure to timely file a notice of tort claim precluded him from asserting a wrongful death action. On October 5, 2019, the trial court denied DCS's motion. On October 8, 2019, DCS filed a motion to certify the trial court's order for interlocutory appeal and the court later granted that motion. On Appeal, the Indiana Court of Appeals reversed. The Indiana Tort Claims Act provides that a claim against the state is barred unless notice is filed with the Attorney General and the state agency involved within 270 days after the loss occurs. Ind. Code § 34-13-3-6. In the November 25, 2016 interview the detective and Morgan and his parents, Morgan said that he wished the state would have taken matters seriously before that time. Based upon review of interviews, the Court of Appeals concluded that Morgan had serious concerns with Price and her boyfriend and knew that Brayson had been injured on multiple occasions and ultimately died, and DCS had been informed on multiple occasions and not removed Brayson from the home. Further, Morgan and his parents expressed concerns about DCS's investigations and inactions. The Court of Appeals concluded that a notice of tort claim would have to have been filed within 270 days of November 20, 2016, or by August 25, 2017. Morgan's December 13, 2017 tort claims notice was untimely, the trial court erred in denying DCS's motion for summary judgment.

21. *In re Tre.S. and Tra.S.*, 149 N.E.3d 310 (Ind. Ct. App. 2020). On May 2, 2019, the Indiana Department of Child Services ("DCS") filed petitions to terminate mother's parental rights to her two children. Thereafter, the trial court appointed counsel for mother and set the fact-finding hearing for October 1, 2019. At some point, DCS asked the trial court to move the hearing forward because the pre-adoptive parents "were hoping to be able to get the matter resolved prior to October first[.]" On August 6, 2019, the trial court rescheduled the hearing to August 21, 2019, at 1:30 p.m. On August 8, 2019, DCS served mother a "ten-day" notice of termination hearing required by Ind. Code § 31-35-2-6.5(c)(1). The Chronological Case Summary did not indicate whether the ten-day notice was sent to mother's attorney, which Ind. Code § 31-35-2-6.5(c)(2) requires. On August 21, 2019, mother's attorney filed an emergency motion for continuance. The trial court asked DCS what it thought about mother's continuance motion and DCS said it objected. An exchange then occurred. The trial court then said if DCS was "comfortable" proceeding with the hearing that day it would allow DCS to do so. DCS responded it was comfortable proceeding that day. The trial court then conducted a hearing without mother or her attorney present and later entered an order terminating mother's parental rights. Mother appealed and DCS asked the Indiana Court of Appeals to dismiss the appeal without prejudice, set aside the trial court's termination of mother's parental rights, and remand the case to the trial court. The Court of Appeals motions panel denied DCS's motion to remand and ordered it to file an appellee's brief. DCS then filed an appellee's brief in which it again conceded that mother's due process rights were violated and asked the Court of Appeals to reverse the trial court and remand the case for further proceedings. The Court of Appeals reversed. In July 2018, the Court of Appeals had issued an order noting that in the previous six months DCS had moved to remand ten termination cases. The Court of Appeals commended DCS for conceding error, but said that it was obligated to formally admonish DCS for failure to afford litigants due process rights. In only two years after that order, DCS continued to file motions to remand conceding that parents' due process rights had been violated. This case was

just one example. Both the trial court and DCS knew that they were committing due process violations and proceeded with the hearing anyway. That must stop. The Court of Appeals reversed the termination order and issued yet another reminder to trial level DCS attorneys and trial courts that they have a duty to ensure that parents' due process rights in termination cases are not violated.

22. *In re D.C.*, 2020 WL 3067732 (Ind. Ct. App. June 10, 2020). On December 22, 2013, child was born. In December 2017, the Indiana Department of Child Services ("DCS") filed a CHINS petition. Specifically, DCS alleged that it received a report that mother was using methamphetamine in the home. DCS further alleged that it contacted mother, who submitted to a drug screen and tested positive for methamphetamine. DCS further alleged that mother was on probation for a methamphetamine-related offense. DCS also alleged that father was incarcerated and that it was unable to locate a suitable kinship placement. DCS ultimately removed child from mother's care and placed child in foster care. On December 21, 2017, and initial hearing was held at which mother and father admitted to the CHINS allegations. The trial court adjudicated child a CHINS, ordered that child remain in foster care, and scheduled separate dispositional hearings for mother and father. DCS filed a pre-dispositional report in which it recommended that the permanency plan for child be reunification with services for mother and father. On May 23, 2018, following a dispositional hearing, the trial court entered a dispositional order as to father. In the ensuing months, child remained in foster care with supervised visits. On February 18, 2019, the trial court found that mother and father had not been fully compliant with the case plan. The trial court entered an order changing the permanency plan to a reunification with a concurrent plan of adoption. On March 14, 2019, DCS filed a petition to terminate mother's and father's parental rights. On May 23, 2019 and August 27, 2019, the trial court conducted a fact-finding hearing. Mother was not present at the August 2019, hearing, at which the trial court received a signed form titled "Voluntarily Relinquishment of Parental Rights" from mother. On September 25, 2019, the trial court entered a written order terminating mother's and father's parental rights. The trial court noted that mother had validly executed a voluntary relinquishment of parental rights notarized by the trial court clerk and reviewed with mother by her attorney. After mother's parental rights were terminated, she wrote to the trial court several times requesting "another chance" and the opportunity to visit child. Mother and father brought a consolidated appeal and the Indiana Court of Appeals affirmed in part, reversed in part, and remanded. Father did not dispute the child had been removed for the statutory period or that adoption was a satisfactory plan. Rather, father challenged the sufficiency of the evidence regarding the reasonable probability that the conditions resulting in child's removal or placement outside of the home would not be remedied and that termination was in child's best interests. As to remedied conditions, the Court of Appeals found that the evidence and findings supported the ultimate finding regarding unremedied conditions. As to best interests, the Court of Appeals found sufficient evidence supported the finding that terminating father's parental rights was in child's best interests. As to mother, the Court of Appeals remanded for further fact-finding regarding whether mother received the 9th statutory advisement that the consent could not be based upon a promise regarding a child's adoption or contact of any type with child after the voluntary relinquishment

of parental rights. Accordingly, the Court of Appeals reversed the termination of mother's parental rights and remanded for fact-finding.

23. *In re D.S.*, 2020 WL 3982829 (Ind. Ct. App. July 15, 2020). On September 1, 2015, child was born to mother. On November 22, 2016, the trial court adjudicated child to be a CHINS in a prior CHINS proceeding due to mother testing positive for amphetamine and methamphetamine and her admission that she had a substance abuse problem. That wardship eventually was dismissed. In February 2019, the Indiana Department of Child Services ("DCS") received a report alleging that mother was using and selling marijuana in her home as well as her residence being in "dirty home condition." Between April 2019 and August 2019, mother failed to submit to 14 out of 22 drug screens despite different formats of drug testing being used. On January 15, 2020, DCS filed a petition requesting child to be adjudicated a CHINS due to mother's use of illegal substances, endangering child, and requiring coercive intervention to compel mother's compliance with the terms of the informal adjustment from the prior CHINS action. On February 27, 2020, the trial court conducted a fact-finding hearing. That day, the trial court adjudicated child to be a CHINS. On March 17, 2020, after a dispositional hearing, the trial court ordered mother to participate in services. Mother appealed and the Indiana Court of Appeals reversed. Mother contended that the trial court abused its discretion in finding child to be a CHINS. The evidence reflected that mother admitted to having a substance abuse problem, especially when she felt stressed or overwhelmed. Although mother agreed to participate in services through an informal adjustment which was extended one time, she failed to submit consistently to drug screens and conceded to using marijuana on several occasions. Reciting other Indiana cases, the Court of Appeals concluded that the children could not be adjudicated as CHINS, despite mother's history of marijuana use, because there was no evidence that, at any point in time, any of the children were in danger, that the parents had ever used drugs in the presence of the children, or that there was ever an occasion in which the parents were impaired by substance abuse while the children were in their care.

24. *In re E.T.*, 2020 WL 4380224 (Ind. Ct. App. July 31, 2020). In September 2018, child was born. On January 9, 2019, the Indiana Department of Child Services ("DCS") received a report alleging that a domestic violence incident had occurred the previous day between mother and father. On February 5, 2019, following the report and investigation of the domestic violence allegation, the trial court authorized DCS to file a petition alleging that the child was a CHINS. Following the initial hearing, DCS filed a motion to have a separate fact-finding hearing for each parent because mother had secured a restraining order against father. On March 25, 2019, father's counsel filed a motion to continue the fact-finding hearing. The motion stated that father waived the 60-day requirement for the fact-finding hearing. The trial court granted the motion and rescheduled father's fact-finding hearing for April 30, 2019. In early-April 2019, father pled guilty to a misdemeanor of disorderly conduct. Later that month, father was arrested again and charged with committing a misdemeanor battery against mother. Father pled guilty as charged. Meanwhile, the trial court held mother's April 2019 fact-finding hearing. At the hearing, mother admitted that child was a CHINS. The trial court adjudicated child a CHINS and held a dispositional hearing. Thereafter, the trial court issued a dispositional order regarding mother. On April 29, 2019, father's counsel

filed another motion to continue father's fact-finding hearing. The trial court granted that motion and rescheduled the fact-finding hearing for June 25, 2019. At the June 25, 2019, hearing, father was not present and his attorney, who had moved out of state without withdrawing from the case, also was not present. The trial court then appointed new counsel for father. On October 2, 2019, the trial court held father's fact-finding hearing. On November 8, 2019, the trial court issued another order adjudicating child to be a CHINS. Thereafter, following a request by DCS, the trial court set father's dispositional hearing for January 27, 2020, which was the same date as the previously-scheduled permanency hearing. Father did not object to the scheduled date of the dispositional hearing. At the January 27, 2020, hearing, DCS requested that child's permanency plan as to both parents change to a termination of parental rights. However, the trial court ordered the permanency plan change to termination as to mother only. Following the dispositional hearing, the trial court issued a dispositional order requiring father to (1) complete a domestic violence assessment and follow all recommendations, (2) complete Fatherhood Engagement, (3) participate in supervised visitation, (4) submit to random drug screens, and (5) not commit any acts of domestic violence. Father appealed and the Indiana Court of Appeals affirmed. Father first argued that the trial court committed fundamental error when it held his fact-finding and dispositional hearings outside the statutory timeframes. The trial court did hold father's fact-finding and dispositional hearings outside of the statutory timeframes in Ind. Code §§ 31-34-11-1 and 31-34-19-1, but father did not file motions to dismiss. Accordingly, his argument was waived. Father also contended that his due process rights were violated because the trial court adjudicated child a CHINS before father's fact-finding hearing had occurred. The Court of Appeals distinguished this case from *In re S.A.*, 15 N.E.3d 602 (Ind. Ct. App. 2014), *aff'd on reh'g*, 27 N.E.3d 287 (Ind. Ct. App. 2015), finding that the CHINS petition in this case was based on a domestic violence incident between father and mother that had occurred in front of child. Further, despite mother's admission, the trial court did not adjudicate child to be a CHINS based solely on that admission. Father received the due process to which he was entitled and had the opportunity to be heard at a meaningful time and in a meaningful manner.

III. LEGISLATION

See attached legislation.

IV. REVISIONS TO INDIANA CHILD SUPPORT GUIDELINES

See attached revisions to the Indiana Child Support Guidelines, effective January 1, 2020.

V. CONCLUSION

The Indiana Court of Appeals and Indiana Supreme Court continued their important work during unprecedented conditions and provided valuable guidance to Indiana families.

Second Regular Session of the 121st General Assembly (2020)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2019 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1006

AN ACT to amend the Indiana Code concerning family law and juvenile law.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 31-9-2-7, AS AMENDED BY P.L.191-2011, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 7. (a) "Adult", for purposes of IC 31-19-17 through IC 31-19-25.5, means a person who is at least twenty-one (21) years of age.

(b) "Adult", for purposes of the juvenile law, means a person other than a child.

(c) "Adult", for purposes of IC 31-11, means:

(1) a person at least eighteen (18) years of age; or

(2) a:

(A) married minor who is at least sixteen (16) years of age; or

(B) minor who has been completely emancipated by a court;

subject to specific constitutional and statutory age requirements and health and safety regulations that remain applicable to the person because of the person's age.

SECTION 2. IC 31-9-2-133.1, AS AMENDED BY P.L.144-2018, SECTION 5, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 133.1. "Victim of human or sexual trafficking",

for purposes of IC 31-34-1-3.5, refers to a child who is recruited, harbored, transported, or engaged in:

(1) forced labor;

(2) involuntary servitude;

(3) prostitution;

(4) juvenile prostitution, as defined in IC 35-31.5-2-178.5;

(5) child exploitation, as defined in IC 35-42-4-4(b);

(6) marriage, unless authorized by a court under ~~IC 31-11-1-6;~~ **IC 31-11-1-7;**

(7) trafficking for the purpose of prostitution, juvenile prostitution, or participation in sexual conduct as defined in IC 35-42-4-4(a)(4); or

(8) human trafficking as defined in IC 35-42-3.5-0.5.

SECTION 3. IC 31-11-1-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 4. Except as provided in ~~section~~ **sections** 5 ~~or 6~~ **and 7** of this chapter, two (2) individuals may not marry each other unless both individuals are at least eighteen (18) years of age.

SECTION 4. IC 31-11-1-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 5. Two (2) individuals may marry each other if:

(1) both individuals are at least ~~seventeen (17)~~ **sixteen (16)** years of age;

(2) one (1) of the individuals is not more than four (4) years older than the other individual if the other individual is sixteen (16) or seventeen (17) years of age;

~~(2)~~ **(3)** each individual who is less than eighteen (18) years of age: ~~receives the consent required by IC 31-11-2;~~

(A) has been granted an order by a juvenile court under section 7 of this chapter granting the individual approval to marry and completely emancipating the individual; and

(B) not earlier than fifteen (15) days after the issuance of the order described in clause (A), presents to the clerk of the circuit court an application for a marriage license accompanied by:

(i) a certified copy of the order; and

(ii) a certificate of completion of any premarital counseling required under the order; and

~~(3)~~ **(4)** the individuals are not prohibited from marrying each other for a reason set forth in this article.

SECTION 5. IC 31-11-1-6 IS REPEALED [EFFECTIVE JULY 1, 2020]. ~~Sec. 6. (a) Two (2) individuals may marry each other if:~~

~~(1) the individuals are not prohibited from marrying for a reason set forth in this article; and~~

~~(2) a circuit or superior court of the county of residence of either individual considers the information required to be submitted by subsection (b) and authorizes the clerk of the circuit court to issue the individuals a marriage license.~~

~~(b) A court may not authorize the clerk of the circuit court to issue a marriage license under subsection (a) unless:~~

~~(1) the individuals have filed with the court a verified petition that includes allegations that:~~

~~(A) the female is at least fifteen (15) years of age;~~

~~(B) the female is pregnant or is a mother;~~

~~(C) each of the individuals who is less than eighteen (18) years of age has received the consent required by IC 31-11-2;~~

~~(D) the male is at least fifteen (15) years of age and is either:~~

~~(i) the putative father of the expected child of the female; or~~

~~(ii) the father of the female's child; and~~

~~(E) the individuals desire to marry each other;~~

~~(2) the court has provided notice of the hearing required by this section to both parents of both petitioners or, if applicable to either petitioner:~~

~~(A) to the legally appointed guardian or custodian of a petitioner; or~~

~~(B) to one (1) parent of a petitioner if the other parent:~~

~~(i) is deceased;~~

~~(ii) has abandoned the petitioner;~~

~~(iii) is mentally incompetent;~~

~~(iv) is an individual whose whereabouts is unknown; or~~

~~(v) is a noncustodial parent who is delinquent in the payment of court ordered child support on the date the petition is filed;~~

~~(3) a hearing is held on the petition in which the petitioners and interested persons, including parents, guardians, and custodians, are given an opportunity to appear and present evidence; and~~

~~(4) the allegations of the petition filed under subdivision (1) have been proven.~~

~~(c) A court's authorization granted under subsection (a):~~

~~(1) constitutes part of the confidential files of the clerk of the circuit court; and~~

~~(2) may be inspected only by written permission of a circuit, superior, or juvenile court.~~

SECTION 6. IC 31-11-1-7 IS ADDED TO THE INDIANA CODE

AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: **Sec. 7. (a) A minor who is sixteen (16) or seventeen (17) years of age may petition the juvenile court in the county in which the minor resides for an order granting the minor approval to marry and completely emancipating the minor. The petition must contain the following information:**

(1) The minor's name, gender, and age.

(2) Documentary proof of the minor's date of birth.

(3) The minor's address, and how long the minor has resided at that address.

(4) The following information with regard to the intended spouse:

(A) The intended spouse's name, gender, and age.

(B) Documentary proof of the intended spouse's date of birth.

(C) The intended spouse's address, and how long the intended spouse has resided at that address.

(5) A statement of:

(A) the reasons the minor desires to marry;

(B) how the minor and the intended spouse came to know each other; and

(C) how long the minor and the intended spouse have known each other.

(6) Copies of:

(A) any criminal records of the minor and of the intended spouse; and

(B) any protective order:

(i) issued to protect or restrain either the minor or the intended spouse; and

(ii) relating to domestic or family violence, a sexual offense, or stalking.

(7) Evidence that the minor has demonstrated maturity and capacity for self-sufficiency and self-support independent of the minor's parents or legal guardians or the intended spouse, including proof that the minor:

(A) has graduated from high school;

(B) has obtained a high school equivalency diploma;

(C) has a plan for continued education;

(D) has completed a vocational training or certificate program;

(E) has attained a professional licensure or certification; or

(F) has maintained stable housing or employment for at

least three (3) consecutive months prior to filing the petition.

(b) A court with which a petition under subsection (a) is filed shall:

(1) set a date for an evidentiary hearing on the petition;

(2) provide reasonable notice of the hearing to the minor and the minor's parents or legal guardians; and

(3) appoint an attorney to serve as guardian ad litem for the minor.

(c) At the evidentiary hearing, the court shall conduct an in camera interview with the minor separate from the minor's parents or legal guardians and intended spouse.

(d) Following the evidentiary hearing, and subject to subsection (e), the court may grant the petition if the court finds all of the following:

(1) The minor is a county resident who is at least sixteen (16) years of age.

(2) The intended spouse is not more than four (4) years older than the minor.

(3) The minor's decision to marry is voluntary, and free from force, fraud, or coercion.

(4) The minor is mature enough to make a decision to marry.

(5) The minor has established the minor's capacity to be self-sufficient and self-supporting independent of the minor's parents, legal guardians, and intended spouse.

(6) The minor understands the rights and responsibilities of parties to marriage and of completely emancipated minors.

(7) It is in the best interests of the minor for the court to grant the petition to marry and to completely emancipate the minor. In making the determination under this subdivision, the court shall consider how marriage and emancipation may affect the minor's health, safety, education, and welfare.

A court that grants a petition under this section shall issue written findings regarding the court's conclusions under subdivisions (1) through (7).

(e) The following, considered independently or together, are not sufficient to determine the best interests of a minor for purposes of this section:

(1) The fact that the minor or the intended spouse is pregnant or has had a child.

(2) The wishes of the parents or legal guardians of the minor. However, there is a rebuttable presumption that marriage and

emancipation are not in the best interests of the minor if both parents of the minor oppose the minor's marriage and emancipation.

(f) The juvenile court shall deny a petition under this section if the court finds any of the following:

(1) The intended spouse:

(A) is or was in a position of authority or special trust in relation to the minor; or

(B) has or had a professional relationship with the minor, as defined in IC 35-42-4-7.

(2) The intended spouse has been convicted of, or entered into a diversion program for, an offense under IC 35-42:

(A) that involves an act of violence;

(B) of which a child was the victim; or

(C) that is an offense under:

(i) IC 35-42-3.5; or

(ii) IC 35-42-4.

(3) Either the minor or the intended spouse is pregnant or is the mother of a child, and the court finds by a preponderance of evidence that:

(A) the other party to the marriage is the father of the child or unborn child; and

(B) the conception of the child or unborn child resulted from the commission of an offense under:

(i) IC 35-42-4-3 (child molesting);

(ii) IC 35-42-4-6 (child solicitation);

(iii) IC 35-42-4-7 (child seduction); or

(iv) IC 35-42-4-9 (sexual misconduct with a minor).

(4) The intended spouse has previously been enjoined by a protective order relating to domestic or family violence, a sexual offense, or stalking, regardless of whether the person protected by the order was the minor.

(g) If a court grants a petition under this section, the court shall also issue an order of complete emancipation of the minor and provide a certified copy of the order to the minor.

(h) A minor emancipated under this section is considered to have all the rights and responsibilities of an adult, except as provided under specific constitutional or statutory age requirements that apply to the minor because of the minor's age, including requirements related to voting, use of alcoholic beverages or tobacco products, and other health and safety regulations.

(i) A court hearing a petition under this section may issue any

other order the court considers appropriate for the minor's protection.

(j) A court that grants a petition under this section may require that both parties to the marriage complete premarital counseling with a marriage and family therapist licensed under IC 25-22.5, IC 25-23.6-8, or IC 25-33.

(k) A court that grants a petition under this section may impose any other condition on the grant of the petition that the court determines is reasonable under the circumstances.

SECTION 7. IC 31-11-2 IS REPEALED [EFFECTIVE JULY 1, 2020]. (Consent to Marry Required for Certain Individuals).

SECTION 8. IC 31-11-4-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 6. Each individual who applies for a marriage license must submit to the clerk of the circuit court **documentary proof of the individual's age, in the form of:**

(1) a:

(A) certified copy of the individual's birth certificate;

(B) copy of a birth record; or

(C) certification of birth issued by the state department of health, a local registrar of vital statistics, or another public office charged with similar duties under the law of another state, territory, or country;

(2) a certified copy of a judicial decree issued under IC 34-28-1 (or IC 34-4-3 before its repeal) that establishes the date of the individual's birth;

~~(3) any written evidence of the individual's date of birth that is satisfactory to the clerk; or~~

(3) a passport;

(4) a valid operator's license or other identification **that is** issued by a state **or another governmental entity and** that contains the individual's date of birth and current address;

(5) an immigration or naturalization record showing the individual's date of birth;

(6) a United States selective service card or armed forces record showing the individual's date of birth; or

(7) a:

(A) court record; or

(B) document or record issued by a governmental entity;

showing the individual's date of birth.

SECTION 9. IC 31-11-4-8 IS REPEALED [EFFECTIVE JULY 1, 2020]. ~~Sec. 8. If a written consent is required by IC 31-11-2, a clerk of a circuit court may not receive an application for a marriage license~~

~~unless:~~

~~(1) the clerk has filed the consent form in the clerk's office; and~~

~~(2) the clerk has entered a notice of the filing on the marriage license docket.~~

SECTION 10. IC 31-11-8-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 6. A marriage is void if the parties to the marriage:

(1) are residents of Indiana;

(2) had their marriage solemnized in another state with the intent to:

(A) evade **IC 31-11-1-4,** IC 31-11-4-4, or IC 31-11-4-11 (or IC 31-7-3-3 or IC 31-7-3-10 before their repeal); and

(B) subsequently return to Indiana and reside in Indiana; and

(3) without having established residence in another state in good faith, return to Indiana and reside in Indiana after the marriage is solemnized.

SECTION 11. IC 31-11-11-2 IS REPEALED [EFFECTIVE JULY 1, 2020]. ~~Sec. 2. A person who knowingly furnishes false information in a verified written consent under IC 31-11-2 commits a Level 6 felony.~~

SECTION 12. IC 31-34-20-6, AS AMENDED BY P.L.85-2017, SECTION 104, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 6. (a) The juvenile court **for the county in which a child resides** may emancipate ~~a~~ **the** child under section 1(a)(5) of this chapter **upon a petition brought by the child.**

(b) The court in which a petition is filed under subsection (a) shall appoint an attorney to serve as guardian ad litem for the child. The guardian ad litem shall investigate the statements contained in the petition and file a report of the investigation with the court.

(c) After receiving the report of the guardian ad litem under subsection (b) and holding a hearing, the court may grant the petition if the court finds:

(1) that emancipation is in the child's best interests; and

(2) that the child:

~~(1)~~ **(A)** wishes to be free from parental control and protection and no longer needs that control and protection;

~~(2)~~ **(B)** has sufficient money for the child's own support;

~~(3)~~ **(C)** understands the consequences of being free from parental control and protection; and

~~(4)~~ **(D)** has an acceptable plan for independent living.

~~(b)~~ **(d)** If the juvenile court **completely emancipates the child, the**

child has all the rights and responsibilities of an adult. If the juvenile court partially ~~or completely~~ emancipates the child, the court shall specify the terms of the emancipation, which may include the following:

(1) Suspension of the parent's or guardian's duty to support the child. In this case, the judgment of emancipation supersedes the support order of a court.

(2) Suspension of the following:

(A) The parent's or guardian's right to the control or custody of the child.

(B) The parent's right to the child's earnings.

~~(3) Empowering the child to consent to marriage.~~

~~(4)~~ **(3)** Empowering the child to consent to military enlistment.

~~(5)~~ **(4)** Empowering the child to consent to:

(A) medical;

(B) psychological;

(C) psychiatric;

(D) educational; or

(E) social;

services.

~~(6)~~ **(5)** Empowering the child to contract.

~~(7)~~ **(6)** Empowering the child to own property.

~~(c)~~ **(e)** An emancipated child remains subject to the following:

(1) IC 20-33-2 concerning compulsory school attendance.

(2) The continuing jurisdiction of the court.

(3) IC 31-11-1-4 concerning minimum age for marriage.

(4) Other specific constitutional and statutory age requirements applicable to the emancipated child because of the emancipated child's age, including requirements regarding voting, use of alcoholic beverages or tobacco products, and other health and safety regulations.

SECTION 13. IC 31-37-19-27, AS AMENDED BY P.L.85-2017, SECTION 107, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 27. (a) The juvenile court **for the county in which a child resides** may emancipate ~~a~~ **the** child under section 1(a)(5) or 5(b)(5) of this chapter **upon a petition brought by the child.**

(b) The court in which a petition is filed under subsection (a) shall appoint an attorney to serve as guardian ad litem for the child. The guardian ad litem shall investigate the statements contained in the petition and file a report of the investigation with the court.

(c) After receiving the report of the guardian ad litem under subsection (b) and holding a hearing, the court may grant the petition if the court finds that the child:

(1) wishes to be free from parental control and protection and no longer needs that control and protection;

(2) has sufficient money for the child's own support;

(3) understands the consequences of being free from parental control and protection; and

(4) has an acceptable plan for independent living.

~~(b)~~ **(d)** ~~Whenever~~ **If** the juvenile court **completely emancipates the child, the child has all the rights and responsibilities of an adult. If the juvenile court** partially ~~or completely~~ emancipates the child, the court shall specify the terms of the emancipation, which may include the following:

(1) Suspension of the parent's or guardian's duty to support the child. In this case, the judgment of emancipation supersedes the support order of a court.

(2) Suspension of:

(A) the parent's or guardian's right to the control or custody of the child; and

(B) the parent's right to the child's earnings.

~~(3) Empowering the child to consent to marriage.~~

~~(4)~~ **(3)** Empowering the child to consent to military enlistment.

~~(5)~~ **(4)** Empowering the child to consent to:

(A) medical;

(B) psychological;

(C) psychiatric;

(D) educational; or

(E) social;

services.

~~(6)~~ **(5)** Empowering the child to contract.

~~(7)~~ **(6)** Empowering the child to own property.

~~(c)~~ **(e)** An emancipated child remains subject to **the following:**

(1) IC 20-33-2 concerning compulsory school attendance. ~~and~~

(2) The continuing jurisdiction of the court.

(3) IC 31-11-1-4 concerning minimum age for marriage.

(4) Other specific constitutional and statutory age requirements applicable to the emancipated child because of the emancipated child's age, including requirements regarding voting, use of alcoholic beverages or tobacco products, and other health and safety regulations.

SECTION 14. IC 35-52-31-2 IS REPEALED [EFFECTIVE JULY

1, 2020]. ~~Sec. 2. IC 31-11-11-2 defines a crime concerning marriage.~~

_____

Speaker of the House of Representatives

_____

President of the Senate

_____

President Pro Tempore

_____

Governor of the State of Indiana

Date: _____ Time: _____

Second Regular Session of the 121st General Assembly (2020)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2019 Regular Session of the General Assembly.

HOUSE ENROLLED ACT No. 1313

AN ACT to amend the Indiana Code concerning courts and court officers.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 31-17-2.2-1, AS AMENDED BY P.L.186-2019, SECTION 11, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 1. (a) Except as provided in subsection (b), a relocating individual must file a notice of the intent to move with the clerk of the court that:

(1) issued the custody order or parenting time order; or

(2) if subdivision (1) does not apply, has jurisdiction over the legal proceedings concerning the custody of or parenting time with a child.

(b) A relocating individual is not required to file a notice of intent to move with the clerk of the court if:

(1) the relocation has been addressed by a prior court order, including a court order relieving the relocating individual of the requirement to file a notice; ~~and~~

or

(2) the relocation will:

(A) result in a decrease in the distance between the relocating individual's residence and the nonrelocating individual's residence; or

(B) result in an increase of not more than twenty (20) miles in the distance between the relocating individual's residence and

the nonrelocating individual's residence;

and allow the child to remain enrolled in the child's current school.

(c) Upon motion of a party, the court shall set the matter for a hearing to allow or restrain the relocation of a child and to review and modify, if appropriate, a custody order, parenting time order, grandparent visitation order, or child support order. The court's authority to modify a custody order, parenting time order, grandparent visitation order, or child support order is not affected by the fact that a relocating individual is exempt from the requirement to file a notice of relocation by subsection (b). The court shall take into account the following in determining whether to modify a custody order, parenting time order, grandparent visitation order, or child support order:

(1) The distance involved in the proposed change of residence.

(2) The hardship and expense involved for the nonrelocating individual to exercise parenting time or grandparent visitation.

(3) The feasibility of preserving the relationship between the nonrelocating individual and the child through suitable parenting time and grandparent visitation arrangements, including consideration of the financial circumstances of the parties.

(4) Whether there is an established pattern of conduct by the relocating individual, including actions by the relocating individual to either promote or thwart a nonrelocating individual's contact with the child.

(5) The reasons provided by the:

(A) relocating individual for seeking relocation; and

(B) nonrelocating parent for opposing the relocation of the child.

(6) Other factors affecting the best interest of the child.

(d) A court may order the relocating individual and the nonrelocating individual to participate in mediation or another alternative dispute resolution process before a hearing under this section:

(1) on its own motion; or

(2) upon the motion of any party.

(e) If a relocation occurs, all existing orders for custody, parenting time, grandparent visitation, and child support remain in effect until modified by the court.

(f) The court may award reasonable attorney's fees for a motion filed under this section in accordance with IC 31-15-10 and IC 34-52-1-1(b).

SECTION 2. IC 33-23-5-5 IS REPEALED [EFFECTIVE JULY 1, 2020]. ~~Sec. 5. A magistrate may do any of the following:~~

~~(1) Administer an oath or affirmation required by law.~~
~~(2) Solemnize a marriage.~~
~~(3) Take and certify an affidavit or deposition.~~
~~(4) Order that a subpoena be issued in a matter pending before the court.~~
~~(5) Compel the attendance of a witness.~~
~~(6) Punish contempt.~~
~~(7) Issue a warrant.~~
~~(8) Set bail.~~
~~(9) Enforce court rules.~~
~~(10) Conduct a preliminary, an initial, an omnibus, or other pretrial hearing.~~
~~(11) Conduct an evidentiary hearing or trial.~~
~~(12) Receive a jury's verdict.~~
~~(13) Verify a certificate for the authentication of records of a proceeding conducted by the magistrate.~~
~~(14) Enter a final order, conduct a sentencing hearing, and impose a sentence on a person convicted of a criminal offense as described in section 9 of this chapter.~~
~~(15) Enter a final order or judgment in any proceeding involving matters specified in IC 33-29-2-4 (jurisdiction of small claims docket) or IC 34-26-5 (protective orders to prevent domestic or family violence or harassment).~~
~~(16) Approve and accept criminal plea agreements.~~
~~(17) Approve agreed settlements concerning civil matters.~~
~~(18) Approve:~~
~~(A) decrees of dissolution;~~
~~(B) settlement agreements; and~~
~~(C) any other agreements;~~
~~of the parties in domestic relations actions or paternity actions.~~

SECTION 3. IC 33-23-5-8.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: **Sec. 8.5. Except as provided in section 8 of this chapter, a magistrate has the same powers as a judge.**

SECTION 4. IC 33-23-5-9 IS REPEALED [EFFECTIVE JULY 1, 2020]. ~~Sec. 9. (a) If a magistrate presides at a criminal trial or a guilty plea hearing, the magistrate may do the following:~~
~~(1) Enter a final order.~~
~~(2) Conduct a sentencing hearing.~~
~~(3) Impose a sentence on a person convicted of a criminal offense.~~
~~(b) This subsection does not apply to a consolidated city. Unless the defendant consents, a magistrate who did not preside at the criminal~~

~~trial may not preside at the sentencing hearing. However, this subsection does not prohibit a magistrate from presiding at a sentencing hearing if there was no trial.~~

SECTION 5. IC 33-23-17 IS REPEALED [EFFECTIVE JULY 1, 2020]. (Judicial Technology Oversight Committee).

SECTION 6. IC 33-24-6-3, AS AMENDED BY P.L.207-2019, SECTION 1, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 3. (a) The office of judicial administration shall do the following:

(1) Examine the administrative and business methods and systems employed in the offices of the clerks of court and other offices related to and serving the courts and make recommendations for necessary improvement.

(2) Collect and compile statistical data and other information on the judicial work of the courts in Indiana. All justices of the supreme court, judges of the court of appeals, judges of all trial courts, and any city or town courts, whether having general or special jurisdiction, court clerks, court reporters, and other officers and employees of the courts shall, upon notice by the chief administrative officer and in compliance with procedures prescribed by the chief administrative officer, furnish the chief administrative officer the information as is requested concerning the nature and volume of judicial business. The information must include the following:

(A) The volume, condition, and type of business conducted by the courts.

(B) The methods of procedure in the courts.

(C) The work accomplished by the courts.

(D) The receipt and expenditure of public money by and for the operation of the courts.

(E) The methods of disposition or termination of cases.

(3) Prepare and publish reports, not less than one (1) or more than two (2) times per year, on the nature and volume of judicial work performed by the courts as determined by the information required in subdivision (2).

(4) Serve the judicial nominating commission and the judicial qualifications commission in the performance by the commissions of their statutory and constitutional functions.

(5) Administer the civil legal aid fund as required by IC 33-24-12.

(6) Administer the court technology fund established by section 12 of this chapter.

(7) By December 31, 2013, develop and implement a standard

protocol for sending and receiving court data:

(A) between the protective order registry, established by IC 5-2-9-5.5, and county court case management systems;

(B) at the option of the county prosecuting attorney, for:

(i) a prosecuting attorney's case management system;

(ii) a county court case management system; and

(iii) a county court case management system developed and operated by the office of judicial administration;

to interface with the electronic traffic tickets, as defined by IC 9-30-3-2.5; and

(C) between county court case management systems and the case management system developed and operated by the office of judicial administration.

The standard protocol developed and implemented under this subdivision shall permit private sector vendors, including vendors providing service to a local system and vendors accessing the system for information, to send and receive court information on an equitable basis and at an equitable cost.

(8) Establish and administer an electronic system for receiving information that relates to certain individuals who may be prohibited from possessing a firearm and transmitting this information to the Federal Bureau of Investigation for inclusion in the NICS.

(9) Establish and administer an electronic system for receiving drug related felony conviction information from courts. The office of judicial administration shall notify NPLEx of each drug related felony entered after June 30, 2012, and do the following:

(A) Provide NPLEx with the following information:

(i) The convicted individual's full name.

(ii) The convicted individual's date of birth.

(iii) The convicted individual's driver's license number, state personal identification number, or other unique number, if available.

(iv) The date the individual was convicted of the felony.

Upon receipt of the information from the office of judicial administration, a stop sale alert must be generated through NPLEx for each individual reported under this clause.

(B) Notify NPLEx if the felony of an individual reported under clause (A) has been:

(i) set aside;

(ii) reversed;

(iii) expunged; or

(iv) vacated.

Upon receipt of information under this clause, NPLEx shall remove the stop sale alert issued under clause (A) for the individual.

~~(10) Staff the judicial technology oversight committee established by IC 33-23-17-2.~~

~~(11)~~ **(10)** After July 1, 2018, establish and administer an electronic system for receiving from courts felony conviction information for each felony described in IC 20-28-5-8(c). The office of judicial administration shall notify the department of education at least one (1) time each week of each felony described in IC 20-28-5-8(c) entered after July 1, 2018, and do the following:

(A) Provide the department of education with the following information:

(i) The convicted individual's full name.

(ii) The convicted individual's date of birth.

(iii) The convicted individual's driver's license number, state personal identification number, or other unique number, if available.

(iv) The date the individual was convicted of the felony.

(B) Notify the department of education if the felony of an individual reported under clause (A) has been:

(i) set aside;

(ii) reversed; or

(iii) vacated.

~~(12)~~ **(11)** Perform legal and administrative duties for the justices as determined by the justices.

~~(13)~~ **(12)** Provide staff support for the judicial conference of Indiana established in IC 33-38-9.

~~(14)~~ **(13)** Work with the United States Department of Veterans Affairs to identify and address the needs of veterans in the court system.

(b) All forms to be used in gathering data must be approved by the supreme court and shall be distributed to all judges and clerks before the start of each period for which reports are required.

(c) The office of judicial administration may adopt rules to implement this section.

SECTION 7. IC 33-28-3-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 4. (a) This section applies after June 30, 2005.

(b) The small claims docket has jurisdiction over the following:

(1) Civil actions in which the amount sought or value of the property sought to be recovered is not more than ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).** The plaintiff in a statement of claim or the defendant in a counterclaim may waive the excess of any claim that exceeds ~~six~~ **eight** thousand dollars ~~($6,000)~~ **($8,000)** in order to bring it within the jurisdiction of the small claims docket.

(2) Possessory actions between landlord and tenant in which the rent due at the time the action is filed does not exceed ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).**

(3) Emergency possessory actions between a landlord and tenant under IC 32-31-6.

SECTION 8. IC 33-29-2-4 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 4. (a) This section applies after June 30, 2005.

(b) The small claims docket has jurisdiction over the following:

(1) Civil actions in which the amount sought or value of the property sought to be recovered is not more than ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).** The plaintiff in a statement of claim or the defendant in a counterclaim may waive the excess of any claim that exceeds ~~six~~ **eight** thousand dollars ~~($6,000)~~ **($8,000)** in order to bring it within the jurisdiction of the small claims docket.

(2) Possessory actions between landlord and tenant in which the rent due at the time the action is filed does not exceed ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).**

(3) Emergency possessory actions between a landlord and tenant under IC 32-31-6.

SECTION 9. IC 33-31-2-3, AS ADDED BY P.L.201-2011, SECTION 30, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 3. The small claims docket has jurisdiction over the following:

(1) Civil actions in which the amount sought or value of the property sought to be recovered is not more than ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).** The plaintiff in a statement of claim or the defendant in a counterclaim may waive the excess of any claim that exceeds ~~six~~ **eight** thousand dollars ~~($6,000)~~ **($8,000)** in order to bring it within the jurisdiction of the small claims docket.

(2) Possessory actions between landlord and tenant in which the rent due at the time the action is filed does not exceed ~~six~~ **eight** thousand dollars ~~($6,000).~~ **($8,000).**

(3) Emergency possessory actions between a landlord and tenant under IC 32-31-6.

SECTION 10. IC 33-33-49-14, AS AMENDED BY P.L.142-2007, SECTION 10, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 14. (a) Not more than thirty (30) days after taking the oath of office, the judges shall meet and designate four (4) of the judges as the executive committee for administrative purposes. The executive committee shall be selected by a vote of two-thirds (2/3) of the judges sitting at the time the vote is taken. If all vacancies cannot be filled by a two-thirds (2/3) vote, vacancies may be filled by such other method as provided by court rule. The executive committee is responsible for the operation and conduct of the court. The executive committee shall operate and maintain the juvenile detention facilities in the county. A member of the executive committee shall serve in the capacity provided by rules adopted by the court under section 11 of this chapter. A member of the executive committee serves for a term of two (2) years beginning on the date of the member's election. Except for the rotation of the presiding judge as provided in subsection (b), any or all of the members elected to the executive committee may be reelected. Of the four (4) judges elected to the executive committee, not more than two (2) may be members of the same political party.

(b) One (1) of the four (4) judges elected to the executive committee shall be elected as presiding judge, and three (3) of the four (4) judges elected to the executive committee shall be elected as associate presiding judges. Beginning with the election of the executive committee in 2007, a presiding judge may not be elected from the same political party as the presiding judge who served the previous term. Each judge who is a member of the executive committee has an equal vote in all matters pertaining to the business of the court when an action requires a majority vote. If a tie vote occurs, the presiding judge shall cast the tiebreaking vote. Any action taken by the executive committee may be overruled by a vote of two-thirds (2/3) of all the judges sitting at the time the vote is taken. The physical reassignment of a judge to a different courtroom requires a unanimous vote of the executive committee. The executive committee shall assign cases, offices, and courtrooms for trial judges or reassignment of newly filed cases in the interests of the speedy, economical, and uniform disposition of cases. All matters of trial dates, continuances, and subpoenas used for trial shall be determined by the trial judge in accordance with rules of the superior court. The executive committee shall perform other duties as determined by rules of the court.

(c) The court shall, by rules of the court, divide the work of the court

into various divisions, including but not limited to the following:

(1) Civil.

(2) Criminal.

(3) ~~Probate.~~ **Family.**

~~(4) Juvenile.~~

(d) The work of each division shall be allocated by the rules of the court.

(e) The judges shall be assigned to various divisions or rooms as provided by rules of the court. Whenever possible, an incumbent judge shall be allowed the option of remaining in a particular room or division. Whenever any action of the court is required, the judges of the court shall act in concert, by a vote under section 11 of this chapter. The court shall keep appropriate records of rules, orders, and assignments of the court.

SECTION 11. IC 33-33-49-16 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 16. (a) An appointed probate hearing judge or probate commissioner shall be vested by the judge of the probate division with suitable powers for the handling of all probate matters of the court, including the following:

(1) Fixing of all bonds.

(2) Auditing accounts of estates, guardianships, and trusts.

(3) Accepting reports, accounts, and settlements filed in the court.

(4) Appointing personal representatives, guardians, and trustees.

(5) Probating wills.

(6) Taking or hearing evidence on or concerning matters described in this subsection or any other probate, guardianship, or trust matters in litigation before the court.

(7) Enforcing court rules.

(8) Making reports to the court concerning the judge's or commissioner's doings in the proceedings described in this subsection, including reports concerning the commissioner's findings and conclusions regarding the proceedings.

However, all matters handled by a hearing judge or commissioner under this subsection are under the final jurisdiction and decision of the judge of the probate division.

(b) A juvenile referee appointed by the judge of the juvenile division shall have all suitable powers for the handling of the juvenile matters of the court, including the following:

(1) Fixing of bonds.

(2) Taking and hearing evidence on or concerning juvenile matters in litigation before the court.

(3) Enforcing court rules.

(4) Making reports to the court concerning the juvenile referee's handling of proceedings of the juvenile division of the court.

However, all matters handled by a juvenile referee under this subsection are under final jurisdiction and decision of the judge or judges of the juvenile division designated by rules of the court.

(c) A bail commissioner may fix bonds, including the following:

(1) Determining whether an individual is to be released on the individual's own recognizance in criminal cases and proceedings.

(2) Making reports to the court concerning the bail commissioner's activities.

All matters handled by a bail commissioner under this subsection are under the final jurisdiction and decision of the judge or judges of the criminal division as designated by rules of the court.

(d) For any of the purposes specified in this section, a probate hearing judge, probate commissioner, referee, or bail commissioner may do the following:

(1) Summon witnesses to testify before the probate hearing judge, probate commissioner, referee, or bail commissioner.

(2) Administer oaths and take acknowledgments in connection with duties.

(3) Administer oaths and take acknowledgments generally.

(e) A master commissioner appointed by the court under this section has the powers and duties prescribed for a magistrate under ~~IC 33-23-5-5~~ **IC 33-23-5-6** through ~~IC 33-23-5-9.~~ **IC 33-23-5-8.5.** A master commissioner shall report the findings in each of the matters before the master commissioner in writing to the judge or judges of the division to which the master commissioner is assigned or as designated by rules of the court.

SECTION 12. IC 33-33-49-17 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 17. (a) The court shall hold sessions in:

(1) the ~~city-county building~~ **community justice campus** in Indianapolis; and

(2) other places in Marion County as the court determines.

(b) The city-county council shall:

(1) provide and maintain in the ~~building~~ **community justice campus** and at other places in Marion County as the court may determine suitable and convenient courtrooms for the holding of the court, suitable and convenient jury rooms, and offices for the judges, other court officers and personnel, and other facilities as are necessary; and

(2) provide all necessary furniture and equipment for rooms and

offices of the court.

SECTION 13. **An emergency is declared for this act.**

_____

Speaker of the House of Representatives

_____

President of the Senate

_____

President Pro Tempore

_____

Governor of the State of Indiana

Date: _____ Time: _____

Indiana Rules of Court
Child Support Rules and Guidelines

Adopted Effective October 1, 1989
Including Amendments Received Through January 1, 2020

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CHILD SUPPORT RULES

Support Rule 1. Adoption of Child Support Rules and Guidelines

The Indiana Supreme Court hereby adopts the Indiana Child Support Guidelines, as drafted by the Judicial Administration Committee and adopted by the Board of the Judicial Conference of Indiana and all subsequent amendments thereto presented by the Domestic Relations Committee of the Judicial Conference of Indiana, as the Child Support Rules and Guidelines of this Court.

Support Rule 2. Presumption

In any proceeding for the award of child support, there shall be a rebuttable presumption that the amount of the award which would result from the application of the Indiana Child Support Guidelines is the correct amount of child support to be awarded.

Support Rule 3. Deviation from Guideline Amount

If the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances supporting that conclusion.

INDIANA CHILD SUPPORT GUIDELINES

GUIDELINE 1. PREFACE

Guidelines to determine levels of child support and educational support were developed by the Judicial Administration Committee of the Judicial Conference of Indiana and adopted by the Indiana Supreme Court. The guidelines are consistent with the provisions of Indiana Code Title 31 which place a duty for child support and educational support upon parents based upon their financial resources and needs, the standard of living the child would have enjoyed had the marriage not been dissolved or had the separation not been ordered, the physical or mental condition of the child, and the child's educational needs.

The Guidelines have three objectives:

(1) To establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support;

(2) To make awards more equitable by ensuring more consistent treatment of people in similar circumstances; and,

(3) To improve the efficiency of the court process by promoting settlements and giving courts and the parties guidelines in settling the level of awards.

The Indiana Child Support Guidelines are based on the Income Shares Model, developed by the Child Support Project of the National Center for State Courts. The Income Shares Model is predicated on the concept that the child should receive the same proportion of parental income that he or she would have received if the parents lived together. Because household spending on behalf of children is intertwined with spending on behalf of adults for most expenditure categories, it is difficult to determine the proportion allocated to children in individual cases, even with exhaustive financial information. However, a number of authoritative economic studies provide estimates of the average amount of household expenditure on children in intact households. These studies have found the proportion of household spending devoted to children is related to the level of household income and to the number and ages of children. The Indiana Child Support Guidelines relate the level of child support to income and the number of children. In order to provide simplicity in the use of the Guidelines, however, child support figures reflect a blend of all age categories weighted toward school age children.

Based on this economic evidence, the Indiana Child Support Guidelines calculate child support as the share of each parent's income estimated to have been spent on the child if the parents and child were living in an intact household. The calculated amount establishes the level of child support for both the custodial and non-custodial parent. Absent grounds for a deviation, the custodial parent should be required to make monetary payments of child support, if application of the parenting time credit would so require.

COMMENTARY

History of Development. *In June of 1985, the Judicial Reform Committee (now the Judicial Administration Committee) of the Judicial Conference of Indiana undertook the task of developing child support guidelines for use by Indiana judges. While the need had been long recognized in Indiana, the impetus for this project came from federal statutes requiring guidelines to be in place no later than October 1, 1987. P.L. 98-378. Paradoxically, guidelines did not need to be mandatory under the 1984 federal legislation to satisfy federal requirements; they were only required to be made available to judges and other officials with authority to establish child support awards. 45 CFR Ch. III, § 302.56.*

The final draft was completed by the Judicial Reform Committee on July 24, 1987, and was presented to the Judicial Conference of Indiana Board of Directors on September 17, 1987. The Board accepted the report of the Reform Committee, approved the Guidelines and recommended their use to the judges of Indiana in all matters of child support.

Family Support Act of 1988. *On October 13, 1988, the United States Congress passed the "Family Support Act of 1988," P.L. 100-485 amending the Social Security Act by deleting the original language which made application of the Guideline discretionary and inserted in its place the following language:*

"There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines

would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case." P.L. 100-485, § 103(a)(2).

The original Guidelines that went into effect October 1, 1987 and their commentary were revised by the Judicial Administration Committee to reflect the requirement that child support guidelines be a rebuttable presumption. The requirement applies to all cases where support is set after October 1, 1989, including actions brought under Title IV-D of the Social Security Act (42 U.S.C.A. § 651-669). Also, after October 1, 1989, counties and individual courts may not opt to use alternate methods of establishing support. The Indiana Child Support Guidelines were required to be in use in all Indiana courts in all proceedings where child support is established or modified on and after October 1, 1989.

Periodic Review of Guidelines and Title IV-D Awards. *The "Family Support Act of 1988" also requires that the Guidelines be reviewed at least every four years "to assure their application results in the determination of appropriate child support award amounts." P.L. 100-485, § 103(b). Further, each state must develop a procedure to ensure that all Title IV-D awards are periodically reviewed to ensure that they comply with the Guidelines. P.L. 100-485, § 103(c).*

Compliance With State Law. *The Child Support Guidelines were developed specifically to comply with federal requirements, as well as Indiana law.*

Objectives of the Indiana Child Support Guidelines. *The following three objectives are specifically articulated in the Indiana Child Support Guidelines:*

1. To establish as state policy an appropriate standard of support for children, subject to the ability of parents to financially contribute to that support. When the Guidelines were first recommended for use by the Indiana Judicial Conference on September 17, 1987, many courts in the state had no guideline to establish support. Many judges had expressed the need for guidelines, but few had the resources to develop them for use in a single court system. The time, research and economic understanding necessary to develop meaningful guidelines were simply beyond the resources of most individual courts.

2. To make awards more equitable by ensuring more consistent treatment of people in similar circumstances. This consistency can be expected not only in the judgments of a particular court, but between jurisdictions as well. What is fair for a child in one court is fair to a similarly situated child in another court.

3. To improve the efficiency of the court process by promoting settlements and giving courts and the parties guidelines in settling the level of awards. In other words, when the outcome is predictable, there is no need to fight. Because the human experience provides an infinite number of variables, no guideline can cover every conceivable situation, so litigation is not completely forestalled in matters of support. If the Guidelines are consistently applied, however, those instances should be minimized.

Economic Data Used in Developing Guidelines. *What does it take to support a child? The question is simple, but the answer is extremely complex. Yet, the question must be answered if an adequate amount of child support is to be ordered by the court. Determining the cost attributable to children is complicated by intertwined general household expenditures. Rent, transportation, and grocery costs, to mention a few, are impossible to accurately apportion between family members. In developing these Guidelines, a great deal of reliance was placed on the research of Thomas J. Espenshade, (Investing In Children, Urban Institute Press, 1984) generally considered the most authoritative study of household expenditure patterns. Espenshade used data from 8,547 households and from that data estimated average expenditures for children present in the home. Espenshade's estimates demonstrate that amounts spent on the children of intact households rise as family income increases. They further demonstrate at constant levels of income that expenditures decrease for each child as family size increases. These principles are reflected in the Guideline Schedules for Weekly Support Payments, which are included in the Indiana Child Support Guidelines. By demonstrating how expenditures for each child decrease as family size increases, Espenshade should have put to rest the previous practice of ordering equal amounts of support per child when two or more children are involved. Subsequent guidelines reviews have considered more current economic studies of child-rearing expenditures (e.g., Mark Lino, Expenditures on Children by Families: 2006 Annual Report, United States Department of Agriculture, 2007; David Betson, State of Oregon Child Support Guidelines Review: Updated Obligation Scales and Other Considerations, report to State of Oregon Department of Justice, 2006). These periodic guidelines reviews have concluded that the Indiana Guidelines based on the Espenshade estimates are generally within the range of more current estimates of child-rearing expenditures. A notable exception at high incomes leveled off the child support schedule for combined weekly adjusted incomes above $4,000. In 2009 this exception was removed. The increase is now incorporated into the schedule up to combined weekly adjusted incomes of $10,000 and a formula is provided for incomes above that amount. Previously, a formula was provided for combined weekly adjusted incomes above $4,000.*

Income Shares Model. *After review of five approaches to the establishment of child support, the Income Shares Model was selected for the Indiana Guidelines. This model was perceived as the fairest approach for children because it is based on the premise that children should receive the same proportion of parental income after a dissolution that they would have received if the family had remained intact. Because it then apportions the cost of*

children between the parents based on their means, it is also perceived as being fair to parents. In applying the Guidelines, the following steps are taken:

1. *The gross income of both parents is added together after certain adjustments are made. A percentage share of income for each parent is then determined.*
2. *The total is taken to the support tables, referred to in the Indiana Guidelines as the Guideline Schedules for Weekly Support Payments, to determine the total cost of supporting a child or children.*
3. *Work-related child care expenses and the weekly costs of health insurance premiums for the child(ren) are then added to the basic child support obligation.*
4. *The child support obligation is then prorated between the parents, based on their proportionate share of the weekly adjusted income, hence the name "income shares."*

The Income Shares Model was developed by The Institute for Court Management of the National Center for State Courts under the Child Support Guidelines Project. This approach was designed to be consistent with the Uniform Marriage and Divorce Act, the principles of which are consistent with IC 31-16-6-1. Both require the court to consider the financial resources of both parents and the standard of living the child would have enjoyed in an intact family.

Gross Versus Net Income. *One of the policy decisions made by the Judicial Administration Committee in the early stages of developing the Guidelines was to use a gross income approach as opposed to a net income approach. Under a net income approach, extensive discovery is often required to determine the validity of deductions claimed in arriving at net income. It is believed that the use of gross income reduces discovery. (See Commentary to Guideline 3A). While the use of gross income has proven controversial, this approach is used by the majority of jurisdictions and, after a thorough review, is considered the best reasoned.*

The basic support obligation would be the same whether gross income is reduced by adjustments built into the Guidelines or whether taxes are taken out and a net income option is used. A support guideline schedule consists of a column of income figures and a column of support amounts. In a gross income methodology, the tax factor is reflected in the support amount column, while in a net income guideline, the tax factor is applied to the income column. In devising the Indiana Guidelines, an average tax factor of 21.88 percent was used to adjust the support column.

Of course, taxes vary for different individuals. This is the case whether a gross or net income approach is used. Under the Indiana Guideline, where taxes vary significantly from the assumed rate of 21.88 percent, a trial court may choose to deviate from the guideline amount where the variance is substantiated by evidence at the support hearing.

Flexibility Versus the Rebuttable Presumption. *Although application of the Guideline yields a figure that becomes a rebuttable presumption, there is room for flexibility. Guidelines are not immutable, black letter law. A strict and totally inflexible application of the Guidelines to all cases can easily lead to harsh and unreasonable results. If a judge believes that in a particular case application of the Guideline amount would be unreasonable, unjust, or inappropriate, a finding must be made that sets forth the reason for deviating from the Guideline amount. The finding need not be as formal as Findings of Fact and Conclusions of Law; the finding need only articulate the judge's reasoning. For example, if under the facts and circumstances of the case, the noncustodial parent would bear an inordinate financial burden, the following finding would justify a deviation:*

"Because the noncustodial parent suffers from a chronic medical condition requiring uninsured medical expenses of $357.00 per month, the Court believes that setting child support in the Guideline amount would be unjust and instead sets support in the amount of $___per week."

Agreed Orders submitted to the court must also comply with the "rebuttable presumption" requirement; that is, the order must recite why the order deviates from the Guideline amount.

1. ***Phasing in Support Orders.*** *Some courts may find it desirable in modification proceedings to gradually implement the Guideline order over a period of time, especially where support computed under the Guideline is considerably higher than the amount previously paid. Enough flexibility exists in the Guidelines to permit that approach, as long as the judge's rationale is explained with an entry such as:*

"The Guideline's support represents an increase of 40%, and the court finds that such an abrupt change in support obligation would render the obligor incapable of meeting his/her other established obligations. Therefore, the Court sets support in the amount of $_____ and, on October 1, 20___, it shall increase to $_____ and, on September 1, 20__, obligor shall begin paying the Guideline amount of $_____."

2. ***Situations Calling for Deviation****. An infinite number of situations may prompt a judge to deviate from the Guideline amount. For illustration only, and not as a complete list, the following examples are offered:*

- *One or both parties pay union dues as a condition of employment.*
- *A party provides support for an elderly parent.*

- *The noncustodial parent purchases school clothes.*
- *The noncustodial parent has extraordinary medical expenses for himself or herself.*
- *A parent is a member of the armed forces and the military provides housing.*
- *The obligor is still making periodic payments to a former spouse pursuant to a prior Dissolution Decree.*
- *One of the parties is required to travel an unusually long distance in the course of employment on a regular or daily basis and incurs an unusually large expense for such travel, and*
- *The custodial or noncustodial parent incurs significant travel expense in exercising parenting time.*

Again, no attempt has been made to define every possible situation that could conceivably arise when determining child support and to prescribe a specific method of handling each of them. Practitioners must keep this in mind when advising clients and when arguing to the court. Many creative suggestions will undoubtedly result. Judges must also avoid the pitfall of blind adherence to the computation for support without giving careful consideration to the variables that require changing the result in order to do justice.

GUIDELINE 2. USE OF THE GUIDELINES

The Guideline Schedules provide calculated amounts of child support. For obligors with a combined weekly adjusted income, as defined by these Guidelines, of less than $100.00, the Guidelines provide for case-by-case determination of child support. When a parent has extremely low income the amount of child support recommended by use of the Guidelines should be carefully scrutinized. The court should consider the obligor's income and living expenses to determine the maximum amount of child support that can reasonably be ordered without denying the obligor the means for self-support at a minimum subsistence level. A numeric amount of child support shall be ordered; however, there are situations where a $0.00 support order is appropriate.

Temporary maintenance may be awarded by the court not to exceed thirty-five percent (35%) of the obligor's weekly adjusted income. In no case shall child support and temporary maintenance exceed fifty percent (50%) of the obligor's weekly adjusted income. Temporary maintenance and/or child support may be ordered by the court either in dollar payments or "in-kind" payments of obligations.

Federal law requires the Indiana Child Support Guidelines be applied in every instance in which child support is established including, but not limited to, dissolutions of marriage, legal separations, paternity actions, juvenile proceedings, petitions to establish support and Title IV D proceedings.

Indiana requires worksheets, including a Child Support Obligation Worksheet, to assist judges, practitioners, and parents in calculating the presumptive amount of child support under the Guidelines.

COMMENTARY

Minimum Support. *The Guideline's schedules for weekly support payments do not provide an amount of support for couples with combined weekly adjusted income of less than $100.00. Consequently, the Guidelines do not establish a minimum support obligation. Instead the facts of each individual case must be examined and support set in such a manner that the obligor is not denied a means of self-support at a subsistence level. For example, (1) a parent who has a high parenting time credit; (2) a parent who suffers from debilitating mental illness; (3) a parent caring for a disabled child; (4) an incarcerated parent; (5) a parent or a family member with a debilitating physical health issue; or, (6) a natural disaster are significant but not exclusive factors for the court to consider in setting a child support order. The court should not automatically attribute minimum wage to parents who, for a variety of factors, are not capable of earning minimum wage.*

Where parents live together with the child and share expenses, a child support worksheet shall be completed and a $0.00 order may be entered as a deviation.

Temporary Maintenance. *It is recommended that temporary maintenance not exceed thirty-five percent (35%) of the obligor's weekly adjusted income. The maximum award should be reserved for those instances where the custodial spouse has no income or no means of support, taking into consideration that spouse's present living arrangement (i.e., whether or not he or she lives with someone who shares or bears the majority of the living expense, lives in the marital residence with little or no expense, lives in military housing, etc.).*

It is further recommended that the total of temporary maintenance and child support should not exceed fifty percent (50%) of the obligor's weekly adjusted income. In computing temporary maintenance, in-kind payments, such as the payment of utilities, house payments, rent, etc., should also be included in calculating the percentage limitations. Care must also be taken to ensure that the obligor is not deprived of the ability to support himself or herself.

Spousal Maintenance. *It should also be emphasized that the recommendations concerning maintenance apply only to temporary maintenance, not maintenance in the Final Decree. An award of spousal maintenance in the*

Final Decree must, of course, be made in accordance with Indiana statute. These Guidelines do not alter those requirements. Theoretically, when setting temporary maintenance, child support should come first. That is, if child support is set at forty percent (40%) of the obligor's weekly adjusted income, only a maximum of ten percent (10%) of the obligor's income would be available for maintenance. That distinction, however, makes little practical difference. As with temporary maintenance, care should be taken to leave the obligor with adequate income for subsistence. In many instances the court will have to review the impact of taxes on the obligor's income before entering an order for spousal maintenance in addition to child support to avoid injustice to the obligor.

The worksheet provides a deduction for spousal maintenance paid (Line 1D). Caution should be taken to assure that any credit taken is for maintenance and not for periodic payments as the result of a property settlement. No such deduction is given for amounts paid by an obligor as the result of a property settlement, although that is a factor the court may wish to consider in determining the obligor's ability to pay the scheduled amount of support at the present time. Again, flexibility was intended throughout the Guidelines and they were not intended to place the obligor in a position where he or she loses all incentive to comply with the orders of the court.

Guidelines to be Applied in all Matters of Child Support. *The Indiana Child Support Guidelines shall be applied in every instance in which child support is established including, but not limited to, dissolutions of marriage, legal separations, paternity actions, juvenile proceedings, petitions to establish support and Title IV-D proceedings.*

The Indiana legislature requires the Indiana Child Support Guidelines be applied and the Child Support Worksheet be used in determining the manner in which financial services to children that are CHINS (Child in Need of Services) or delinquent are to be repaid. Similarly, the legislature requires the court to use the Guidelines to determine the financial contribution required from each parent of a child or the guardian of the child's estate for costs associated with the institutional placement of a child.

GUIDELINE 3. DETERMINATION OF CHILD SUPPORT AMOUNT

A. Definition of Weekly Gross Income.

1. Definition of Weekly Gross Income (Line 1 of Worksheet). For purposes of these Guidelines, "weekly gross income" is defined as actual weekly gross income of the parent if employed to full capacity, potential income if unemployed or underemployed, and the value of "in-kind" benefits received by the parent. Weekly gross income of each parent includes income from any source, except as excluded below, and includes, but is not limited to, income from salaries, wages, commissions, bonuses, overtime, partnership distributions, dividends, severance pay, pensions, interest, trust income, annuities, structured settlements, capital gains, social security benefits, worker's compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, inheritance, prizes, and alimony or maintenance received.

Social Security disability benefits paid for the benefit of the child must be included in the disabled parent's gross income. The disabled parent is entitled to a credit for the amount of Social Security disability benefits paid for the benefit of the child.

Certain Exclusions from Income. Specifically excluded are benefits from means-tested public assistance programs, including, but not limited to, Temporary Aid to Needy Families (TANF), Supplemental Security Income, and Food Stamps. Also excluded are survivor benefits received by or for other children residing in either parent's home.

2. Self-Employment, Business Expenses, In-Kind Payments and Related Issues. Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly Gross Income from self-employment may differ from a determination of business income for tax purposes.

Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business should be counted as income if they are significant and reduce personal living expenses. Such payments might include a company car, free housing, or reimbursed meals.

The self-employed shall be permitted to deduct that portion of their FICA tax payment that exceeds the FICA tax that would be paid by an employee earning the same Weekly Gross Income.

3. Unemployed, Underemployed and Potential Income. If a court finds a parent is voluntarily unemployed or underemployed without just cause, child support shall be calculated based on a determination of potential income. A determination of potential income shall be made by determining employment potential and probable earnings

level based on the obligor's employment and earnings history, occupational qualifications, educational attainment, literacy, age, health, criminal record or other employment barriers, prevailing job opportunities, and earnings levels in the community. If there is no employment and earnings history and no higher education or vocational training, the facts of the case may indicate that Weekly Gross Income be set at least at the federal minimum wage level, provided the resulting child support amount is set in such a manner that the obligor is not denied a means of self-support at a subsistence level.

COMMENTARY TO GUIDELINE 3A

Weekly Gross Income.

1. Child Support Calculations Generally. *Weekly Gross Income, potential income, weekly adjusted income and basic child support obligation have very specific and well-defined meanings within the Indiana Child Support Guidelines. Their definitions are not repeated in the Commentary, but further explanation follows.*

2. Determination of Weekly Gross Income. *Weekly Gross Income is the starting point in determining the child support obligation, and it must be calculated for both parents. If one or both parents have no income, then potential income may be calculated and used as Weekly Gross Income. Likewise, imputed income may be substituted for, or added to, other income in arriving at Weekly Gross Income. It includes such items as free housing, a company car that may be used for personal travel, and reimbursed meals or other items received by the obligor that reduce his or her living expenses.*

The Child Support Obligation Worksheet does not include space to calculate Weekly Gross Income. It must be calculated separately and the result entered on the worksheet.

In calculating Weekly Gross Income, it is helpful to begin with total income from all sources. This figure may not be the same as gross income for tax purposes. Internal Revenue Code of 1986, § 61. Means-tested public assistance programs (those based on income) are excluded from the computation of Weekly Gross Income, but other government payments, such as Social Security benefits and veterans pensions/retired pay, should be included. However, survivor benefits paid to or for the benefit of their children are not included. In cases where a custodial parent is receiving, as a representative payee for a prior born child, Social Security survivor benefits because of the death of the prior born child's parent, the court should carefully consider Line 1 C of the basic child support obligation worksheet, Legal Duty of Support for Prior-born Children. Because the deceased parent's contribution for the support of the prior born child is being partially paid by Social Security survivor benefits that are excluded from Weekly Gross Income, the court should not enter, on Line 1C, an amount that represents 100% of the cost of support for the prior born child. The income of the spouses of the parties is not included in Weekly Gross Income.

A court may not consider the incarceration of a parent as voluntary unemployment and his or her potential income should not be assessed for the establishment or modification of child support. I.C. 31-16-8-1 (d).

a. Self-Employment, Rent and Royalty Income. *Calculating Weekly Gross Income for the self-employed or for those who receive rent and royalty income presents unique problems, and calls for careful review of expenses. The principle involved is that actual expenses are deducted, and benefits that reduce living expenses (i.e. company cars, free lodging, reimbursed meals, etc.) should be included in whole or in part. It is intended that actual out-of-pocket expenditures for the self-employed, to the extent that they are reasonable and necessary for the production of income, be deducted. Reasonable deductions for capital expenditures may be included. While income tax returns may be helpful in arriving at Weekly Gross Income for a self-employed person, the deductions allowed by the Guidelines may differ significantly from those allowed for tax purposes.*

The self-employed pay FICA tax at twice the rate that is paid by employees. At present rates, the self-employed pay fifteen and thirty one-hundredths percent (15.30%) of their gross income to a designated maximum, while employees pay seven and sixty-five one-hundredths percent (7.65%) to the same maximum. The self-employed are therefore permitted to deduct one-half of their FICA payment when calculating Weekly Gross Income.

b. Overtime, Commissions, Bonuses and Other Forms of Irregular Income. *There are numerous forms of income that are irregular or nonguaranteed, which cause difficulty in accurately determining the gross income of a party. Overtime, commissions, bonuses, periodic partnership distributions, voluntary extra work and extra hours worked by a professional are all illustrations, but far from an all-inclusive list, of such items. Each is includable in the total income approach taken by the Guidelines, but each is also very fact sensitive.*

Each of the above items is sensitive to downturns in the economy. The fact that overtime, for example, has been consistent for three (3) years does not guarantee that it will continue in a poor economy. Further, it is not the intent of the Guidelines to require a party who has worked sixty (60) hour weeks to continue doing so indefinitely just to meet a support obligation that is based on that higher level of earnings. Care should be taken to set support based on dependable income, while at the same time providing children with the support to which they are entitled.

When the court determines that it is not appropriate to include irregular income in the determination of the child support obligation, the court should express its reasons. When the court determines that it is appropriate to

include irregular income, an equitable method of treating such income may be to require the obligor to pay a fixed percentage of overtime, bonuses, etc., in child support on a periodic but predetermined basis (weekly, bi-weekly, monthly, quarterly) rather than by the process of determining the average of the irregular income by past history and including it in the obligor's gross income calculation.

One method of treating irregular income is to determine the ratio of the basic child support obligation (line 4 of the worksheet) to the combined weekly adjusted income (line 3 of the worksheet) and apply this ratio to the irregular income during a fixed period. For example, if the basic obligation was $110.00 and the combined income was $650.00, the ratio would be .169 ($110.00 / $650.00). The order of the court would then require the obligor to make a lump sum payment of .169 of the obligor's irregular income received during the fixed period.

The use of this ratio will not result in an exact calculation of support paid on a weekly basis. It will result in an overstatement of the additional support due, and particularly so when average irregular income exceeds $250.00 per week or exceeds 75% of the regular adjusted Weekly Gross Income. In these latter cases the obligor may seek to have the irregular income calculation redetermined by the court.

Another form of irregular income may exist when an obligor takes a part-time job for the purpose of meeting financial obligations arising from a subsequent marriage, or other circumstances. Modification of the support order to include this income or any portion of it may require that the obligor continue with that employment just to meet an increased support obligation, resulting in a disincentive to work.

Judges and practitioners should be innovative in finding ways to include income that would have benefited the family had it remained intact, but be receptive to deviations where reasons justify them. The foregoing discussion should not be interpreted to exclude consideration of irregular income of the custodial parent.

c. Potential Income. *Potential income may be determined if a parent has no income, or only means-tested income, and is capable of earning income or capable of earning more. Obviously, a great deal of discretion will have to be used in this determination. One purpose of potential income is to discourage a parent from taking a lower paying job to avoid the payment of significant support. Another purpose is to fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed. However, attributing potential income that results in an unrealistic child support obligation may cause the accumulation of an excessive arrearage, and be contrary to the best interests of the child(ren). Research shows that on average more noncustodial parental involvement is associated with greater child educational attainment and lower juvenile delinquency. Ordering support for low-income parents at levels they can reasonably pay may improve noncustodial parent-child contact; and in turn, the outcomes for their children. The six examples which follow illustrate some of the considerations affecting attributing potential income to an unemployed or underemployed parent.*

(1) When a custodial parent with young children at home has no significant skills or education and is unemployed, he or she may not be capable of entering the work force and earning enough to even cover the cost of child care. Hence, it may be inappropriate to attribute any potential income to that parent. It is not the intention of the Guidelines to force all custodial parents into the work force. Therefore, discretion must be exercised on an individual case basis to determine if it is fair under the circumstances to attribute potential income to a particular nonworking or underemployed custodial parent. The need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home.

(2) When a parent has some history of working and is capable of entering the work force, but without just cause voluntarily fails or refuses to work or to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income shall be included in the gross income of that parent. The amount to be attributed as potential income in such a case may be the amount that the evidence demonstrates he or she was capable of earning in the past. If for example the custodial parent had been a nurse or a licensed engineer, it may be unreasonable to determine his or her potential at the minimum wage level. Discretion must be exercised on an individual case basis to determine whether under the circumstances there is just cause to attribute potential income to a particular unemployed or underemployed parent.

(3) Even though an unemployed parent has never worked before, potential income should be considered for that parent if he or she voluntarily remains unemployed without justification. Absent any other evidence of potential earnings of such a parent, the federal minimum wage should be used in calculating potential income for that parent. However, the court should not add child care expense that is not actually incurred.

(4) When a parent is unemployed by reason of involuntary layoff or job termination, it still may be appropriate to include an amount in gross income representing that parent's potential income. If the involuntary layoff can be reasonably expected to be brief, potential income should be used at or near that parent's historical earning level. If the involuntary layoff will be extensive in duration, potential income may be determined based upon

such factors as the parent's unemployment compensation, job capabilities, education and whether other employment is available. Potential income equivalent to the federal minimum wage may be attributed to that parent.

(5) When a parent is unable to obtain employment because that parent suffers from debilitating mental illness, a debilitating health issue, or is caring for a disabled child, it may be inappropriate to attribute any potential income to that parent.

(6) When a parent is incarcerated and has no assets or other source of income, potential income should not be attributed.

d. In-Kind Benefits. *Whether or not the value of in-kind benefits should be included in a parent's weekly gross income is fact-sensitive and requires careful consideration of the evidence in each case. It may be inappropriate to include as gross income occasional gifts received. However, regular and continuing payments made by a family member, subsequent spouse, roommate or live in friend that reduce the parent's costs for housing, utilities, or groceries, may be included as gross income. If there were specific living expenses being paid by a parent which are now being regularly and continually paid by that parent's current spouse or a third party, the value of those assumed expenses may be considered to be in-kind benefits and included as part of the parent's weekly gross income. The marriage of a parent to a spouse with sufficient affluence to obviate the necessity for the parent to work may give rise to a situation where either potential income or the value of in-kind benefits or both should be considered in arriving at gross income.*

e. Return from Individual Retirement Accounts and other retirement plans. *The annual return of an IRA, 401(K) or other retirement plan that is automatically reinvested does not constitute income. Where previous withdrawals from the IRA or 401(K) have been made to fund the parent's lifestyle choices or living expenses, these withdrawals may be considered "actual income" when calculating the parent's child support obligation. The withdrawals must have been received by the parent and immediately available for his or her use. The court should consider whether the early withdrawal was used to reduce the parent's current living expenses, whether it was utilized to satisfy on-going financial obligations, and whether the sums are immediately available to the parent. This is a fact-sensitive situation. Retirement funds which were in existence at the time of a dissolution and which were the subject of the property division would not be considered "income" when calculating child support.*

B. Income Verification.

1. Submitting Worksheet to Court. In all cases, a copy of the worksheet which accompanies these Guidelines shall be completed and filed with the court when the court is asked to order support. This includes cases in which agreed orders are submitted. Worksheets shall be signed by both parties, not their counsel, under penalties for perjury.

2. Documenting Income. Income statements of the parents shall be verified with documentation of both current and past income. Suitable documentation of current earnings includes paystubs, employer statements, or receipts and expenses if self-employed. Documentation of income may be supplemented with copies of tax returns.

COMMENTARY TO GUIDELINE 3B

Worksheet Documentation.

1. Worksheet Requirement. *Submission of the worksheet became a requirement in 1989 when use of the Guidelines became mandatory. The Family Support Act of 1988 requires that a written finding be made when establishing support. In Indiana, this is accomplished by submission of a child support worksheet. The worksheet memorializes the basis upon which the support order is established. Failure to submit a completed child support worksheet may, in the court's discretion, result in the court refusing to approve a child support order or result in a continuance of a hearing regarding child support until a completed worksheet is provided. At subsequent modification hearings the court will then have the ability to accurately determine the income claimed by each party at the time of the prior hearing.*

If the parties disagree on their respective gross incomes, the court shall include in its order the gross income it determines for each party. When the court deviates from the Guideline amount, the order or decree should also include the reason or reasons for deviation. This information becomes the starting point to determine whether or not a substantial and continuing change of circumstance occurs in the future.

2. Verification of Income. *The requirement of income verification is not a change in the law but merely a suggestion to judges that they take care in determining the income of each party. One pay stub standing alone can be very misleading, as can other forms of documentation. This is particularly true for salesmen, professionals and others who receive commissions or bonuses, or others who have the ability to defer payments, thereby distorting the true picture of their income in the short term. When in doubt, it is suggested that income tax returns for the last two or three*

years be reviewed.

C. Computation of Weekly Adjusted Income (Line 1E of Worksheet).

After Weekly Gross Income is determined, certain reductions are allowed in computing weekly adjusted income which is the amount on which child support is based. These reductions are specified below.

1. Adjustment for Subsequent-born or Legally Adopted Child(ren) (Line 1A of Worksheet). There shall be an adjustment to Weekly Gross Income of parents who have a legal duty or court order to support children (1)born or legally adopted subsequent to the birthdates(s) of the child(ren) subject of the child support order and (2)that parent is actually meeting or paying that obligation.

2. Court Orders for Prior-born Child(ren) (Line 1B of Worksheet). The amount(s) of any court order(s) for child support for prior-born children shall be deducted from Weekly Gross Income. This should include court ordered post-secondary education expenses calculated on an annual basis divided by 52 weeks. A credit shall not be given for any portion of the order addressing arrearages.

3. Legal Duty of Support for Prior-born Child(ren) When No Court Order Exists (Line 1C of Worksheet). Where a party has a legal duty to financially support children born prior to the child(ren) for whom support is being established, and no court order exists, an amount reasonably necessary for such support actually paid, or funds actually spent shall be deducted from weekly gross income to arrive at weekly adjusted income. This deduction is not allowed for step-children.

4. Alimony or Maintenance (Line 1D of Worksheet). The amount(s) of alimony ordered in decrees from foreign jurisdictions or maintenance should be deducted from Weekly Gross Income.

COMMENTARY TO GUIDELINE 3C

Determining Weekly Adjusted Income. *After Weekly Gross Income is determined, the next step is to compute weekly adjusted income (Line 1E of the Worksheet). Certain deductions, discussed below, are allowed from Weekly Gross Income in arriving at weekly adjusted income.*

1. Adjustment of Weekly Gross Income for Subsequent-born or Legally Adopted Child(ren). *The adjustment should be computed as follows:*

STEP 1: Determine the number of children born or legally adopted by the parents subsequent to the birthdate(s) of the child(ren) subject of the child support order and for whom the parent has a legal duty or court order to support. The parent seeking the adjustment has the burden to prove the support is actually paid if the subsequent child does not live in the respective parent's household.

STEP 2: Calculate the subsequent child credit by multiplying the parent's Weekly Gross Income by the appropriate factor listed in the table below and enter the product on Line 1A on the Worksheet.

Appropriate factors are:

1	*Subsequent child*	*.065*
2	*Subsequent children*	*.097*
3	*Subsequent children*	*.122*
4	*Subsequent children*	*.137*
5	*Subsequent children*	*.146*
6	*Subsequent children*	*.155*
7	*Subsequent children*	*.164*
8	*Subsequent children*	*.173*

EXAMPLE: A noncustodial parent has a Weekly Gross Income, before adjustment, of $500.00. The custodial parent has a Weekly Gross Income, before adjustment, of $300.00. An adjustment shall be made to the parents' respective Weekly Gross Incomes for the two (2) children born to the noncustodial parent after the birthdates(s) of the child(ren) subject of the child support order and the one (1) adopted child of the custodial parent, legally adopted after the birthdate(s) of the child(ren) subject of the child support order. The respective subsequent child adjustment to be entered on Line 1A of the Worksheet would be as follows:

Noncustodial.....$500.00 x .097 = $48.50 adjustment

Custodial.....$300.00 x .065 = $19.50 adjustment

2. Court Orders for Prior born Child(ren). *The party seeking the adjustment for the court ordered child support obligation bears the burden of establishing the actual existence of the order and the amount of the order.*

3. Legal Duty to Support for Prior-born Child(ren) When No Court Order Exists.

A. Prior Born Child(ren) Not in the Home. A deduction is allowed for reasonably necessary support actually paid, or funds actually spent, for the child(ren) born prior to the child(ren) for whom support is being established. This is true even though that obligation has not been reduced to a court order. The party seeking the deduction bears the burden of proving the obligation and satisfaction of the obligation.

The court may consider evidence of those funds paid or routinely spent on behalf of the prior born child(ren).

For example, paternity of the prior born child was established by execution of a paternity affidavit and the parents lived together for the first two years of the child's life. The parties then separated and negotiated an agreement for the ongoing financial support of the child, without seeking a court order. Father has routinely paid $50 per week to the mother of his prior born child and has evidence to support those payments.

B. Prior Born Child(ren) In the Home. A parent should be permitted to deduct his or her portion of the support obligation for prior born children living in his or her home. It is recommended that these guidelines be used to compute a deduction from weekly gross income.

i. ***Incomes of Both Parents Known****: If the actual incomes of both parents of the prior born child(ren) are known, then the actual incomes should be utilized in calculating the basic child support obligation for the prior born child(ren). In order to determine the adjustment to be applied, use the Indiana Child Support Guideline Schedules for Weekly Support Payments. The percentage share of the basic child support obligation attributable to the parent seeking the adjustment should be considered the legal duty of support for the prior born child(ren) and the amount placed in Line 1.C., Child Support Obligation Worksheet.*

ii. Income of a Parent Unknown: If actual income information for a parent of the prior-born child(ren) is unknown, the court should utilize the known income of the parent seeking the adjustment for the legal duty to support the prior born child(ren) and attribute zero ($0.00) income to the other parent. In order to determine the adjustment to be applied, use the Indiana Child Support Guideline Schedules for Weekly Support Payments as the amount placed in Line 1.C., Child Support Obligation Worksheet.

If the parent seeking the adjustment has prior born children with different non-custodial parents whose incomes are unknown, the basic child support obligation shall be calculated as if the prior born children have the same noncustodial parent and the adjustment for those prior born children shall be attributed as a single legal duty, rather than the total of two or more separate and distinct legal duties.

a. For example, the gross weekly income of the parent seeking the adjustment is $400.00 and there is one prior born child in the home. The gross weekly income for the other parent of the prior born child is unknown. The other parent's gross weekly income would be set at $0.00 to determine the legal duty to support that prior born child. The legal duty to support that prior born child for the parent seeking the adjustment would be $79.00 from the Guideline Schedules for Weekly Support Payments.

b. For example, the gross weekly income of the parent seeking the adjustment is $400.00 and there are two prior born children in the home with different parents. The gross weekly incomes for those other parents of the prior born children are unknown. Those other parents' gross weekly incomes would be set at $0.00 to determine the legal duty to support those prior born children. The legal duty to support those two prior born children for the parent seeking the adjustment would be $119.00 from the Guideline Schedules for Weekly Support Payments.

4. Alimony or Maintenance. *The final allowable deduction from Weekly Gross Income in arriving at weekly adjusted income is for alimony ordered in decrees from foreign jurisdictions or spousal maintenance. These amounts are allowable only if they arise as the result of a court order. This deduction is intended only for spousal maintenance, not for periodic payments from a property settlement although the court may consider periodic payments when determining whether or not to deviate from the guideline amount when ordering support. Refer to the discussion of temporary maintenance earlier in this commentary. (Line 1D of Worksheet).*

D. Basic Child Support Obligation (Worksheet Line 4).

The Basic Child Support Obligation should be determined using the attached Guideline Schedules for Weekly Support Payments. For combined weekly adjusted income amounts falling between amounts shown in the schedule, basic child support amounts should be rounded to the nearest amount. The number of children refers to children for whom the parents share joint legal responsibility and for whom support is being sought, excluding children for whom Section Two of the Post-Secondary Education Worksheet is used to determine support.

COMMENTARY TO GUIDELINE 3D

Use of Guideline Schedules.

Combined Weekly Adjusted Income. *After reducing Weekly Gross Income by the deductions allowed above, weekly adjusted income is computed. The next step is to add the weekly adjusted income of both parties and take the combined weekly adjusted income to the Guideline schedules for weekly support payments. In selecting the appropriate column for the determination of the basic child support obligation, it should be remembered that the number of children refers only to the number of children of this marriage for whom support is being computed, excluding children for whom a Post-Secondary Education Worksheet is used to determine support.*

E. Additions to the Basic Child Support Obligation.

1. Work-Related Child Care Expense (Worksheet Line 4A). Child care costs incurred due to employment or job search of both parent(s) should be added to the basic obligation. It includes the separate cost of a sitter, day care, or like care of a child or children while the parent works or actively seeks employment. Such child care costs must be reasonable and should not exceed the level required to provide quality care for the children. Continuity of child care should be considered. Child care costs required for active job searches are allowable on the same basis as costs required in connection with employment.

The parent who contracts for the child care shall be responsible for the payment to the provider of the child care. For the purpose of designating this expense on the Child Support Obligation Worksheet (Line 4A), each parent's expense shall be calculated on an annual basis divided by 52 weeks. The combined amount shall be added to the Basic Child Support Obligation and each parent shall receive a credit equal to the expense incurred by that parent as an Adjustment (Line 7 of the Worksheet).

When potential income is attributed to a party, the court should not also attribute work-related child care expense which is not actually incurred.

2. Cost of Health Insurance for Child(ren) (Worksheet Line 4B). The weekly cost of health insurance premiums for the child(ren) should be added to the basic obligation whenever either parent actually incurs the premium expense or a portion of such expense. (Please refer to Guideline 7 for additional information regarding the treatment of Health Care Expenses)

3. Extraordinary Health Care Expense. Please refer to Support Guideline 7 for treatment of this issue.

4. Extraordinary Educational Expense. Please refer to Support Guideline 8 for treatment of this issue.

COMMENTARY TO GUIDELINE 3E

Additions to the Basic Child Support Obligation.

1. Work-Related Child Care Expense (Worksheet Line 4A). *One of the additions to the basic child support obligation is a reasonable child care expense incurred due to employment, or an attempt to find employment. This amount is added to the basic child support obligation in arriving at the total child support obligation.*

Work-related child care expense is an income-producing expense of the parent. Presumably, if the family remained intact, the parents would treat child care as a necessary cost of the family attributable to the children when both parents work. Therefore, the expense is one that is incurred for the benefit of the child(ren) which the parents should share.

In circumstances where a parent claims the work-related child care credit for tax purposes, it would be appropriate to reduce the amount claimed as work-related child care expense by the amount of tax saving to the parent. The exact amount of the credit may not be known at the time support is set, but counsel should be able to make a rough calculation as to its effect.

When potential income is attributed to a party, the court should not also attribute a work-related child care expense which is not actually incurred because this expense is highly speculative and difficult to adequately verify.

2. Cost of Health Insurance for Child(ren) (Worksheet Line 4B). *The weekly out of pocket costs of*

health insurance premiums only for the child(ren) should be added to the basic obligation so as to apportion that cost between the parents. The parent who actually pays that cost then receives a credit towards his or her child support obligation on Line 7 of the Worksheet. (See Support Guideline 3G. Adjustments to Parent's Child Support Obligation). Only that portion of the cost actually paid by a parent is added to the basic obligation. If coverage is provided without cost to the parent(s), then zero should be entered as the amount. If health insurance coverage is provided through an employer or purchased through the private market, only the child(ren)'s portion should be added. If the insurance is eligible for a federal tax credit, the amount of the credit should be subtracted from the premiums paid by the parent. In determining the amount to be added, only the amount of the insurance cost attributable to the child(ren) subject of the child support order shall be included, such as the difference between the cost of insuring a single party versus the cost of family coverage. In circumstances where coverage is applicable to persons other than the child(ren) subject of the child support order, such as other child(ren) and/or a subsequent spouse, the total cost of the insurance premium shall be prorated by the number of persons covered to determine a per person cost.

3. Total Child Support Obligation (Worksheet Line 5). *Adding work-related child care costs, and the weekly cost of health insurance premiums for the child(ren) to the basic child support obligation results in a figure called Total Child Support Obligation. This is the basic obligation of both parents for the support of the child(ren) of the marriage, or approximately what it would cost to support the child(ren) in an intact household, excluding extraordinary health care and/or extraordinary education expenses.*

F. Computation of Parent's Child Support Obligation (Worksheet Line 6).

Each parent's child support obligation is determined by multiplying his or her percentage share of total weekly adjusted income (Worksheet Line 2) times the Total Child Support Obligation (Worksheet Line 5).

1. Division of Obligation Between Parents (Worksheet Line 6). The total child support obligation is divided between the parents in proportion to their weekly adjusted income. A monetary obligation is computed for each parent. The custodial parent's share is presumed to be spent directly on the child. When there is near equal parenting time, and the custodial parent has significantly higher income than the noncustodial parent, application of the parenting time credit should result in an order for the child support to be paid from a custodial parent to a noncustodial parent, absent grounds for a deviation.

2. Deviation from Guideline Amount. If, after consideration of the factors contained in IC 31-16-6-1 and IC 31-16-6-2, the court finds that the Guideline amount is unjust or inappropriate in a particular case, the court shall state a factual basis for the deviation and proceed to enter a support amount that is deemed appropriate.

COMMENTARY TO GUIDELINE 3F

Computation of Child Support.

1. Apportionment of Support Between Parents. *After the total child support obligation is determined, it is necessary to apportion that obligation between the parents based on their respective weekly adjusted incomes. First, a percentage is formed by dividing the weekly adjusted income of each parent by the total weekly adjusted income (Line 1E of the Worksheet). The percentages are entered on Line 2 of the Worksheet. The total child support obligation is then multiplied by the percentages on Line 2 (the percentage of total weekly adjusted income that the weekly adjusted income of each parent represents) and the resulting figure is the child support obligation of each parent. The noncustodial parent is ordered to pay his or her proportionate share of support as calculated on Line 6 of the Worksheet. Custodial parents are presumed to be meeting their obligations by direct expenditures on behalf of the child, so a support order is not entered against the custodial parent.*

2. Apportionment of Support When Incapacitated Adult Child has Earned Income. *Under certain circumstances the earned income of a child may be considered in apportioning support. In calculating a support obligation with respect to an incapacitated adult child with earned income, the support obligation may be determined by apportioning the support based upon the relative amount earned by the parents and the child.*

3. Deviation from Guideline Amount. *If the court determines that the Guideline amount is unjust, inappropriate, or denies the obligor a means of self-support at a subsistence level, a written finding shall be made setting forth the factual basis for deviation from the Guideline amount. A simple finding such as the following is sufficient: "The court finds that the presumptive amount of support calculated under the Guidelines has been rebutted for the following reasons." A pro forma finding that the Guidelines are not appropriate does not satisfy the requirement for a specific finding of inappropriateness in a particular case, which is required in an order to deviate from the Guideline amount. For further discussion of deviation from the Guideline amount, see also the Commentary to Support Guideline 1.*

G. Adjustments to Parent's Child Support Obligation (Worksheet Line 7).

The parent's child support obligation (Worksheet Line 7) may be subject to four (4) adjustments.

1. Obligation from Post-Secondary Education Worksheet. If the parents have a child who is living away from home while attending school, his or her child support obligation will reflect the adjustment found on Line J of the Post-Secondary Education Worksheet (See Support Guideline 8).

2. Weekly Cost of Work-related Child Care Expenses. A parent who pays a weekly child care expense should receive a credit towards his or her child support obligation. This credit is entered on the space provided on the Worksheet Line 7. The total credits claimed by the parents must equal the total amount on Line 4A. (See Support Guideline 3E Commentary).

3. Weekly Cost of Health Insurance Premiums for Child(ren). The parent who pays the weekly premium cost for the child(ren)'s health insurance should receive a credit towards his or her child support obligation in most circumstances. This credit is entered on the space provided on the Worksheet Line 7 and will be in an amount equal to that entered on the Worksheet Line 4B (See Support Guideline 3E Commentary).

4. Parenting Time Credit. The court should grant a credit toward the total amount of calculated child support for either "duplicated" or "transferred" expenses incurred by the noncustodial parent. The proper allocation of these expenses between the parents shall be based on the calculation from a Parenting Time Credit Worksheet. (See Support Guideline 6 Commentary).

5. Effect of Social Security Benefits.

a. *Current Support Obligation*

1. Custodial parent: Social Security benefits received for a child based upon the disability of the custodial parent are not a credit toward the child support obligation of the noncustodial parent. The amount of the benefit is included in the custodial parent's income for the purpose of calculating the child support obligation, and the benefit is also a credit toward the custodial parent's child support obligation.

2. Noncustodial parent: Social Security benefits received by a custodial parent, as representative payee of the child, based upon the earnings or disability of the noncustodial parent shall be considered as a credit to satisfy the noncustodial parent's child support obligation as follows:

i. Social Security Retirement benefits may, at the court's discretion, be credited to the noncustodial parent's current child support obligation. The credit is not automatic. The presence of Social Security Retirement benefits is merely one factor for the court to consider in determining the child support obligation or modification of the obligation. Stultz v. Stultz, 659 N.E.2d 125 (Ind. 1995).

ii. Social Security Disability benefits shall be included in the Weekly Gross Income of the noncustodial parent and applied as a credit to the noncustodial parent's current child support obligation. The credit is automatic.

iii. Any portion of the benefit that exceeds the child support obligation shall be considered a gratuity for the benefit of the child(ren), unless there is an arrearage.

3. The filing of a petition to modify on grounds a Social Security Disability determination has been requested will not relieve the parent's obligation to pay the current support order while the disability application is pending. Filing of the petition to modify support may entitle the noncustodial parent to a retroactive reduction in support to the date of filing of the petition for modification and not the date of filing for the benefits. If the modification of support is granted, any lump sum payment of retroactive Social Security Disability benefits paid shall be credited toward the modified support obligation.

b. *Arrearages*

1. Credit for retroactive lump sum payment. A lump sum payment of retroactive Social Security Disability benefits shall be applied as a credit against an existing child support arrearage if the custodial parent, as representative payee, received a lump sum retroactive payment, without the requirement of a filing of a Petition to Modify Child Support. However, no credit should be allowed under the following circumstances:

i. A custodial parent should never be required to pay restitution to a disabled noncustodial parent for lump sum retroactive Social Security Disability benefits which exceed the amount of "court-ordered" child support. Any portion of lump sum payments of retroactive Social Security Disability benefits paid to children not credited against the existing child support arrearage is properly treated as a gratuity to the children. No credit toward future support should be granted.

ii. No credit shall be given for a lump sum disability payment paid directly to a child who is over the age of eighteen (18). The dependency benefits paid directly to a child who has reached the age of majority under the Social Security law, rather than to the custodial parent, as representative payee, do not fulfill the obligations of court-ordered child support.

2. Application of current Social Security Disability benefits. The amount of the benefit which exceeds the child support order may be treated as an ongoing credit toward an existing arrearage.

3. In Title IV-D cases there is no credit toward the monies owed to the State of Indiana unless the retroactive benefit is actually paid to the State of Indiana. The child's Social Security benefits received and used by the custodial parent will not reduce or be credited against the noncustodial parent's obligation to reimburse the State of Indiana for Title IV-A or Title IV-E benefits previously paid on behalf of the children.

4. Modification. The award of Social Security Disability benefits retroactive to a specific date does not modify a noncustodial parent's child support obligation to the same date. The noncustodial parent's duty to pay support cannot be retroactively modified earlier than the filing date of a petition to modify child support. IC 31-16-16-6.

COMMENTARY TO GUIDELINE 3G

It is important to remember the amount of the child's Social Security benefits that exceed the current child support order will not be reflected in ISETS as a credit toward an existing arrearage unless specified in the court order. Unless the credit is recognized in ISETS, there is a chance that an arrearage notice may be issued administratively and sanctions could be entered on that arrearage.

Social Security benefits paid to a parent for the benefit of a minor child are included in the disabled parent's Gross Weekly Income for purposes of determining child support regardless of which parent actually receives the payment. (See Guideline 3A). This section, 3G and its commentary, address adjustments to the recommended child support obligation. Although Social Security benefits are not reflected on Line 7 of the child support Worksheet, the benefit should be considered, and its effect and application shall be included in the written order for support of that child.

The Guidelines make no change in the law regarding an adjustment for Social Security Retirement benefits or Supplemental Security Income (SSI). The court has discretion to allow an adjustment to a parent's child support obligation based on the amount of Social Security Retirement benefits paid for the benefit of the child due to that parent's retirement. The retirement benefit is merely one of the factors that the court should consider when making an adjustment to the child support obligation. SSI is a means-tested program and the benefit is not included in either parent's gross income. It therefore should not be considered an adjustment to either parent's child support obligation.

In Brown v. Brown, 849 N.E.2d 610 (Ind. 2006), Social Security Disability (SSD)benefits paid to a child were clearly recognized as earnings of the disabled parent. Id. at 614. Social Security Disability benefits paid for a child are recognized as income of the disabled parent who earned the benefits and those benefits are included in the Weekly Gross Income of that parent. See Guideline 3A. It follows then that the payment received for the benefit of the child should be applied to satisfy the disabled parent's support obligation. The child support order should state that the SSD benefit received for the child is credited as payment toward the support obligation. Any portion of the SSD benefit in excess of the current support obligation is a gratuity, unless there is an arrearage.

The language in Guideline 3.G.5.b.2. directs that the excess SSD benefit may be applied as payment toward an existing arrearage. Once the arrearage is satisfied, any portion of the SSD benefit that exceeds the current support obligation is considered a gratuity. The Guidelines also change the application of a lump sum SSD payment. SSD is, by definition, a substitution for a person's income lost due to a recognized disability. Further, under the Social Security Act, that individual may be entitled to a lump sum benefit retroactive to the date that his or her disability occurred and that caused the disruption in earnings. This lump sum payment is unique to SSD. The Guidelines now allow the courts to apply the lump sum SSD benefits toward an existing child support arrearage if the custodial parent, as representative payee, receives a lump sum payment. This credit is appropriate without the requirement of a filing of a Petition to Modify Child Support.

The Guidelines change the law regarding the application of SSD benefits. The holding in Hieston v. State, 885 N.E.2d 59 (Ind. Ct. App. 2008) and its progeny has been superseded by this change. The rationale is that the lump sum payment is merely a method of payment applied to a past support obligation not paid. The distinction is between modification of support which changes the rate of support, e.g. from $100.00 per week to $50.00 per week, as opposed to credit for an indirect payment. Modification of a child support obligation still requires the filing of a petition for modification as set forth in Guideline 4.

The lump sum payment is a method of payment that may not be specifically authorized by express court order but which should be recognized as a payment of support. Indiana case law establishes that credit can be allowed for

payments that do not technically conform to the original support decree. For example, where the obligated parent makes payments directly to the custodial parent rather than through the clerk of the court, the Supreme Court has recognized these payments when there was sufficient proof to convince a trier of fact that the required payments were actually made. O'Neil v. O'Neil, 535 N.E.2d 523 (Ind. 1989), Nill v. Martin, 686 N.E.2d 116 (Ind. 1997). Proof of the lump sum SSD benefit payment is not difficult because the Social Security award certificate is a record easily admitted into evidence as an exception to the hearsay rule under IRE 803(6) and (8) (reports of a public agency setting forth its regularly recorded activity) and trial courts are rarely burdened with an evidentiary dispute about what was paid, when or to whom, once the Social Security records are shared. By contrast, the informal arrangement disputes between parties to modify and reduce the actual amount of weekly support below that ordered in the divorce decree are actual attempts to retroactively modify the amount of support, which are prohibited. Similar to the nonconforming payment, the lump sum payment shall be applied as a credit to an existing child support arrearage.

If there is no child support arrearage, the lump sum payment is considered gratuity. As long as there is an existing support order, there should never be an order entered that requires any excess payment of SSD or the lump sum payment to be paid back to the disabled parent.

The Guidelines exclude from the parent's Weekly Gross Income any survivor benefits received by or for other children residing in either parent's home based on the Social Security death benefits of a deceased parent of a prior-born child. See Commentary to Guideline 3(A).

GUIDELINE 4. MODIFICATION

The provisions of a child support order may be modified only if there is a substantial and continuing change of circumstances which makes the present order unreasonable or the amount of support ordered at least twelve (12) months earlier differs from the Guideline amount presently computed by more than twenty percent (20%).

COMMENTARY

Substantial and Continuing Change of Circumstances*. A change in circumstances may include the incarceration of a parent, a change in the income of the parents, the application of a parenting plan, the failure to comply with a parenting plan, or a change in the expense of child rearing specifically considered in the Guidelines.*

If the amount of support computed at the time of modification is significantly higher or significantly lower than that previously ordered and would require a drastic reduction in a parent's standard of living, consideration may be given to phasing in the change in support. This approach would allow the parent affected by the change time to make adjustments in his or her standard of living. Again, it is not the intent of the Guidelines to drive the parents into noncompliance by reducing their spendable income below subsistence level.

Retroactive Modification. *The modification of a support obligation may only relate back to the date the petition to modify was filed, and not an earlier date, subject to two exceptions: (1) when the parties have agreed to and carried out an alternative method of payment which substantially complies with the spirit of the decree; or (2) the obligated parent takes the child into the obligated parent's home and assumes custody, provides necessities, and exercises parental control for a period of time that a permanent change of custody is exercised.*

Emancipation: Support Orders for Two or More Children. *In child support orders issued under these Guidelines, support amounts for two or more children, are stated as an in gross or total amount rather than on a per child basis. Absent judicial modification of the order, the total obligation will not decrease when the oldest child reaches nineteen (19) years of age, or the child is emancipated after the occurrence of other events. Parents should seek to modify child support orders when the legal obligation to pay child support terminates for any child or any child is emancipated. See Ind. Code § 31-16-6-6.*

The concept of a pro rata delineation of support is generally inconsistent with the economic policy underlying the Guidelines (See "Economic Data Used in Developing Guidelines" in "Commentary" to Support Guideline 1). That policy recognizes that the amount of support required for two children is about 1.5 times that required to support one child. The multiplication factor decreases as the number of children increases. If support were reduced by one half when the first of two children was emancipated, the remaining amount of support would be significantly below the Guideline amount for one child at the same parental income levels.

Parents should seek to modify or terminate a support order when a child(ren) becomes emancipated under Indiana law.

GUIDELINE 5. FEDERAL STATUTES

These Guidelines have been drafted in an attempt to comply with, and should be construed to conform with

applicable federal statutes.

COMMENTARY

Every attempt was made to draft Guidelines for the State of Indiana that would comply with applicable federal statutes and regulations. Likewise, careful attention was paid to state law.

GUIDELINE 6. PARENTING TIME CREDIT

A credit should be awarded for the number of overnights each year that the child(ren) spend with the noncustodial parent.

COMMENTARY

Analysis of Support Guidelines. *The Indiana Child Support Guidelines are based on the assumption the child(ren) live in one household with primary physical custody in one parent who undertakes all of the spending on behalf of the child(ren). There is a rebuttable presumption the support calculated from the Guideline support schedule is the correct amount of weekly child support to be awarded. The total amount of the anticipated average weekly spending is the Basic Child Support Obligation (Line 4 of the Worksheet).*

The Guideline support schedules do not reflect the fact, however, when both parents exercise parenting time, out-of-pocket expenses will be incurred for the child(ren)'s care. These expenses were recognized previously by the application of a 10% visitation credit and a 50% abatement of child support during periods of extended visitation. The visitation credit was based on the regular exercise of alternate weekend visitation which is equivalent to approximately 14% of the annual overnights. With the adoption of the Indiana Parenting Time Guidelines, the noncustodial parent's share of parenting time, if exercised, is equivalent to approximately 27% of the annual overnights. As a result, these revisions provide a parenting credit based upon the number of overnights with the noncustodial parent ranging from 52 overnights annually to equal parenting time. As parenting time increases, a proportionally larger increase in the credit will occur.

Analysis of Parenting Time Costs. *An examination of the costs associated with the sharing of parenting time reveals two types of expenses are incurred by both parents, transferred and duplicated expenses. A third category of expenses is controlled expenses, such as the 6% uninsured health care expense that remains the sole obligation of the parent for whom the parenting time credit is not calculated. This latter category is assumed to be equal to 15% of the Basic Child Support Obligation.*

Transferred Expenses. *This type of expense is incurred only when the child(ren) reside(s) with a parent and these expenses are "transferred" with the child(ren) as they move from one parent's residence to the other. Examples of this type of expense are food and the major portion of spending for transportation. When spending is transferred from one parent to the other parent, the other parent should be given a credit against that parent's child support obligation since this type of expense is included in the support calculation schedules. When parents equally share in the parenting, an assumption is made that 35% of the Basic Child Support Obligation reflects "transferred" expenses. The amount of expenses transferred from one parent to the other will depend upon the number of overnights the child(ren) spend(s) with each parent.*

Duplicated Fixed Expenses. *This type of expense is incurred when two households are maintained for the child(ren). An example of this type of expense is shelter costs which are not transferred when the child(ren) move(s) from one parent's residence to the other but remain fixed in each parent's household and represent duplicated expenditures. The fixed expense of the parent who has primary physical custody is included in the Guideline support schedules. However, the fixed expense of the other parent is not included in the support schedules but represents an increase in the total cost of raising the child(ren) attributed to the parenting time plan. Both parents should share in these additional costs.*

When parents equally share in the parenting, an assumption is made that 50% of the Basic Child Support Obligation will be "duplicated." When the child(ren) spend(s) less time with one parent, the percentage of duplicated expenses will decline.

Controlled Expenses. *This type of expense for the child(ren) is typically paid by the custodial parent and is not transferred or duplicated. Controlled expenses are items like clothing, education, school books and supplies, ordinary uninsured health care and personal care. For example, the custodial parent buys a winter coat for the child. The noncustodial parent will not buy another one. The custodial parent controls this type of expense. "Education" expenses include ordinary costs assessed to all students, such as textbook rental, laboratory fees, and lunches, which should be paid by the custodial parent. The cost of participating in elective school activities such as sports, performing arts and clubs, as well as related extracurricular activities are "optional" activities covered by the paragraph on "Other Extraordinary Expenses" in Guideline 8.*

The controlled expenses account for 15% of the cost of raising the child. The parenting time credit is based on the more time the parents share, the more expenses are duplicated and transferred. The controlled expenses are not shared and remain with the parent that does not get the parenting time credit. Controlled expenses are generally not a consideration unless there is equal parenting time. These categories of expenses are not pertinent for litigation. They are presented only to explain the factors used in developing the parenting time credit formula. The percentages were assigned to these categories after considering the treatment of joint custody by other states and examining published data from the Bureau of Labor Statistics' Consumer Expenditure Survey.

***Computation of Parenting Time Credit**. The computation of the parenting time credit will require a determination of the annual number of overnights of parenting time exercised by the parent who is to pay child support, the use of the standard Child Support Obligation Worksheet, a Parenting Time Table, and a Parenting Time Credit Worksheet.*

An overnight will not always translate into a twenty-four hour block of time with all of the attendant costs and responsibilities. It should include, however, the costs of feeding and transporting the child, attending to school work and the like. Merely providing a child with a place to sleep in order to obtain a credit is prohibited.

The Parenting Time Table (Table PT) begins at 52 overnights annually or the equivalent of alternate weekends of parenting time only. If the parenting plan is for fewer overnights because the child is an infant or toddler (Section II A of the Parenting Time Guidelines), the court may consider granting the noncustodial parent an appropriate credit for the expenses incurred when caring for the child. If the parenting plan is for fewer overnights due to a significant geographical distance between the parties, the court may consider granting an appropriate credit. The actual cost of transportation should be treated as a separate issue.

If the parents are using the Parenting Time Guidelines without extending the weeknight period into an overnight, the noncustodial parent will be exercising approximately 96-100 overnights. The actual number of overnights may vary based on differing school calendars.

***Parenting Time Table.** The TOTAL column represents the anticipated total out-of-pocket expenses expressed as a percentage of the Basic Child Support Obligation that will be incurred by the parent who will pay child support. The total expenses are the sum of transferred and duplicated expenses. The DUPLICATED column represents the duplicated expenses and reflects the assumption that when there is an equal sharing of parenting time, 50% of the Basic Child Support Obligation will be duplicated. The Number of Annual Overnights column will determine the particular fractions of TOTAL and DUPLICATED to be used in the Parenting Time Credit Worksheet.*

TABLE PT

ANNUAL OVERNIGHTS			
FROM	TO	TOTAL	DUPLICATED
1	51	0.000	0.000
52	55	0.062	0.011
56	60	0.070	0.014
61	65	0.080	0.020
66	70	0.093	0.028
71	75	0.108	0.038
76	80	0.127	0.052
81	85	0.150	0.070
86	90	0.178	0.093
91	95	0.211	0.122
96	**100**	**0.250**	**0.156**
101	105	0.294	0.195
106	110	0.341	0.237
111	115	0.388	0.280
116	120	0.434	0.321
121	125	0.476	0.358
126	130	0.513	0.390
131	135	0.544	0.417
136	140	0.570	0.438
141	145	0.591	0.454
146	150	0.609	0.467
151	155	0.623	0.476
156	160	0.634	0.483

161	165	0.644	0.488
166	170	0.652	0.491
171	175	0.660	0.494
176	180	0.666	0.495
181	183	0.675	0.500

Parenting Time Credit Worksheet (Credit Worksheet). *In determining the credit, take the following steps:*

1. *Complete the Child Support Obligation Worksheet through Line 6.*
2. *Enter on Line 1PT of the Credit Worksheet the annual number of overnights exercised by the parent who will pay child support.*
3. *Enter on Line 2PT of the Credit Worksheet the Basic Child Support Obligation (Line 4 from the Child Support Obligation Worksheet).*
4. *Enter on Line 3PT of the Credit Worksheet the figure from the TOTAL column that corresponds to the annual overnights exercised by the parent who will pay child support.*
5. *Enter on Line 4PT of the Credit Worksheet the figure from the DUPLICATED column that corresponds to the annual number of overnights exercised by the parent who will pay child support.*
6. *Enter on Line 5PT of the Credit Worksheet the percentage share of the Combined Weekly Income of the parent who will pay child support (Line 2 of the Child Support Obligation Worksheet).*
7. *Complete Lines 6PT through 9PT to determine the allowable credit.*
8. *Enter the result from Line 9PT on Line 7 of the Child Support Obligation Worksheet as the Parenting Time Credit.*
9. *Apply the Line 7 Adjustments to determine the recommended Child Support Obligation (Line 8 of the Child Support Obligation Worksheet).*

PARENTING TIME CREDIT WORKSHEET

Line:		
1PT	Enter Annual Number of Overnights	
2PT	Enter Weekly Basic Child Support Obligation – BCSO (Enter Line 4 from Child Support Worksheet)	_____.__
3PT	Enter Total Parenting Time Expenses as a Percentage of the BCSO (Enter Appropriate TOTAL Entry from Table PT)	._____
4PT	Enter Duplicated Expenses as a Percentage of the BCSO (Enter Appropriate DUPLICATED Entry from Table PT)	._____
5PT	Parent's Share of Combined Weekly Income (Enter Line 2 from Child Support Worksheet)	._____
6PT	Average Weekly Total Expenses during Parenting Time (Multiply Line 2PT times Line 3PT)	_____.__
7PT	Average Weekly Duplicated Expenses (Multiply Line 2PT times Line 4PT)	_____.__
8PT	Parent's Share of Duplicated Expenses (Multiply Line 5PT times Line 7PT)	_____.__
9PT	Allowable Expenses during Parenting Time (Line 6PT – Line 8PT)	_____.__
	Enter Line 9PT on Line 7 of the Child Support Worksheet as the Parenting Time Credit	

Application of Parenting Time Credit*. Parenting Time Credit is not automatic. The court should determine if application of the credit will jeopardize a parent's ability to support the child(ren). If such is the case, the court should consider a deviation from the credit.*

The Parenting Time Credit is earned by performing parental obligations as scheduled and is an advancement of weekly credit. The granting of the credit is based on the expectation the parties will comply with a parenting time order.

A parent who does not carry out the parenting time obligation may be subject to a reduction or loss of the credit, financial restitution, or any other appropriate remedy. However, missed parenting time because of occasional illness, transportation problems or other unforeseen events should not constitute grounds for a reduction or loss of the credit, or financial restitution.

Consistent with Parenting Time Guidelines, if court action is initiated to reduce the parenting time credit because of a failure to exercise scheduled parenting time, the parents shall enter mediation unless otherwise ordered by the court.

***Contents of Agreements/Decrees**. Orders establishing custody and child support shall set forth the specifics of the parties' parenting time plan in all cases. A reference to the Indiana Parenting Time Guidelines will suffice if the parties intend to follow the Guidelines. All such entries shall be accompanied by a copy of the Child Support Obligation Worksheet and the Parenting Time Credit Worksheet.*

In every instance the court shall designate one parent who is receiving support and shall be responsible for payment of the uninsured health care expenses up to 6% of the Basic Child Support Obligation.

If the court determines it is necessary to deviate from the parenting time credit, it shall state its reasons in the order.

***Split Custody and Child Support.** In those situations where each parent has physical custody of one or more children (split custody), it is suggested that support be computed by completing the Child Support Obligation Worksheets in the following manner:*

1. *Compute the support a father would pay to a mother for the children in her custody as if they were the only children of the marriage.*
2. *Compute the support a mother would pay to a father for the children in his custody as if they were the only children of the marriage.*
3. *Subtract the lesser from the greater support amount. The parent who owes the remaining amount pays the difference to the other parent on a weekly basis.*

This method of computation takes into account the fact that the first child in each home is the most expensive to support, as discussed in the Commentary to Guideline 1.

***Child Support When Parenting Time is Equally Shared.** A frequent source of confusion in determining child support arises in cases where parents equally share the parenting time with the children. Parenting time is considered equally shared when it is 181 to 183 overnights per year. To determine child support in these cases, either the mother or father must be designated as the parent who will pay the controlled expenses. Then, the other parent is given the parenting time credit. The controlled expenses remain the sole obligation of the parent for whom the parenting time credit is not calculated.*

When both parents equally share parenting time, the court must determine which parent will pay the controlled expenses. If, for example, father is the parent paying controlled expenses, the parenting time credit will be awarded to the mother.

Factors courts should use in assigning the controlled expenses to a particular parent include the following areas of inquiry:

- *Which parent has traditionally paid these expenses.*
- *Which parent is more likely to be able to readily pay the controlled expenses.*
- *Which parent more frequently takes the child to the health care provider.*
- *Which parent has traditionally been more involved in the child's school activities (since much of the controlled expenses concern school costs, such as clothes, fees, supplies, and books).*

This determination requires a balancing of these and other factors. Once the court assigns responsibility for these controlled expenses, the court should award the other parent the parenting time credit. When the assignment of the controlled expenses occurs, calculation of the child support in shared custody situations is fairly basic, and is completed by application of the remainder of these Guidelines.

***Cost of Transportation for Parenting Time**. The Parenting Time Guidelines require the noncustodial parent to provide transportation for the child(ren) at the start of the scheduled parenting time, and the custodial parent to provide transportation for the child(ren) at the end of the scheduled parenting time. There is no specific provision in*

the Child Support Guidelines for an assignment of costs or a credit for transportation on the child support worksheet. Transportation costs are part of the transferred expenses. When transportation costs are significant, the court may address transportation costs as a deviation from the child support calculated by the Worksheet, or may address transportation as a separate issue from child support. Consideration should be given to the reason for the geographic distance between the parties and the financial resources of each party. The relocation statute provides that one factor in modifying child support in conjunction with parent relocation is the hardship and expense involved for the nonrelocating individual to exercise parenting time.

GUIDELINE 7. HEALTH CARE / MEDICAL SUPPORT

The court shall order one or both parents to provide health insurance when accessible to the child at a reasonable cost. Health insurance may be public, for example, Medicaid, or Children's Health Insurance Program (CHIP), Hoosier Healthwise, or private, for example, Affordable Care Act (ACA) or employer-provided

Accessibility. Health insurance is accessible if it covers the geographic area in which the child lives. The court may consider other relevant factors such as provider network, comprehensiveness of covered services and likely continuation of coverage.

Reasonable cost. There is a rebuttable presumption that parents have health insurance available at a reasonable cost. The presumption may be rebutted by demonstrating that the lowest out of pocket cost of insuring the child(ren) is more than 5% of the parents' combined gross incomes. The lowest out of pocket cost health insurance available may be public insurance.

Cash medical support. When health insurance is not accessible to the child(ren) at a reasonable cost, federal law requires the court to order the parties to pay cash medical support. Cash medical support is an amount ordered for medical costs not covered by insurance. The uninsured medical expense apportionment calculation on the Child Support Obligation Worksheet, "the 6% rule," satisfies this federal requirement for a cash medical support order, when incorporated into the court order.

Explanation of 6% rule/uninsured health care expenses. The data upon which the Guideline schedules are based include a component for ordinary health care expenses. Ordinary uninsured health care expenses are paid by the parent who is assigned to pay the controlled expenses (the parent for whom the parenting time credit is not calculated) up to six percent (6%) of the basic child support obligation (Line 4 of the Child Support Obligation Worksheet). Extraordinary health care expenses are those uninsured expenses which are in excess of six percent (6%) of the basic obligation, and would include uninsured expenses for chronic or long term conditions of a child. Calculation of the apportionment of the health care expense obligation is a matter separate from the determination of the weekly child support obligation. These calculations shall be inserted in the space provided on the Worksheet.

Birth expense. The court may order the father to pay a percentage of the reasonable and necessary expenses of the mother's pregnancy and childbirth, as part of the court's decree in child support actions. The costs to be included in apportionment are pre-natal care, delivery, hospitalization, and post-natal care. The paternity statutes require the father to pay at least fifty percent (50%) of the mother's pregnancy and childbirth expenses.

COMMENTARY

Health Insurance Coverage and Costs.

The court is federally mandated to order parents to obtain health insurance if accessible at a reasonable cost. The rebuttable presumption that all children have insurance available at a reasonable cost recognizes (1) both public and private insurance can be used to satisfy the federal mandate to insure children, (2) the availability of guaranteed acceptance for policies, and (3) the availability of tax credits for the purpose of obtaining health insurance.

Health insurance coverage should normally be provided by the parent who can obtain the most comprehensive coverage at the least out of pocket cost. The parents bear the burden of demonstrating to the court the out of pocket cost of health insurance for the child(ren) exceeds 5% of the parents' combined gross incomes. A parent shall provide the court with proof of existing public or private health insurance for the child(ren) through an employer, a retirement plan, Tricare, a Veteran's Health Care Program, Medicaid, or the Children's Health Insurance Program (CHIP). If the child is not currently covered, the parent must provide the court with proof of the cost of health insurance. (Please refer to Guideline 3, E. 2. for additional information regarding determining the cost of insurance coverage.)

Where one or both parents have a history of changing jobs and/or health insurance providers both parents may be ordered to carry health insurance when it becomes available at a reasonable cost to the parents. Where one parent has a history of maintaining consistent insurance coverage for the child(ren), there may be no need to order both parents to provide health insurance for the child(ren).

Parental Self-Monitoring and Compliance.

Parents should cooperate with one another to ensure the child(ren) remain insured at all times. The court should order the parent providing health insurance to show proof of coverage and give notice of any coverage changes, including termination of coverage, to the other parent. See Indiana Parenting Time Guidelines I, D. paragraph 5.

Apportionment of Uninsured Health Care Expenses. *Six percent (6%) of the support amount is for health care. The noncustodial parent is, in effect, prepaying health care expenses every time a support payment is made. Consequently, the Guidelines require that custodial parent bear the cost of uninsured health care expenses up to six percent (6%) of the Basic Child Support Obligation found on Line 4 of the Child Support Obligation Worksheet and, if applicable, the child support obligation attributable to a student living away from home (Section Two Line I of the Post-Secondary Education Worksheet).*

That computation is made by multiplying the total of Line 4 and Line I by 52 (weeks) and multiplying the product of that multiplication by .06 to arrive at the amount the custodial parent must spend on the uninsured health care costs of the parties' child(ren) in any calendar year before the noncustodial parent is required to contribute toward payment of those uninsured costs. For example, if Line 4 is $150.00 per week and Line I is $25.00 per week, the calculation would be as follows: $150.00 + $25.00 = $175.00 x 52 = $9,100.00 x .06 = $546.00.

Thus, on an annual basis, the custodial parent is required to spend $546.00 for health care of the child(ren) before the noncustodial parent is required to contribute. The custodial parent must document the $546.00 spent on health care and provide the documentation to the noncustodial parent.

After the custodial parent's obligation for ordinary uninsured health care expenses is computed, provision should be made for the uninsured health care expenses that may exceed that amount. The excess costs should be apportioned between the parties according to the Percentage Share of Income computed on Line 2 of the Worksheet. Where imposing such percentage share of the uninsured costs may work an injustice, the court may resort to the time-honored practice of splitting uninsured health care costs equally, or by using other methods. The court may prorate the custodial parent's uninsured health care expense contribution when appropriate.

As a practical matter, it may be wise to spell out with specificity in the order what uninsured expenses are covered and a schedule for the periodic payment of these expenses. For example, a chronic long-term condition might necessitate weekly payments of the uninsured expense. The order may include any reasonable medical, dental, hospital, pharmaceutical and psychological expenses deemed necessary for the health care of the child(ren). If it is intended that such things as aspirin, vitamins and band-aids be covered, the order should specifically state that such non-prescription health care items are covered.

There are also situations where major health care costs are incurred for a single event such as orthodontics or major injuries. For financial reasons, this may require the custodial parent to pay the provider for the amount not covered by insurance over a number of years. The 6% rule applies to expenses actually paid by the custodial parent each year.

Birth expenses. *There is no statute of limitations barring recovery of birthing expenses, providing the paternity or child support action is timely filed. The court should be very careful to be sure the claimed expenses are both reasonable and necessary. Birthing expenses include both the expenses incurred by the child as well as by the mother, providing they are directly related to the child's birth. The court should distinguish between "postpartum expenses" and "postnatal expenses." "Postpartum" expenses are mother's expenses following the birth of the child. "Postnatal" expenses of the child are those expenses directly related to the child's birth. Between the two, only "postnatal" expenses are reimbursable.*

GUIDELINE 8. EXTRAORDINARY EXPENSES

Extraordinary Educational Expenses.

The data upon which the Guideline schedules are based include a component for ordinary educational expenses. Any extraordinary educational expenses incurred on behalf of a child shall be considered apart from the total Basic Child Support Obligation.

Extraordinary educational expenses may be for elementary, secondary or post-secondary education, and should be limited to reasonable and necessary expenses for attending private or special schools, institutions of higher learning, and trade, business or technical schools to meet the particular educational needs of the child.

Commentary

Parents should consider whether an educational support order is necessary or appropriate to address educational needs

prior to the child reaching nineteen (19) years of age.

a. Elementary and Secondary Education. If the expenses are related to elementary or secondary education, the court may want to consider whether the expense is the result of a personal preference of one parent or whether both parents concur; whether the parties would have incurred the expense while the family was intact; and whether or not education of the same or higher quality is available at less cost.

b. Post-Secondary Education. The authority of the court to award post-secondary educational expenses is derived from IC 31-16-6-2. It is discretionary with the court to award post-secondary educational expenses and in what amount. In making such a decision, the court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.

When determining whether or not to award post-secondary educational expenses, the court should consider each parent's income, earning ability, financial assets and liabilities. If the expected parental contribution is zero under Free Application for Federal Student Aid (FAFSA), the court should not award post-secondary educational expenses. If the court determines an award of post-secondary educational expenses would impose a substantial financial burden, an award should not be ordered.

If the court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student. These latter sources of assistance should be credited to the child's share of the educational expense unless the court determines that it should credit a portion of any scholarships, grants and loans to either or both parents' share(s) of the education expense.

Current provisions of the Internal Revenue Code provide tax credits and preferences which will subsidize the cost of a child's post-secondary education. While tax planning on the part of all parties will be needed to maximize the value of these subsidies, no one party should disproportionately benefit from the tax treatment of post-secondary expenses. Courts may consider who may be entitled to claim various education tax benefits and tax exemptions for the minor child(ren) and the total value of the tax subsidies prior to assigning the financial responsibility of post-secondary expenses to the parents and the child.

A determination of what constitutes educational expenses will be necessary and will generally include tuition, books, lab fees, course related supplies, and student activity fees. Room and board may be included when the child does not reside with either parent.

The impact of an award of post-secondary educational expenses is substantial upon the custodial and non-custodial parent and a reduction of the Basic Child Support Obligation attributable to the child under the age of nineteen years will be required when the child does not reside with either parent.

The court should require that a student maintain a certain minimum level of academic performance to remain eligible for parental assistance and should include such a provision in its order. The court should also consider requiring the student or the custodial parent provide the noncustodial parent with a copy of the child's high school transcript and each semester or trimester post-secondary education grade report.

The court may limit consideration of college expenses to the cost of state supported colleges and universities or otherwise may require that the income level of the family and the achievement level of the child be sufficient to justify the expense of private school.

COMMENTARY

Time for Filing Petition for Post-Secondary Educational Expenses. There is a distinct difference between an order for child support and an order for post-secondary educational expenses. An order for educational expenses can continue after an order for child support has ended. If an order for child support was issued before July 1, 2012, a petition for educational support can be filed until the child reaches twenty-one (21) years of age. If an order for child support was issued or modified after June 30, 2012, a petition for educational support must be filed before the child reaches nineteen (19) years of age.

c. Use of Post-Secondary Education Worksheet.

The Worksheet makes two calculations. Section One calculates the contribution of each parent for payment of post-secondary education expenses based upon his or her percentage share of the weekly adjusted income from the Child Support Obligation Worksheet after contribution from the student toward those costs. Notwithstanding this calculation, the court retains discretion to award and determine the allocation of these expenses taking into consideration the ability of

each parent to meet these expenses and the child's reasonable ability to contribute to his or her educational expenses. The method of paying such contribution should be addressed in the court's order.

In situations when the student, under age nineteen (19), remains at home with the custodial parent while attending an institution of higher learning, generally no reduction to the noncustodial parent's support obligation will occur and Section Two of the Worksheet need not be completed.

Section Two determines the amount of each parent's weekly support obligation for the student who does not live at home year round. The amount attributable to the student while at home has been annualized to avoid weekly variations in the order. It further addresses the provisions of IC 31-16-6-2(b) which require a reduction in the child support obligation when the court orders the payment of educational expenses which are duplicated or would otherwise be paid to the custodial parent. In determining the reduction, the student is treated as emancipated. This treatment recognizes that the diminishing marginal effect of additional children is due to economies of scale in consumption and not the age of the children. A second child becomes the "first child" in terms of consumption and the custodial parent will receive Guideline child support on that basis.

Section Two applies when the parties' only child attending school does not reside with the custodial parent while attending school, as well as when the parties have more than one child and one resides away from home while attending school and the other child(ren) remain at home.

Line E of the Worksheet determines the percentage of the year the student lives at home. Line F is used to enter the Basic Child Support Obligation, from the Guideline Schedules for all of the children of the parties including the student who does not live at home year round. Line G is used to enter the amount of support for those children who are not living away from home. If the student is the only child, Line G will be $0.00. The difference between Lines F and G is the total support obligation attributable to the student. This is entered on Line H. By multiplying the percentage of the year the student lives at home, times the support obligation attributable to the student, the Worksheet pro rates to a weekly basis the total support obligation attributed to the student. This is computed on Line I and the result is included in the uninsured health care expense calculation. The parents' pro rata share of this obligation is computed in Line J. This result is included in section 7 of the Child Support Obligation Worksheet.

1. ***The One Child Situation.*** When the parties' only child is a student who does not live at home with the custodial parent while attending school, Section Two establishes the weekly support obligation for that child on Line I. The regular Child Support Obligation Worksheet should be completed through Line 5 for that child and the annualized obligation from Line J of the Post-secondary Education Worksheet is entered on Line 7 with an explanation of the deviation in the order or decree.

2. ***The More Than One Child Situation.*** When the parties have more than one child, Section Two requires the preparation of a regular Child Support Obligation Worksheet applicable only to the child(ren) who regularly reside with the custodial parent, and for a determination of that support obligation. The annualized obligation from Line J of the Post-Secondary Education Worksheet is then inserted on Line 7 of the regular support Worksheet as an addition to the Parent's Child Support Obligation on Line 6. An explanation of the increase in the support obligation should then appear in the order or decree.

In both situations the Child Support Obligation Worksheet and the Post-Secondary Education Worksheet must be filed with the court. This includes cases in which agreed orders are submitted.

When more than one child lives away from home while attending school, Section One of the Post-Secondary Education Worksheet should be prepared for each child. However, Section Two should be completed once for all children living away from home while attending school. The number used to fill in the blank in Line E should be the average number of weeks these children live at home. For example, if one child lives at home for ten (10) weeks and another child lives at home for sixteen (16) weeks, the average number of weeks will be thirteen (13). This number would then be inserted in the blank on Line E which is then divided by 52 (weeks).

COMMENTARY

With the modification of the age of emancipation from age twenty-one (21) to age nineteen (19), Section Two of the Post-Secondary Education Worksheet will only be applicable in a limited number of cases. However, it remains a valuable tool to calculate child support for a child under age nineteen (19) who does not reside with either parent during the school year but returns to the home of the custodial parent during school breaks and recess. Section Two of the Post-Secondary Education Worksheet should not be utilized once the child attains age nineteen (19).

Other Extraordinary Expenses. The economic data used in developing the Child Support Guideline Schedules do not include components related to those expenses of an "optional" nature such as costs related to summer camp, soccer leagues, scouting and the like. When both parents agree that the child(ren) may participate in optional activities, the parents should pay their pro rata share of these expenses from line 2 of the Child Support Obligation

Worksheet. In the absence of an agreement relating to such expenses, assigning responsibility for the costs should take into account factors such as each parent's ability to pay, which parent is encouraging the activity, whether the child(ren) has/have historically participated in the activity, and the reasons a parent encourages or opposes participation in the activity. If the parents or the court determine that the child(ren) may participate in optional activities, the method of sharing the expenses shall be set forth in the entry.

COMMENTARY

The costs of participating in elective school activities such as sports, performing arts and clubs, including the costs of participating in related extracurricular activities, are "Other Extraordinary Expenses."

GUIDELINE 9. ACCOUNTABILITY, TAX EXEMPTIONS, ROUNDING SUPPORT AMOUNTS

Accountability of the Custodial Parent for Support Received. Quite commonly noncustodial parents request, or even demand, that the custodial parent provide an accounting for how support money is spent. While recognizing that in some instances an accounting may be justified, the Committee does not recommend that it be routinely used in support orders. The Indiana Legislature recognized that an accounting may sometimes be needed when it enacted IC 31-16-9-6.

At the time of entering an order for support, or at any time thereafter, the court may make an order, upon a proper showing of the necessity, requiring the spouse or other person receiving such support payments to render an accounting to the court of future expenditures upon such terms and conditions as the court shall decree.

It is recommended that an accounting be ordered upon a showing of reasonable cause to believe that child support is not being used for the support of the child. This provision is prospective in application and discretionary with the court. An accounting may not be ordered as to support payments previously paid.

A custodial parent may be able to account for direct costs (clothing, school expenses, music lessons, etc.) but it should be remembered that it is extremely difficult to compile indirect costs (a share of housing, transportation, utilities, food, etc.) with any degree of accuracy. If a court found that a custodial parent was diverting support for his or her own personal use, the remedy is not clear. Perhaps, the scrutiny that comes with an accounting would itself resolve the problem.

Tax Exemptions. Development of these Guidelines did not take into consideration the awarding of the income tax exemption. Instead, it is required each case be reviewed on an individual basis and that a decision be made in the context of each case. Judges and practitioners should be aware that under current law the court cannot award an exemption to a parent, but the court may order a parent to release or sign over the exemption for one or more of the children to the other parent pursuant to Internal Revenue Code § 152(e). To effect this release, the parent releasing the exemption must sign and deliver to the other parent I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The parent claiming the exemption must then file this form with his or her tax return. The release may be made, pursuant to the Internal Revenue Code, annually, for a specified number of years or permanently. Courts shall include in the support order that a parent may only claim an exemption if the parent has paid at least ninety-five percent (95%) of their court ordered support for the calendar year in which the exemption is sought by January 31 of the following year. Shifting the exemption for dependents does not alter the filing status of either parent.

A court is required to specify in a child support order which parent may claim the child(ren) as dependents for tax purposes. In determining when to order a release of exemptions, it is required that the following factors be considered:

(1) the value of the exemption at the marginal tax rate of each parent;
(2) the income of each parent;
(3) the age of the child(ren) and how long the exemption will be available;
(4) the percentage of the cost of supporting the child(ren) borne by each parent;
(5) the financial aid benefit for post-secondary education for the child(ren);
(6) the financial burden assumed by each parent under the property settlement in the case; and
(7) any other relevant factors,(including health insurance tax subsidies or tax penalties under the Affordable Care Act).

COMMENTARY

Under the Affordable Care Act, premium tax subsidies, dependent tax exemptions, and tax penalties for failure to provide health insurance are inextricably linked. Problems can arise when a parent purchases health insurance through the health insurance marketplace under the Affordable Care Act and needs access to premium tax subsidies in order to make the insurance affordable. Only the parent who claims a child as a dependent on a federal tax return is eligible for the subsidies and liable for the tax penalties.

Rounding child support amounts. The amount of child support entered as an order may be expressed as an even amount, by rounding to the nearest dollar. For example, $50.50 is rounded to $51.00 and $50.49 is rounded to $50.00.

ADDITIONAL DOCUMENTS:

The following documents are available in Rich Text and PDF formats. Click the icon corresponding to your preferred format to open the documents below.

Amended Child Support Obligation Worksheet	MS Word	Adobe PDF
Parenting Time Credit Worksheet	MS Word	Adobe PDF
Amended Post-Secondary Education Worksheet	MS Word	Adobe PDF
Amended Guideline Schedules for Weekly Support Payments	MS Word	Adobe PDF

2020 Indiana Family Law Update

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Property Division

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Smith v. Smith, 136 N.E.3d 275 (Ind. Ct. App. 2019)

- **No error in denying wife's seventh continuance motion**
- **Excess of husband's date of marriage net worth less husband's expenditures during the marriage is not a marital liability unless existent on the date of filing**
- **Distribution of net carryover losses to husband to offset potential future business losses not erroneous**
- **Affirmed 74%/26% division of marital estate in favor of husband**

Baglan v. Baglan, 137 N.E.3d 271 (Ind. Ct. App. 2019)

- **Gifted stocks to wife 26 years into marriage**
- **Must include all assets in the marital estate; gifted stock existing on the date of filing is a marital asset**
- **Valuation date of assets must be between the date of filing and the date of final hearing; cannot value at date of pre-filing gift**

Henderson v. Henderson, 139 N.E.3d 227 (Ind. Ct. App. 2019)

- **Real estate land contract in husband's name with title transferring to husband at final payment was a marital asset**
- **Husband had a vested interest in the contract and a vested equitable interest in the real estate derived from the contract**
- **Contractual interest is a marital asset**
- **55% division of marital estate to husband affirmed**
- ***Cf. Tyagi v. Tyagi*, 142 N.E.3d 960 (Ind. Ct. App. 2020) (business and real estate owned by husband's parents were not marital assets)**

Hartman v. BigInch Fabricators & Construction Holding Co., 148 N.E.3d 1017 (Ind. Ct. App. 2020)

- **Not a divorce case**
- **Distinguishes compelled shareholder return of ownership interests to a controlling party where there is a ready-made market from divorce cases where there is no compelled termination and no ready-made market**
- **Discounts for lack of control and marketability applicable to divorce cases; *see Alexander v. Alexander*, 927 N.E.2d 926 (Ind. Ct. App. 2010)**
- **"Fair value" v. "fair market value"**

Story v. Story, 148 N.E.3d 1155 (Ind. Ct. App. 2020)

- **Complexities of military retirement benefits**
- **Settlement agreement interpreted to apply to pre-retirement and post-retirement benefits**
- **Allocation of unallocated premium costs**

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Bringle v. Bringle, 2020 WL 3526021 (Ind. Ct. App. June 30, 2020)

- **Shareholder debt included in business valuation as an asset but not as a separate marital liability**
- **Contingent liability too speculative and uncertain to be repaid**
- **60% division of marital estate to husband affirmed**

Procedural Issues

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Smith v. Smith, 136 N.E.3d 656 (Ind. Ct. App. 2019)

- **Motion to withdraw appearance filed and granted one day before final hearing**
- ***Pro se* continuance motion denied**
- **Reversed; when good cause is shown it is an abuse of discretion not to grant continuance motion**
- **Relevant to consider timing of granting of motion to withdraw appearance**

Henderson v. Box, 947 F.3d 482 (7th Cir. 2020)

- **Ind. Code § 31-14-7-1 regarding man presumed to be a child's biological father**
- **After *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), the statute must provide an equivalent presumption for same-sex marriages**
- **Proper to enjoin that portion of the statute and issue a declaratory judgment that the presumption violated the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution**

S.H. v. D.W., 139 N.E.3d 214 (Ind. 2020)

- **3-2 decision**
- **Reversal of extension of order of protection; new facts needed to warrant reissuance, renewal, or extension of order of protection**
- **Dissent questioned necessity of waiting for another act of violence or violation of order of protection to occur**
- ***See also Ritt v. S.W.*, 142 N.E.3d 1010 (Ind. Ct. App. 2020) (reversing entry of order of protection and noting statutory definitions of "domestic or family violence," "stalking," and "harassment")**

In re Name and Gender Change of R.E., 142 N.E.2d 1045 (Ind. Ct. App. 2020)

- **Medical evidence of a physical sex change not required; *See In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014)**
- **Request made in good faith and not for a fraudulent or unlawful purpose**
- **Case remained sealed and another admonishment as to treatment of requesting party**

Ferrell v. Ferrell, 143 N.E.3d 350 (Ind. Ct. App. 2020)

- **Separate settlement agreement language regarding Voluntary Separation Incentive payments and military pension**
- **Interpreted like any other contract and *de novo* review**
- **Reversed finding husband in contempt**

In re Paternity of C.B. and S.B., 144 N.E.3d 759 (Ind. Ct. App. 2020)

- **Mother withdrew her petition for attorneys' fees and fired counsel**
- **Former counsel's subsequent motion to intervene should not have been granted; former counsel had no right to request fees from father "separate and apart" from mother**
- **Former counsel could seek fees from mother**

In re De.B., 144 N.E.3d 763 (Ind. Ct. App. 2020)

- **Ind. Evid. Rule 803(6) – business records exception**
- **Applies to lab reports**
- **Different outcome from *In re L.E.S.*, 125 N.E.3d 628 (Ind. Ct. App. 2019)**

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In re Name Change of Jane Doe, 148 N.E.3d 1147 (Ind. Ct. App. 2020)

- **Another name change opinion**
- **Ind. Code § 34-28-2-2.5(a)(5) provides a list of information to be submitted with a name change petition for an individual who is at least 17 years of age "whenever possible"**
- **The applicable statute do not require United States citizenship in order to obtain a name change**

Berg v. Berg, 2020 WL 3982838 (Ind. Ct. App. July 15, 2020)

- **2-1 decision**
- **Important mediation opinion; reaffirms confidentiality**
- **$122,000.00 omitted stock account**
- **The judgment could not stand without mediation evidence; mediation evidence was essential to the judgment**
- **Dissent found husband's arguments waived and that the trial court acted within its discretion in relying on wife's exhibits**

Parker v. State, 2020 WL 4357077 (Ind. Ct. App. July 30, 2020)

- **Facebook evidence admissible**
- **Ind. Evid. Rule 901(a) and 901(b) – reasonable probability, distinctive characteristics**
- **Absolute proof of authenticity not required; once reasonable probability is established inconclusiveness goes to weight rather than admissibility**
- ***See also Tienda v. State*, 358 S.W.3d 633 (Tex. Crim. App. 2012)**

Child Support

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T.R. v. E.R., 134 N.E.3d 409 (Ind. Ct. App. 2019)

- **Voluntarily underemployed and imputed income ($36,000.00 to $43,000.00 per year or $17.78 per hour for 8 hours per week)**
- **Evidence of mother's weekly income ($500.00) exceeded the $420.00 per week calculated by trial court**
- **Father ordered to pay for parenting time at an agency**

Scott v. Corcoran, 135 N.E.3d 931 (Ind. Ct. App. 2019)

- **Irregular income**
- **Father must timely produce tax returns under the terms of the settlement agreement**
- **Overpayment of irregular child support even though the payments were non-conforming**
- **Overpayment is a credit against future child support payments and not a money judgment against mother**

Cunningham v. Barton, 139 N.E.3d 1081 (Ind. Ct. App. 2019)

- **College expenses**
- **Focus on children's actions after adulthood; no repudiation**
- **Ind. Code § 31-16-6-2(b) – college expense payments ordered only after child support obligation ceased**
- **No imputation of mother's boyfriend's income**

Anselm v. Anselm, 146 N.E.3d 1042 (Ind. Ct. App. 2020)

- **Unsigned Child Support Obligation Worksheet accepted with no objection**
- **6% Rule must be applied**
- ***See also In re Paternity of A.J.*, 146 N.E.3d 1075 (Ind. Ct. App. 2020) (affirming a child support order when no evidence of either party's income was in the record)**

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Eldredge v. Ruch, 2020 WL 2971708 (Ind. Ct. App. June 4, 2020)

- **Educational support orders are subject to income withholding orders**
- **Ind. Code § 31-9-2-58(a) provides that income withholding orders apply to "support" and are not limited to "child support"**
- **15 U.S.C. § 1673 does not limit the amount of income withholding; "any person" not subject to limitations found in the general rule**

Hill v. Cox, 2020 WL 4357331 (Ind. Ct. App. July 30, 2020)

- **Social Security Administration payments**
- **Lump-sum payments and monthly payments to children**
- **Timing of payments matter**

Custody/Parenting Time

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In re Ay.H., 121 N.E.3d 149 (Ind. Ct. App. 2019)

- **Agreed order to forgo adoption in exchange for continuing guardianship**
- **Father then petitioned to terminate guardianship**
- **Trial court acted within its discretion in denying father's petition to terminate guardianship**

T.R. v. E.R., 134 N.E.3d 409 (Ind. Ct. App. 2019)

- **Supervised parenting time at father's expense**
- **Father can be ordered to participate in a domestic violence program (Ind. Code § 31-34-20-3)**
- **Psychological evaluation of father as a condition of parenting time appropriate if explained in findings**

Monasky v. Taglieri, 140 S. Ct. 719 (2020)

- **Hague Convention case**
- **Definition of “habitual residence” reversed for “clear error”**
- **Resolves division among Federal Circuit Courts**
- **Two concurrences**

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Rasheed v. Rasheed, 142 N.E.3d 1017 (Ind. Ct. App. 2020)

- **Reversed joint legal custody; unwilling and unable to communicate and cooperate**
- **Joint legal custody not appropriate when parents have made child-rearing a battleground**
- ***See also Hecht v. Hecht*, 142 N.E.3d 1022 (Ind. Ct. App. 2020) (affirming modification of sole legal custody to mother when there were educational and medical disputes)**

Anselm v. Anselm, 146 N.E.3d 1042 (Ind. Ct. App. 2020)

- **Ind. Code § 31-17-2-8 requires consideration of but not findings as to all statutory factors in a custody determination**
- **Importance of Ind. Trial Rule 52 request**

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In re Paternity of I.P., 148 N.E.3d 1098 (Ind. Ct. App. 2020)

- **Ind. Code § 31-14-13-1; sole custody to a biological mother of a child born out-of-wedlock unless a statute or court order provides otherwise**
- **Construed as a petition to modify custody**
- **Sole legal and primary physical custody to mother**

Jones v. Gruca, 2020 WL 3282524 (Ind. Ct. App. June 18, 2020)

- **Ind. Code § 31-17-2-21 allows a court to modify custody only if there is a substantial change in one of the factors that courts may consider in initially determining custody and if it is in the children's best interests**
- **Order that parties meet with a parenting coordinator as a prerequisite to future filings is not an unconstitutional delegation of judicial authority**

McDaniel v. McDaniel, 2020 WL 3968085 (Ind. Ct. App. July 14, 2020)

- **Relocation case**
- **Change of custody to father when mother requested relocation**
- **Distinguished *In re Paternity of W.R.H.*, 120 N.E.3d 1039 (Ind. Ct. App. 2019); joint legal custody can be modified even if parties do not advance that request if no related request to modify custody**
- **Father did not file a petition to modify custody**

Madden v. Phelps, 2020 WL 4211564 (Ind. Ct. App. July 23, 2020)

- **Reversed modification of joint legal custody to sole legal custody to father; joint legal custody not in issue**
- **Affirmed modification of physical custody to father**
- **Concurrence cautions that a parenting coordinator must be neutral in resolving disputes and not become an advocate**

Adoption/Paternity

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In re D.H., 135 N.E.3d 914 (Ind. Ct. App. 2019)

- **Mother's consent to stepmother adoption required under Ind. Code § 31-19-9-8; not abandonment**
- **Mother's attempts to achieve sobriety supplied "justifiable cause" for failure to maintain significant contact for over one year**
- **"The most protected status in any adoption proceeding is that of the natural parent." *See also In re Adoption of I.B.*, 2020 WL 2020 WL 40457497 (Ind. Ct. App. July 20, 2020) (reversing a determination that mother's consent was not required)**
- **Adoption statute strictly construed to preserve parent-child relationship**

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D.T. v. J.M., 136 N.E.3d 323 (Ind. Ct. App. 2019)

- **Ind. Code § 31-19-9-8(a)(1) requires specific findings as to what constitutes an "unfit parent"**
- **After that initial determination, "best interests" analysis to determine if to dispense with consent**
- ***See also In re Adoption of K.H.*, 2020 WL 4343157 (Ind. Ct. App. July 29, 2020) (affirming a finding that father's consent to adoption was unnecessary when no court order, paternity affidavit, or participation by father)**

In re Adoption of C.A.H., 136 N.E.3d 1126 (Ind. 2020)

- **No default judgment granting adoption based on father failing to attend a single hearing; no implied consent**
- **Important liberty interests at stake**

In re M.A.M., 137 N.E.3d 1019 (Ind. Ct. App. 2019)

- **2-1 decision**
- **Prosecutor could bring paternity action; Ind. Code § 31-14-1-1 "tie-breaker" for tension with Ind. Code § 31-14-4-3**
- **Dissent indicated paternity action emanated from state statutes rather than the Title IV-D program or Federal grants initiatives**

Young v. Davis f/k/a Brummet, 139 N.E.3d 1099 (Ind. Ct. App. 2019)

- **Order establishing paternity in Young vacated due to mother's fraud related to paternity affidavit and testing**
- **Presumption of paternity based on a paternity affidavit may be rebutted pursuant to Ind. Code § 16-37-2-2.1(1)**
- ***Cf. In re Support of J.O.*, 141 N.E.3d 1246 (Ind. Ct. App. 2020) (reversing father's challenge to joint custody affidavit as too late and not establishing fraud, duress, or material mistake of fact in connection with the execution)**

Seville v. Lopez, 2020 WL 3478701 (Ind. Ct. App. June 26, 2020)

- **Another attempt to dismiss after agreed order**
- **Grandparents were permitted to intervene in paternity case; mother could not dismiss after order granting motion to intervene**
- **Grandparents' visitation request equated to cross-claim or counterclaim**

Termination of Parental Rights/CHINS

In re S.K., 124 N.E.3d 1225 (Ind. Ct. App. 2019)

- **Indiana Child Welfare Act (ICWA) did not apply to Canadian Indian tribe that was not federally recognized in the United States**
- **No reasonable probability that conditions would be remedied**
- **Termination of parental rights affirmed**

In re Ma.H., 134 N.E.3d 41 (Ind. 2019)

- **Termination of parental rights reinstated**
- **Parents have a fundamental but not absolute right to raise their children**
- **DCS proved statutory elements by clear and convincing evidence**

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In re J.C., 134 N.E.3d 419 (Ind. Ct. App. 2019)

- **Termination of parental rights affirmed**
- **Mother's failure to object to timing of termination hearings waived the issue**
- **Different from time limits for fact-finding hearings**
- **Majority indicated drug screens were not admissible under the business records exception to the hearsay rule; concurrence opined that they were properly admitted under that exception**

In re T.W., 135 N.E.3d 607 (Ind. Ct. App. 2019)

- **Termination of parental rights reversed**
- **Although DCS not required to provide service before seeking termination, parents are afforded due process protections that courts can raise *sua sponte***
- **Family case manager unreasonably decided from the outset that the child would be better off in foster care**

In re K.T., 137 N.E.3d 317 (Ind. Ct. App. 2019)

- **Termination of parental rights reversed**
- **Father's failure to participate in services alone could not sustain the termination of his parental rights**
- **DCS failed to provide clear and convincing evidence that all other reasonable efforts to preserve the parent-child relationship had failed**
- ***See also In re B.F.*, 141 N.E.3d 75 (Ind. Ct. App. 2020) (reversing termination of parental rights)**

In re M.S., 140 N.E.3d 279 (Ind. 2020)

- **Ind Code § 31-34-11-1 provides that a fact-finding hearing must be completed within 120 days of the finding of a CHINS petition**
- **The statute is procedural; can be extended by Ind. Trial Rule 53.5 for "good cause"**
- **Provides for fairness and allows for intent of Indiana General Assembly**

In re J.C. and R.C., 142 N.E.3d 427 (Ind. 2020)

- ***Per curiam* opinion affirming termination of parental rights**
- **Termination hearings must occur within 180 days of the date the termination petition is filed under Ind. Code § 31-35-2-6**
- **This time limit can be waived as opposed to the statutory time limit to complete a fact-finding hearing**

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In re R.L., 144 N.E.3d 686 (Ind. 2020)

- **Follows *Matter of Eq.W.*, 124 N.E.3d 1201 (Ind. 2019)**
- **Second CHINS petition barred by the doctrine of claim preclusion**
- **New facts needed to support the second petition**

In re L.H., 146 N.E.3d 352 (Ind. Ct. App. 2020)

- **Interstate Compact on the Placement of Children (ICPC) does not apply to natural parents**
- **Termination of parental rights reversed**
- **Dismayed that DCS did not understand that the ICPC did not apply to natural parents; DCS's actions unconscionable and may have denied father his due process rights**

In re Tre.S. and Tra.S., 149 N.E.3d 310 (Ind. Ct. App. 2020)

- **DCS conceded mother's due process rights were violated and requested reversal and remand of termination of parental rights**
- **DCS commended for conceding error but admonished for failure to afford litigants due process rights**
- **Still occurring after July 2018 Court of Appeals order noting that in the preceding six months DCS had moved to remand ten termination cases**

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Section Three

Creative Use of Qualified Domestic Relations Orders and Tax Efficient Withdrawal Strategies

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Section Three

Creative Use of Qualified Domestic Relations Orders and Tax Efficient Withdrawal Strategies…….. Denise Alexander Pyle

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Exhibit 5 – Qualified Domestic Relations Order General Motors Retirement Savings Plan 53

PowerPoint Presentation

CREATIVE USE OF QUALIFIED DOMESTIC RELATIONS ORDERS AND TAX EFFICENT WITHDRAWAL STRATEGIES

Denise Alexander-Pyle

I. Overview and some basics

A. Use of Qualified Domestic Relations Orders (QDROS) to effectuate transfer of an interest in a qualified plan. (For QDRO 101, See materials provided from U.S. Department of Labor Website attached as Exhibit _.

i. Rethinking "**What is a QDRO**?" They can be used for more than division of retirement plans and equalization of property in a divorce.

ii. Allowable transaction for division or withdrawal of retirement benefits through a QDRO under ERISA.

a. Division of or allocation of plan as part of property settlement.

The 10% early retirement penalty doesn't not apply to funds assigned by QDRO and liquidated before transfer to another plan or IRA. (See Joseph Cunningham article entitled "TAPPING QUALIFIED FUNDS-A **"WIN WIN"** attached as Exhibit _).

b. A QDRO can be used for payment of spousal support or child support, including arrearages for payments to spouse, former spouse, child or other dependents as along as pursuant to state domestic relations law.

B. Timing Issues

i. Generally QDRO'S are entered simultaneous with or after a judgment or decree is entered. However, they may be obtained earlier as in the case where a participant is going into pay status and the final decrees is not yet entered and the funds need to be obtained to pay child support and or spousal support pursuant to a domestic relations order of later for purposed provided above including enforcement of payments owed under a judgment of divorce.

ii. More than one QDRO may be used to effectuate transfers as in case where loan may have been improperly taken by one party and repayment needs to occur before the remaining balance of funds owed to the alternate payee can be transferred.

HOT TIP #1. Expand your use of QDROS. They are not just for dividing pension plans, but payment of other domestic relations obligations. There are situations where more than one QDRO for the same plan may be appropriate.

II. **Examples of tax efficient withdrawal strategies and other creative uses of QDRO'S, including benefits and risks.**

A. Withdrawals to obtain cash using lower income earners' and/or other spouse's penalty exemption due to divorce related transfer and related withdrawal.

i. Payment of Bills including legal fees (See Joseph Cunningham article entitled "QDRO Used to Secure Funds to Pay Attorney Fees – Silverman V Silverman" Attached as Exhibits).

a. Note: If a party or parties are going to discharge their debts in bankruptcy, one party may receive a windfall if they are awarded the retirement account to pay bills and then they file bankruptcy, as they likely will be able to protect the retirement asset. **By way of example**: Wife is receiving $50,000 from the Husband's 401K from which she is to pay $50,000 in marital debt which is in her name alone. Husband has assumed other debts. Wife then decides to file bankruptcy and discharge the debt and protect and keep the 401K as an exempt asset in bankruptcy. Husband was never liable on wife's debt, so she believes he is not prejudiced. However, had husband known wife was filing for post-dissolution bankruptcy, would he have agreed to give her this additional retirement money or insisted on sharing the debt discharge benefit as an "asset"?

b. More frequently than ever, parties are using QDROS to obtain

funds from a 401K Account to liquidate marital bills. Judgments clearly should identify what bills are to be paid and how taxes on the withdrawal will be paid including escrowing an amount to make sure the party being taxed had sufficient funds to cover the taxes. Sanctions or other protections may need to be included if there is any chance the recipient of funds may not pay the bills. The Judgment can contain a provision that the payments shall be sent to a third party (such as a mediator or arbitrator) to disburse the funds.

c. An issue frequently arises as to how much should be held in escrow and what tax rate should apply to funds received from a plan to cover the anticipated taxes. The plan will usually withhold 20% for federal tax purposes. This may not be enough, especially with state taxes and the amount of the withdrawal may increase the recipient's overall tax rate. If you are representing the recipient, especially if they are receiving funds for the benefit of the other party, you **want** insure the recipient is **not paying** increased taxes for the benefit of the other party only. **For example**, the recipient's overall tax rate was 25% prior to the rollover for the benefit of their spouse. Their overall rate increased to 35% after receiving $50,000 in 401K funds that the spouse agreed to receive so the former spouse, the plan participant could receive funds needed for immediate purposes, without paying the additional withdrawal penalty or having a loan to repay to his plan that would make it more difficult to qualify for future bank or consumer loans. Who should pay the increased tax? Additionally, if a specific net after tax amount is needed, advanced tax planning will be necessary to insure the right amount is received, net of taxes. It is fair to share the tax burden if the parties are both benefitting from the proceeds for the withdrawal, unless some other consideration is being provided.

ii. Funds for party or parties to purchase new residence-post dissolution.

a. When there is little or no equity in the marital home, 401K plans may be the only source for a down payment. While the participant may be able to take a loan from a plan to purchase a home, the loans need to be repaid and there may not be enough income available to pay back the loan and pay a mortgage payment. The benefit to either party or both parties of using the plan funds now to purchase a home, even with payment of taxes may be much greater than leaving the funds intact for retirement.

b. Again, the tax issues raised above will need to be addressed. Keep in mind, that if one party is keeping the marital home and the other party will be the beneficiary of the 401K funds to purchase another residence in the same area to facilitate a shared custody arrangement, a good argument could be made that both parties are benefitting and the tax should be shared.

iii. Reciprocal use of QDROS. If both parties have 401K'S and each party is in need of cash and they don't qualify or want to commit to repay loans, in lieu of awarding each party their own plan benefits, it may be advisable to do two cross QDRO'S so each party can withdraw cash funds from the other party's plan to a get a **penalty** free withdrawal of cash. They will still have to pay the basic income tax on the withdrawal so tax impact shifting still needs to be examined and possibly addressed, especially where there is substantial income disparity and/or amounts being withdrawn are dissimilar.

HOT TIP #2. In conclusion of the above, 401K and related plans (such as a 403B) are a great source of cash for payment of attorney fees, marital debts, down payments on post dissolution home, business start-ups, etc.

The 10% early withdrawal penalty is waived as part of a domestic

relations order provided the funds are not rolled into another plan or IRA first and a non-participants lower tax rate can be used to benefit both parties.

HOT TIP #3. Determine whether a future bankruptcy is likely when allocating retirement accounts for payment of debts.

HOT TIP #4. Make sure you anticipate and agree upon the amount of funds to be held for taxes, taking into consideration the final overall tax rate that will likely be used to cover the recipient's taxes.

B. Transfer if lieu of or as part of maintenance/spousal support payments; Example, benefits and risks.

i. Especially useful in a case where the facts support an award of short term post dissolution maintenance and there is limited cash flow due to debts of other monthly obligations or in a case such as where the spouse or a child in their care has a permanent disability and the payer wants to limit or eliminate maintenance payments altogether.

a. In the case where there is both significant debt and a disparity in income, the party with the greater income may already be assuming a larger portion of the debt. From a cash flow perspective, may find transferring funds from the 401K more palatable than paying monthly support obligations to the former spouse for a period of time. With the current tax laws in effect whereby spousal support in no longer deductible, the benefit of transferring pre-tax dollars to the recipient allows for the shifting of tax savings that was lost with the change in the tax laws to provide a benefit to both parties. There is also the added benefit that the relationship is severed much sooner.

b. **Example**. The parties were married 6 years and have no

children. However, Wife was seriously injured a freak fall and is not expected to complete here rehabilitation and return to work for two years. Husband earns $65,000 and wife currently is receiving less than $10,000 per year in temporary disability although it is anticipated when she is able to return to work it will be much higher. Wife owned the marital home before the marriage but there is no equity. Both parties also have significant debt in their respective names, some of which is marital, but due to a prior child support order and student loans, husband's personal debt is significantly higher. Husband has $25,000 in his 401K account. Wife is seeking post dissolution spousal maintenance Husband may choose to transfer the entire 401K to Wife and service his own debt in lieu of any obligation to Wife for short term maintenance payments.

c. The same risks apply to any present buy-out of future maintenance since the up-front payment may result in a windfall to the recipient if a terminating condition for the spousal maintenance payment such as remarriage occurs that would have otherwise lowered the overall payment obligation.

ii. Using consecutive year or supplemental orders for actual payment of support or for property settlement payments.

a. One order designating more than one payment of additional QDROS can be entered to allow for payments in subsequent years. However, the specific plan may itself have some limitation for their own ease in implementation and you should check first with the plan administrator before entering into an agreement which utilized this mechanism for payment. The orders cannot provide benefits that would not otherwise be available to the participant, only actual rights related to the withdrawal. There must be sufficient funds available in the plan to fund the payments, which is why subsequent order may

be necessary to allow for the accrual of additional funds for disbursement.

iii. Protection from loans, intervening potential claims and other withdrawals. If multiple withdrawals are going to be provided to an alternate payee, an order should be entered and served on the plan preventing or limiting loans by the participant or from other alternate payees obtaining any rights until the obligations of the recipient are satisfied.

iv. Capturing future income deferral and/or future employer contributions to pay outstanding obligations.

a. If a participant is going to continue contributing to a a plan post-dissolution, especially where an employer makes contributions to a plan, the future income can be captured by way of a subsequently entered QDRO to fund a settlement where there were insufficient funds available at the time to make an equitable award.

b. These accrued post-dissolution funds can also be tapped at a later dated to pay arrearages that have accumulated for spousal maintenance, child support and other domestic relations related obligations.

v. Payment of spousal maintenance when retirement account is in pay status.

a. If a payor is receiving income from a retirement account in pay status, that account can be used to fund ongoing spousal maintenance payments to a former spouse, even if the funds are already subject to a QDRO for property settlement purposes to the same spouse or another spouse. Since it is possible both pre- and after tax dollars due to tax limitation on some deferred amounts may be co-mingled in the plan, and the uncertainty as to whether the current tax laws will

remain in effect and spousal support will remain non-deductible, the actual tax implication will need to be looked at to insure the desired result. Use of the QDRO will insure payment if collection issues are a problem, especially if there is no other source of payment. Additionally, if insurance for domestic obligation payments is an issued, if the surviving spouse benefit has not already been awarded, it can be allocated here as a method of securing payments.

HOT TIP #5. QDROS are an ideal tool to transfer funds from retirement accounts to fund short or longer term spousal maintenance payments, especially where other income sources are limited. The tax on funds will still be the responsibility of the recipient, especially if a single lump sum is being paid. Make sure you examine all risks, especially where support might otherwise be terminated early and consult a tax expert.

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HOT TIP #6. Multiple QDROS for the same plan may be used to fund support and property obligations, especially where future contributions and employer matches can be captured.

HOT TIP #7. If there are going to be subsequent withdrawals from a pension using either a single QDRO with multiple payments or an additional QDRO, make sure the plan is put on notice to protect against loans or the attachment of other interests.

C. Payments of Child Support and Other Arrearages.

i. Child Support, Spousal Support and Property Settlement Payments. If

a spouse has an accumulated arrearage which has not been liquidated and there are funds in a 401K, this would be a good time to ask the court to enter a QDRO to collect the arrearage. This is a valuable tool where a spouse may have left a former job and/or the jurisdiction of the Court, but the 401K funds are still intact.

ii. Tax effecting will not be required as it relates to the child or support arrearages as the tax is charged to the participant.

HOT TIP #8. Look at pension plans as a source to collect support and property settlement arrearages. The Participant will be charged for taxes and penalties attributable to withdrawals in satisfaction of support arrearages.

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QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders

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Introduction

More than 46 million private wage and salary workers are currently covered by employer-provided retirement plans in the United States. For many of these Americans, retirement savings represent one of their most significant assets. For this reason, whether and how to divide a participant's interest in a retirement plan are often important considerations in separation, divorce, and other domestic relations proceedings. While the division of marital property generally is governed by state domestic relations law, any assignments of retirement interests must also comply with Federal law, namely the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). Under ERISA and the Code, retirement interests may be assigned only if the judgment, decree, or order creating or recognizing a spouse's, former spouse's, child's, or other dependent's interest in an individual's retirement benefits constitutes a "qualified domestic relations order" or "QDRO."

This booklet was prepared by the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor to provide general guidance about QDROs[1] to employers, retirement plan administrators, participants, beneficiaries, employee benefit professionals, and domestic relations specialists. The views expressed in this booklet represent the views of the Department of Labor.

This publication provides general information about the qualified domestic relations orders (QDROs) under the provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986. More information about QDROs submitted to the Pension Benefit Guaranty Corporation after a retirement plan terminates and PBGC becomes the trustee is available from the Pension Benefit Guaranty Corporation at www.pbgc.gov.

Chapter 1 provides a general overview of the QDRO provisions and the basic rules governing the content of QDROs.

Chapter 2 focuses on the duties of retirement plan administrators in making QDRO determinations and in administering retirement plans for which related QDROs have been issued.

Chapter 3 focuses on issues to be considered in drafting a QDRO. This chapter also discusses the provisions of section 205 of ERISA, which are substantially parallel to the provisions contained in sections 401(a)(11) and 417 of the Code to the extent these sections apply to QDROs. The provisions of section 205 require that retirement plans provide the spouses of retirement plan participants with certain rights to survivor benefits, which are relevant to the provisions governing QDROs. Sample QDRO language developed by the Department of the Treasury and the Internal Revenue Service, in consultation with the Department of Labor, is provided in Appendix C.

EX. 3

It is the hope of EBSA that the information furnished in this booklet will promote better understanding of the rights and obligations of those involved in domestic relations proceedings and those responsible for administering retirement plans.[2] A better understanding of these provisions of law should reduce the costs and burdens associated with QDRO determinations for both retirement plans and the affected individuals.

The Department recognizes that this booklet does not answer every question that may arise in the development and administration of QDROs. In this regard, the Department is willing to consider addressing specific issues through its advisory opinion process (but see Question 1-15 regarding advisory opinion requests on whether a domestic relations order is a QDRO). The ERISA Advisory Opinion Procedure governing this process is set forth in Appendix B of this booklet.

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Chapter 1 - Qualified Domestic Relations Orders: An Overview

This chapter includes a general overview of the provisions of Federal law governing the assignment of retirement benefits in a domestic relations proceeding and the requirements that apply in determining whether a domestic relations order is a qualified domestic relations order (QDRO). The following areas are addressed:

- Who can be an "alternate payee"?
- What information must be included in a domestic relations order in order for it to be "qualified"?
- Who determines whether a domestic relations order is a QDRO?

In general, ERISA and the Code do not permit a participant to assign or alienate the participant's interest in a retirement plan to another person. These "anti-assignment and alienation" rules are intended to ensure that a participant's retirement benefits are actually available to provide financial support during the participant's retirement years. A limited exception to the anti-assignment and alienation rules is provided for assignments of retirement benefits through qualified domestic relations orders (QDROs).

Under the QDRO exception, a domestic relations order may assign some or all of a participant's retirement benefits to a spouse, former spouse, child, or other dependent to satisfy family support or marital property obligations if and only if the order is a "qualified domestic relations order." ERISA requires that each retirement plan pay benefits in accordance with the applicable requirements of any "qualified domestic relations order" that has been submitted to the plan administrator. The plan administrator's determinations on whether a domestic relations order is a QDRO, therefore, have significant implications for both the parties to a domestic relations proceeding and the plan. The following questions and answers are intended to provide an overview of the Federal requirements a domestic relations order must satisfy to be considered a QDRO.

1-1: What is a Qualified Domestic Relations Order?

A "qualified domestic relations order" (QDRO) is:

- A domestic relations order
- That creates or recognizes the existence of an "alternate payee's" right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and
- That includes certain information and meets certain other requirements. See Questions 1-5 and 1-6.

Question 1-4 explains who may be an "alternate payee."

Reference: ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)

1-2: What is a "domestic relations order"?

To be recognized as a QDRO, an order must be a "domestic relations order." A domestic relations order is:

- A judgment, decree, or order (including the approval of a property settlement)
- That is made pursuant to state domestic relations law (including community property law) and
- That relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a "domestic relations order" under ERISA. The mere fact that a property settlement is agreed to and signed by the parties will not, in and of itself, cause the agreement to be a domestic relations order.

There is no requirement that both parties to a marital proceeding sign or otherwise endorse or approve an order. It is also not necessary that the retirement plan be brought into state court or made a party to a domestic relations proceeding for an order issued in that proceeding to be a "domestic relations order" or a "qualified domestic relations order." Indeed, because state law is generally preempted to the extent that it relates to retirement plans, the Department takes the position that retirement plans cannot be joined as a party in a domestic relations proceeding pursuant to state law. Moreover, retirement plans are neither permitted nor required to follow the terms of domestic relations orders purporting to assign retirement benefits unless they are QDROs.

Reference: ERISA §§ 206(d)(3)(B)(ii), 514(a), 514(b)(7); IRC § 414(p)(1)(B)

1-3: Must a "domestic relations order" be issued by a state court?

No. A domestic relations order may be issued by any state agency or instrumentality with the authority to issue judgments, decrees, or orders, or to approve property settlement agreements, pursuant to state domestic relations law (including community property law).

Reference: ERISA § 206(d)(3)(B)(ii); IRC § 414(p)(1)(B); Advisory Opinion 2001-06A (**see** Appendices)

1-4: Who can be an "alternate payee"?

A domestic relations order can be a QDRO only if it creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a part of a participant's benefits. For purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant.

Reference: ERISA § 206(d)(3)(K), IRC § 414(p)(8)

1-5: What information must a domestic relations order contain to qualify as a QDRO under ERISA?

QDROs must contain the following information:

- The name and last known mailing address of the participant and each alternate payee;
- The name of each plan to which the order applies;
- The dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee, and
- The number of payments or time period to which the order applies.

Reference: ERISA § 206(d)(3)(C)(i)-(iv); IRC § 414(p)(2)(A)-(D)

1-6: Are there other requirements that a domestic relations order must meet to be a QDRO?

Yes. There are certain provisions that a QDRO must **not** contain:

- The order must **not** require a plan to provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan
- The order must **not** require a plan to provide for increased benefits (determined on the basis of actuarial value)
- The order must **not** require a plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO and
- The order must **not** require a plan to pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse.

Reference: ERISA §§ 206(d)(3)(D)(i)-(iii), 206(d)(3)(E)(i)(III); IRC §§ 414(p)(3)(A)-(C), 414(p)(4)(A)(iii)

1-7: May a QDRO be part of the divorce decree or property settlement?

Yes. There is nothing in ERISA or the Code that requires that a QDRO (that is, the provisions that create or recognize an alternate payee's interest in a participant's retirement benefits) be issued as a separate judgment, decree, or order. Accordingly, a QDRO may be included as part of a divorce decree or court- approved property settlement, or issued as a separate order, without affecting its "qualified" status. The order must satisfy the requirements described above to be a QDRO.

Reference: ERISA § 206(d)(3)(B); IRC § 414(p)(1)

1-8: Must a domestic relations order be issued as part of a divorce proceeding to be a QDRO?

No. A domestic relations order that provides for child support or recognizes marital property rights may be a QDRO, without regard to the existence of a divorce proceeding. Such an order, however, must be issued pursuant to state domestic relations law and create or recognize the rights of an individual who is an "alternate payee" (spouse, former spouse, child, or other dependent of a participant).

An order issued in a probate proceeding begun after the death of the participant that purports to recognize an interest with respect to retirement benefits arising solely under state community property law, but that doesn't relate to the dissolution of a marriage or recognition of support obligations, is not a QDRO because the proceeding does not relate to a legal separation, marital dissolution, or family support obligation.

Reference: ERISA § 206(d)(3)(B); IRC § 414(p)(1); Advisory Opinion 90-46A (**see** Appendices); see Egelhoff v. Egelhoff, 121 S.Ct. 1322, 149L. Ed. 2d 264 (2001); see Boggs v. Boggs, 520 U.S. 833, 117 S.Ct. 1754 (1997)

1-9: Will a domestic relations order fail to be a QDRO solely because of the timing of issuance?

No, not if it otherwise meets the QDRO requirements under ERISA. A domestic relations order issued after the participant's death, divorce, or annuity starting date, or subsequent to an existing QDRO, will not fail to be treated as a QDRO solely because of the timing of issuance. For example, a subsequent domestic relations order between the same parties which revises an earlier QDRO does not fail to be a QDRO solely because it was issued after the first QDRO. Likewise, a subsequent domestic relations order between different parties which directs a portion of the participant's previously unallocated benefits to a second alternate payee, does not fail to be a QDRO solely because of the existence of a previous QDRO. Further, a domestic relations order requiring a portion of a participant's annuity benefit payments be paid to an alternate payee does not fail to be a QDRO solely because the domestic relations order was issued after the annuity starting date.

Reference: 29 C.F.R. 2530.206; **see** section 1001 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (Aug. 17, 2006)

1-10 : May a QDRO provide for payment to the guardian of an alternate payee?

Yes. If an alternate payee is a minor or is legally incompetent, the order can require payment to someone with legal responsibility for the alternate payee (such as a guardian or a party acting **in loco parentis** in the case of a child, or a trustee as agent for the alternate payee).

Reference: See Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 222.

1-11: Can a QDRO cover more than one plan?

Yes. A QDRO can assign rights to retirement benefits under more than one retirement plan of the same or different employers as long as each plan and the assignment of benefit rights under each plan are clearly specified.

Reference: ERISA § 206(d)(3)(C)(iv); IRC § 414(p)(2)(D)

1-12: Must all QDROs have the same provisions?

No. Although every QDRO must contain certain provisions, such as the names and addresses of the participant and alternate payee(s) and the name of the plan(s), the specific content of the rest of the QDRO will depend, as explained in more detail in Chapter 3, on the type of retirement plan, the nature of the participant's retirement benefits, the purposes behind issuing the order, and the intent of the drafting parties.

1-13: Who determines whether an order is a QDRO?

Under Federal law, the administrator of the retirement plan that provides the benefits affected by an order is the individual (or entity) initially responsible for determining whether a domestic relations order is a QDRO. Plan administrators have specific responsibilities and duties with respect to determining whether a domestic relations order is a QDRO. Plan administrators, as plan fiduciaries, are required to discharge their duties prudently and solely in the interest of plan participants and beneficiaries. Among other things, plans must establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions pursuant to qualified orders. Administrators are required to follow the plan's procedures for making QDRO determinations. Administrators also are required to furnish notice to participants and alternate payees of the receipt of a domestic relations order and to furnish a copy of the plan's procedures for determining the qualified status of such orders. See Chapter 2 for a detailed discussion of the duties and responsibilities of plan administrators in making QDRO determinations.

It is the view of the Department of Labor that a state court (or other state agency or instrumentality with the authority to issue domestic relations orders) does not have jurisdiction to determine whether an issued domestic relations order constitutes a "qualified domestic relations order." In the view of the Department, jurisdiction to challenge a plan administrator's decision about the qualified status of an order lies exclusively in Federal court.

Reference: ERISA §§ 206(d)(3)(G)(i) and (ii), 404(a), 502(a)(3), 502(e), 514; IRC § 414(p)(6)(A)(ii)

1-14: Who is the "administrator" of the plan?

The "administrator" of an employee benefit plan is the individual or entity specifically designated in the plan documents as the administrator. If the plan documents do not designate an administrator, the administrator is the employer maintaining the plan, or, in the case of a plan maintained by more than one employer, the association, committee, joint board of trustees, or similar group representing the parties maintaining the plan. The name, address, and phone number of the plan administrator is required to be included in the plan's summary plan description. The summary plan description is a document that the administrator is required to furnish to each participant and to each beneficiary receiving benefits. It summarizes the rights and benefits of participants and beneficiaries and the obligations of the plan.

Reference: ERISA §§ 3(16), 102(b), 29 CFR § 2520.102-3(f); IRC § 414(g), Treas. Reg. § 1.414(g)-1

1-15: Will the Department of Labor issue advisory opinions on whether a domestic relations order is a QDRO?

No. A determination of whether an order is a QDRO necessarily requires an interpretation of the specific provisions of the plan or plans to which the order applies and the application of those provisions to specific facts, including a determination of the participant's actual retirement benefits under the plan(s). The Department will not issue opinions on such inherently factual matters.

Reference: See ERISA Procedure 76-1, 41 Fed. Reg. 36281 (1976)(Appendix B)

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Chapter 2 - Administration of QDROs: Determining Qualified Status and Paying Benefits

This chapter describes the duties of a plan administrator in determining the qualified status of domestic relations orders and administering distributions under QDROs. The following areas are addressed:

- What are the plan administrator's responsibilities in furnishing information to a participant and alternate payee?
- What measures must a plan administrator take to protect the plan participant's benefits upon receipt of a domestic relations order?
- What procedures must a plan administrator follow in determining whether a domestic relations order is a QDRO?

ERISA imposes a number of responsibilities on the plan administrator relating to the handling of domestic relations orders. As a plan fiduciary, the administrator is required to discharge these responsibilities prudently and solely in the interest of the plan's participants and beneficiaries. It is the view of the Department that the prudent discharge of a fiduciary's responsibilities with respect to the handling of domestic relations orders, like other areas of plan administration, requires plan administrators to take steps to avoid unnecessary and excessive administrative burdens and costs to the plan. The Department believes that the adoption of procedures and policies designed to facilitate, rather than impede, the timely processing and perfection of domestic relations orders generally will serve to minimize plan burdens and costs attendant to QDRO determinations.

The following questions and answers are intended to provide guidance on the discharge of an administrator's obligations under the QDRO and fiduciary responsibility provisions of ERISA.

2-1: What information is an administrator required to provide a prospective alternate payee before the administrator receives a domestic relations order?

Congress conditioned an alternate payee's right to an assignment of a participant's retirement benefit on the prospective alternate payee's obtaining a domestic relations order that satisfies specific informational and other requirements. It is the view of the Department that Congress therefore intended prospective alternate payees -- spouses, former spouses, children, and other dependents of a participant who are involved in a domestic relations proceeding -- to have access to plan and participant benefit information sufficient to prepare a QDRO. Such information might include the summary plan description, relevant plan documents, and a statement of the participant's benefit entitlements.

The Department believes that Congress did not intend to require prospective alternate payees to submit a domestic relations order to the plan as a prerequisite to establishing the prospective alternate payee's rights to information in connection with a domestic relations proceeding. However, it is the view of the Department that a plan administrator may condition disclosure of such information on a prospective alternate payee's providing information sufficient to reasonably establish that the disclosure request is being made in connection with a domestic relations proceeding.

It is the Department's understanding that many domestic relations orders fail initially to qualify when submitted to the plan because they fail to take into account the plan's provisions or the participant's actual benefit entitlements. Affording prospective alternate payees access to plan and participant information in a timely manner will, in the view of the Department, help drafters avoid making such obvious errors in preparing orders and, thereby, facilitate plan administration. See Question 2-5.

Reference: ERISA §§ 206(d)(3)(A) - (C), 404(a); IRC § 414(p)(1) - (3)

2-2: What are the duties of a plan administrator upon receipt of a domestic relations order by the plan?

Upon receipt of a domestic relations order, the plan administrator is required to promptly notify the affected participant and each alternate payee named in the order of the receipt of the order and to provide a copy of the plan's procedures for determining whether a domestic relations order is a QDRO. Notification should be sent to the address included in the domestic relations order.

The administrator is required to determine whether the order is a QDRO within a reasonable period of time after receipt of a domestic relations order and to promptly notify the participant and each alternate payee of such determination. See Question 2-10.

Reference: ERISA § 206(d)(3)(G)(i); IRC § 414(p)(6)(A)

2-3: Is a plan required to have procedures for determining whether a domestic relations order is qualified?

Yes. Every retirement plan is required to establish written procedures for determining whether domestic relations orders are QDROs and for administering distributions under QDROs.

Reference: ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)(B)

2-4: What requirements must a plan's QDRO procedures meet?

The QDRO procedures must:

- Be in writing;
- Be reasonable;
- Provide that each person specified in a domestic relations order received by the plan as entitled to payment of benefits under the plan will be notified (at the address specified in the domestic relations order) of the plan's procedures for making QDRO determinations upon receipt of a domestic relations order, and
- Permit an alternate payee to designate a representative for receipt of copies of notices and plan information that are sent to the alternate payee with respect to a domestic relations order.

[ERISA § 206(d)(3)(G)(ii); IRC § 414(p)(6)]

2-5: Are there other matters that should be addressed in a plan's QDRO procedures?

Yes. It is the view of the Department of Labor that a plan's QDRO procedures should be designed to ensure that QDRO determinations are made in a timely, efficient, and cost-effective manner, consistent with the administrator's fiduciary duties under ERISA. The Department believes that unnecessary administrative burdens and costs attendant to QDRO determinations and administration can be avoided with clear explanations of the plan's determination process, including:

- An explanation of the information about the plan and benefits that is available to assist prospective alternate payees in preparing QDROs, such as summary plan descriptions, plan documents, individual benefit and account statements, and any model QDROs developed for use by the plan (*See* Questions 2-1, 2-7);

- A description of any time limits set by the plan administrator for making determinations;
- A description of the steps the administrator will take to protect and preserve retirement assets or benefits upon receipt of a domestic relations order (for example, a description of when and under what circumstances plan assets will be segregated or benefit payments will be delayed or suspended) (*See* Questions 2-12, 2-13) and
- A description of the process provided under the plan for obtaining a review of the administrator's determination as to whether an order is a QDRO.

It is the view of the Department that the plan administrator's adoption and use of clear QDRO procedures, coupled with the administrator's provision of information about the plan and benefits upon request, will significantly reduce the difficulty and expense of obtaining and administering QDROs by minimizing confusion and uncertainty about the process.

Reference: ERISA §§ 206(d)(3)(G), 206(d)(3)(H), 404(a); IRC §§ 414(p)(6), 414(p)(7)

2-6: May a plan administrator charge a participant or alternate payee for determining the qualified status of a domestic relations order?

The Department has taken the position that in the context of a defined contribution plan, an administrator may assess reasonable expenses attributable to a QDRO determination against the individual account of the participant who is a party to the domestic relations order. The documents of the plan should be reviewed to determine how plan expenses are allocated.

Reference: ERISA § 404(a); see Field Assistance Bulletin 2003-3 (**see** Appendices)

2-7: May plan administrators provide parties with a model form or forms to assist in the preparation of a QDRO?

Yes. Although they are not required to do so, plan administrators may develop and make available "model" QDRO forms to assist in the preparation of a QDRO. Such model forms may make it easier for the parties to prepare a QDRO and reduce the time and expenses associated with a plan administrator's determination of the qualified status of an order. Examples of sample language that may be included in such forms are provided in Appendix C.

Plan administrators are required to honor any domestic relations order that satisfies the requirements to be a QDRO. In the view of the Department, therefore, a plan may not condition its determinations of QDRO status on the use of any particular form.

2-8: In determining the qualified status of a domestic relations order, is the administrator required to determine the validity of the order under state domestic relations law?

No. A plan administrator is generally not required to determine whether the issuing court or agency had jurisdiction to issue an order, whether state law is correctly applied in the order, whether service was properly made on the parties, or whether an individual identified in an order as an alternate payee is in fact a spouse, former spouse, child, or other dependent of the participant under state law.

Reference: See Advisory Opinion 99-13A; Advisory Opinion 92-17A (**see** Appendices)

2-9: Is a plan administrator required to reject a domestic relations order as defective if the order fails to specify factual identifying information that is easily obtainable by the plan administrator?

No. In many cases, an order that is submitted to a plan may clearly describe the identity and rights of the parties, but may be incomplete only with respect to factual identifying information within the plan administrator's knowledge or easily obtained through a simple communication with the alternate payee or the participant. For example, an order may misstate the plan's name or the names of participants or alternate payees, and the plan

administrator can clearly determine the correct names, or an order may omit the addresses of participants or alternate payees, and the plan administrator's records include this information. In such a case, the plan administrator should supplement the order with the appropriate identifying information, rather than rejecting the order as not qualified.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(I); IRC § 414(p)(2); see S. Rep. 575, 98th Cong., 2d Sess. at 20

2-10: How long may the plan administrator take to determine whether a domestic relations order is a QDRO?

Plan administrators must determine whether a domestic relations order is a QDRO within a reasonable period of time after receiving the order. What is a reasonable period will depend on the specific circumstances. For example, a domestic relations order that is clear and complete when submitted should require less time to review than an order that is incomplete or unclear. See Question 2-12.

Plans are required to adopt reasonable procedures for determining the qualified status of domestic relations orders. Compliance with such procedures should ensure that determinations of the qualified status of an order take place within a reasonable period of time. Procedures that unduly inhibit or hamper the QDRO determination process will not be considered reasonable procedures. See Question 2-4.

Reference: ERISA § 206(d)(3)(G)(i)(II); IRC § 414(p)(6)(A)(ii)

2-11: What must the plan administrator do during the determination process to protect against wrongly paying retirement benefits to the participant that would be paid to the alternate payee if the domestic relations order had been determined to be a QDRO?

During any period in which the issue of whether a domestic relations order is a QDRO is being determined (by a plan administrator, by a court of competent jurisdiction, or otherwise), ERISA requires that the plan administrator separately account for the amounts that would be payable to an alternate payee under the terms of the order during such period if the order had been determined to be qualified. These amounts are referred to as "segregated amounts." During the period in which the status of a domestic relations order is being determined, the plan administrator must take steps to ensure that amounts that would have been payable to the alternate payee, if the order were a QDRO, are not distributed to the participant or any other person.

The plan administrator's duty to separately account for and to preserve the segregated amounts is limited in time. ERISA provides that the plan administrator must preserve the segregated amounts for not longer than the end of an "18-month period." This "18-month period" does not begin until the first date (after the plan receives the order) that the order would require payment to the alternate payee.

It is the view of the Department that, in order to ensure the availability of a full 18- month protection period, the 18 months cannot begin before the plan receives a domestic relations order. Rather, the "18-month period" will begin on the first date on which a payment would be required to be made under an order **following receipt by the plan**. See Questions 2-12 and 2-13, which discuss how benefits should be treated when determinations on qualified status are made either before or after the beginning of the "18-month period."

Reference: ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7)

2-12: What are an administrator's duties with respect to a domestic relations order received by the plan before the beginning of the "18-month period"?

As explained in Question 2-10, a plan administrator must determine whether a domestic relations order is a QDRO within a reasonable period following receipt. In the view of the Department, the "18-month period" during which a plan administrator must preserve the "segregated amounts" (See Question 2-11) is not the measure of the reasonable period for determining the qualified status of an order and in most cases would be an unreasonably long period of time to take to review an order.

It is further the view of the Department that, during the determination period, the administrator, as a plan fiduciary, may not permit distributions to the participant or any other person of any amounts that would be payable to the alternate payee if the domestic relations order were determined to be a QDRO. If the domestic relations order is determined to be a QDRO before the first date on which benefits are payable to the alternate payee, the plan administrator has a continuing duty to account for and to protect the alternate payee's interest in the plan to the same extent that the plan administrator is obliged to account for and to protect the interests of the plan's participants. The plan administrator also has a fiduciary duty to pay out benefits in accordance with the terms of the QDRO.

The Department understands that orders that are initially rejected by the plan administrator as not qualified are frequently revised and resubmitted within a short period of time. The Department also recognizes that in some instances plan administrators who reject an order may receive requests from participants for immediate distribution of benefits under circumstances that suggest that the rejected order is being revised and will shortly be resubmitted to the plan. In such circumstances, the plan administrator may be subject to conflicting claims for either paying the benefit or failing to pay the benefit. The Department suggests that plan administrators may wish to consider the establishment of a process for providing preliminary or interim review of orders, and postponing final determinations for limited periods, to permit parties to correct defects within the 18-month segregation period. Such a process would reduce the likelihood of conflicting claims.

Reference: ERISA §§ 206(d)(3)(H), 404(a)

2-13: What are an administrator's duties with respect to a domestic relations order received on or after the date on which benefits would be payable to an alternate payee under the order?

Upon receipt of a domestic relations order, the administrator must separately account for and preserve the amounts that would be payable to an alternate payee until a determination is made with respect to the status of the order. See Questions 2-11, 2-12. If, within the "18-month period" -- beginning with the date (after receipt of the order by the plan) on which the first payment would be required to be made to an alternate payee under the order -- the plan administrator determines that the order is a QDRO, the plan administrator must pay the segregated amounts to the alternate payee in accordance with the terms of the QDRO. If, however, the plan administrator determines within the "18-month period" that the order is not a QDRO, or if the status of the order is not resolved by the end of the "18-month period," the plan administrator must pay out the segregated amounts to the person or persons who would have been entitled to such amounts if there had been no order. If the order is later determined to be a QDRO, the order will apply only prospectively; that is, the alternate payee will be entitled only to amounts payable under the order after the subsequent determination. See Question 2-12.

Reference: ERISA §§ 206(d)(3)(H), 404(a); IRC § 414(p)(7); but see H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-858 (describing 1986 amendments to the Retirement Equity Act of 1984, including clarification of the procedures to be followed during the 18-month segregation period for QDRO determinations)

2-14: What kind of notice is required to be provided by a plan administrator following a QDRO determination?

The plan administrator is required to notify the participant and each alternate payee of the administrator's determination as to whether the order constitutes a QDRO. This notice should be in writing and furnished promptly following a determination.

In the case of a determination that an order is not qualified, the notice should include the reasons for the rejection. It is the view of the Department that, in most instances where there has been a reasonable good faith effort to prepare a qualified domestic relations order, the parties will attempt to correct any deficiencies in the order and resubmit a corrected order for the plan administrator to review. The Department believes that, where a reasonable good faith effort has been made to draft a QDRO, prudent plan administration requires the plan administrator to furnish to the parties the information, advice, and guidance that is reasonably required to

understand the reasons for a rejection, either as part of the notification process or otherwise, if such information, advice, and guidance could serve to reduce multiple submissions of deficient orders and therefore the burdens and costs to plans attendant on review of such orders.

The notice of the plan administrator's determination should be written in a manner that can be understood by the parties. Multiple submissions and unnecessary expenses may be avoided by clearly communicating in the rejection notice:

- The reasons why the order is not a QDRO;
- References to the plan provisions on which the plan administrator's determination is based;
- An explanation of any time limits that apply to rights available to the parties under the plan (such as the duration of any protective actions the plan administrator will take); and
- A description of any additional material, information, or modifications necessary for the order to be a QDRO and an explanation of why such material, information, or modifications are necessary.

Reference: ERISA §§ 206(d)(3)(G)(i)(II), 206(d)(3)(I); IRC § 414(p)(6)(A)(ii)

2-15: What effect does an order that a plan administrator has determined to be a QDRO have on the administration of the plan?

The plan administrator must act in accordance with the provisions of the QDRO as if it were a part of the plan. In particular, if, under a plan, a participant has the right to elect the form in which benefits will be paid, and the QDRO gives the alternate payee that right, the plan administrator must permit the alternate payee to exercise that right under the circumstances and in accordance with the terms that would apply to the participant, as if the alternate payee were the participant.

Reference: ERISA §§ 206(d)(3)(A), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(13)(B), 414(p)(4)(A)(iii)

2-16: What disclosure rights does an alternate payee have under a QDRO?

ERISA provides that a person who is an alternate payee under a QDRO generally shall be considered a beneficiary under the plan for purposes of ERISA. Accordingly, the alternate payee must be furnished, upon written request, copies of a variety of documents, including the latest summary plan description, the latest annual report, any final annual report, and the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated. The administrator may impose a reasonable charge to cover the cost of furnishing such copies. It is the view of the Department that, at such time as benefit payments to the alternate payee commence under the QDRO, the alternate payee must be treated as a "beneficiary receiving benefits under the plan" and automatically furnished the summary plan description, summaries of material plan changes, and the plan's summary annual report.

Reference: ERISA §§ 104, 105, 206(d)(3)(J), 404(a); 29 CFR § 2520.104b-1 et seq.

2-17: What happens to the rights created by a QDRO if the plan to which the QDRO applies is amended, merged into another plan, or is maintained by a successor employer?

The rights of an alternate payee under a QDRO are protected in the event of plan amendments, a plan merger, or a change in the sponsor of the plan to the same extent that rights of participants or beneficiaries are protected with respect to benefits accrued as of the date of the event.

Reference: ERISA §§ 204(g), 206(d)(3)(A), 403(c)(1); IRC §§ 401(a)(13)(B), 411(d)(6); see Staff of the Joint Committee on Taxation, Explanation of Technical Corrections to the Tax Reform Act of 1984 and Other Recent Tax Legislation, 100th Cong., 1st Sess. (Comm. Print 1987) at 224

2-18: What happens to the rights created by a QDRO if a plan is terminated?

In the view of the Department, the rights granted by a QDRO must be taken into account in the termination of a plan as if the terms of the QDRO were part of the plan. To the extent that the QDRO grants the alternate payee part of the participant's benefits, the plan administrator, in terminating the plan, must provide the alternate payee with the notification, consent, payment, or other rights that it would have provided to the participant with respect to that portion of the participant's benefits.

Reference: ERISA §§ 206(d)(3)(A), 403(d)

2-19: What happens to the rights created by a QDRO if a defined benefit plan is terminated and the Pension Benefit Guaranty Corporation becomes trustee of the plan?

The Pension Benefit Guaranty Corporation (PBGC) is a Federal agency that insures pension benefits in most private-sector defined benefit pension plans. It is important to note that not all plans are insured by PBGC and not all plans that terminate become trusteed by PBGC. For example, defined contribution plans (including 401(k) plans) are generally not covered by PBGC's insurance. In addition, most defined benefit plans that terminate have sufficient assets to pay all benefits. PBGC does not trustee these plans. See Question 3-4 for a discussion of these basic types of retirement plans.

When an insured plan terminates without enough money to pay all guaranteed benefits, PBGC becomes trustee of the terminating plan and pays the plan benefits subject to certain limits. For instance, PBGC does not pay certain death and supplemental benefits. In addition, benefit amounts and the forms of benefit PBGC pays are limited. PBGC has special rules that apply these guarantee limitations to QDROs. See PBGC's booklet, **Qualified Domestic Relations Orders & PBGC** available at www.pbgc.gov/documents/qdro.pdf.

For information about a specific domestic relations order or QDRO affecting a plan trusteed by PBGC, write to:

PBGC QDRO Coordinator
P.O. Box 151750
Alexandria, VA 22315-1750

For information about terminated pension plans that PBGC has trusteed, benefit information with respect to a participant in a PBGC-trusteed plan, or to request a copy of PBGC's booklet, call PBGC's Customer Service Center at 1.800.400.PBGC (7242). The booklet is also available on PBGC's Web site.

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Chapter 3 - Drafting QDROs

This chapter provides guidance for the process of drafting domestic relations orders that qualify as QDROs. The following areas are addressed:

- What are the most common and useful ways of dividing retirement benefits?
- What are survivor benefits, and why are they important?
- When can an alternate payee receive the benefits assigned by a QDRO?
- In what form will the alternate payee receive the assigned benefits?

Although domestic relations orders that involve retirement plans are issued under and governed by state law, Federal law (ERISA and the Code) and the terms of the relevant retirement plan determine whether these orders can be QDROs. This chapter discusses how to draft orders that will qualify as QDROs while accomplishing the purposes for which the retirement benefits are being divided.

This chapter also discusses the most common methods of dividing retirement benefits under the two separate types of retirement plans: defined benefit plans and defined contribution plans. The following questions and answers emphasize the importance of understanding the nature of a participant's retirement benefits and of making decisions about the assignment of any survivor benefits payable under the retirement plan.

3-1: What is the best way to divide a participant's retirement benefits in a QDRO?

There is no single "best" way to divide retirement benefits in a QDRO. What will be "best" in a specific case will depend on many factors, including the type of retirement plan, the nature of the participant's retirement benefits, and why the parties are seeking to divide those benefits.

In deciding how to divide a participant's retirement benefits in a QDRO, it is also important to consider two aspects of a participant's retirement benefits: the benefit payable under the plan directly to the participant for retirement purposes (referred to here as the "retirement benefit"), and any benefit that is payable under the plan on behalf of the participant to someone else after the participant dies (referred to here as the "survivor benefit"). These two aspects of a participant's retirement benefits are discussed separately in this booklet only in order to emphasize the importance of considering how best to divide retirement benefits.

The following four questions and answers introduce the basic concepts that should inform decisions about drafting QDROs. Question 3-2 explains the scope of assignment permitted by the QDRO provisions; Questions 3-3 and 3-4 relate primarily to the retirement benefit; Question 3-5 describes survivor benefits. Later questions present more specific information about how to draft QDROs.

3-2: How much can be given to an alternate payee through a QDRO?

A QDRO can give an alternate payee any part or all of the retirement benefits payable with respect to a participant under a retirement plan. However, the QDRO cannot require the plan to provide increased benefits (determined on the basis of actuarial value); nor can a QDRO require a plan to provide a type or form of benefit, or any option, not otherwise provided under the plan (with one exception, described in Questions 3-9 and 3-10, for an alternate payee's right to receive payment at the participant's "earliest retirement age"). The QDRO also cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another QDRO already recognized by the plan.

Reference: ERISA §§ 206(d)(3)(B)(i)(I), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 414(p)(1)(A)(i), 414(p)(3), 414(p)(4); Advisory Opinion 2000-09A (**see** Appendices)

3-3: Why are the reasons for dividing the retirement benefits important?

Generally, QDROs are used either to provide support payments (temporary or permanent) to the alternate payee (who may be the spouse, former spouse or a child or other dependent of the participant) or to divide marital property in the course of dissolving a marriage. These differing goals often result in different choices in drafting a QDRO. This answer describes two common different approaches in drafting QDROs for these two different purposes.

One approach that is used in some orders is to "split" the actual benefit payments made with respect to a participant under the plan to give the alternate payee part of each payment. This approach to dividing retirement benefits is often called the "shared payment" approach. Under this approach, the alternate payee will not receive any payments unless the participant receives a payment or is already in pay status. This approach is often used when a support order is being drafted after a participant has already begun to receive a stream of payments from the plan (such as a life annuity).

An order providing for shared payments, like any other QDRO, must specify the amount or percentage of the participant's benefit payments that is assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). It must also specify the number of payments or period to which it applies. This is particularly important in the shared payment QDRO, which must specify when the alternate payee's right to share the payments begins and ends. For example, when a state authority seeks to provide support to a child of a participant, an order might require payments to the alternate payee to begin as soon as possible after the order is

determined to be a QDRO and to continue until the alternate payee reaches maturity. Alternatively, when support is being provided to a former spouse, the order might state that payments to the alternate payee will end when the former spouse remarries. If payments are to end upon the occurrence of an event, notice and reasonable substantiation that the event has occurred must be provided for the plan to be able to comply with the terms of the QDRO.

Orders that seek to divide a retirement benefit as part of the marital property upon divorce or legal separation often take a different approach to dividing the retirement benefit. These orders usually divide the participant's retirement benefit (rather than just the payments) into two separate portions with the intent of giving the alternate payee a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant. This approach to dividing a retirement benefit is often called the "separate interest" approach.

An order that provides for a separate interest for the alternate payee must specify the amount or percentage of the participant's retirement benefit to be assigned to the alternate payee (or the manner in which such amount or percentage is to be determined). The order must also specify the number of payments or period to which it applies, and such orders often satisfy this requirement simply by giving the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment and the time at which the separate interest will be paid. Such an order would satisfy the requirements to be a QDRO.

Federal law does not require the use of either approach for any specific domestic relations purpose, and it is up to the drafters of any order to determine how best to achieve the purposes for which retirement benefits are being divided. Further, the shared payment approach and the separate interest approach can each be used for either defined benefit or defined contribution plans. See Question 3-4 for a discussion of the two basic types of retirement plans. However, it is important in drafting any order to understand and follow the terms of the plan. An order that would require a plan to provide increased benefits (determined on an actuarial basis) or to provide a type or form of benefit, or an option, not otherwise available under the plan cannot be a QDRO. See Questions 3-4, 3-6, and 3-7 for further information on dividing retirement benefits under defined benefit and defined contribution plans.

In addition to determining whether or how to divide the retirement benefit, it is important to consider whether or not to give the alternate payee a right to survivor benefits or any other benefits payable under the plan. See Question 3-5 for a discussion of survivor benefits.

Reference: ERISA § 206(d)(3)(C)(ii) - (iv); IRC § 414(p)(2)(B) - (D)

3-4: In deciding how to divide the participant's retirement benefits, why is understanding the type of retirement plan important?

Understanding the type of retirement plan is important because the order cannot be a QDRO unless its assignment of rights or division of retirement benefits complies with the terms of the plan. Parties drafting a QDRO should read the plan's summary plan description and other plan documents to understand what retirement benefits are provided under the plan.

Retirement plans may be divided generally into two types:

1. Defined benefit plans

2. Defined contribution plans

A defined benefit plan promises to pay each participant a specific benefit at retirement. This basic retirement benefit is usually based on a formula that takes into account factors like the number of years a participant works for the employer and the participant's salary. The basic retirement benefit is generally provided in the form of periodic payments for the participant's life beginning at what the plan calls "normal retirement age." This stream of periodic payments is generally known as an "annuity." A participant's basic retirement benefit under a defined

benefit plan may increase over time, either before or after the participant begins receiving benefits, due to a variety of circumstances, such as increases in salary or the crediting of additional years of service with the employer (which are taken into account under the plan's benefit formula), or through amendment to the plan's provisions, including some amendments to provide cost of living adjustments.

Defined benefit plans may promise to pay benefits at various times, under certain circumstances, or in alternative forms. Benefits paid at those times or in those forms may have a greater actuarial value than the basic retirement benefit payable by the plan at the participant's normal retirement age. When one form of benefit has a greater actuarial value than another form, the difference in value is often called a "subsidy." See Appendix C for further discussion of the benefits provided under defined benefit plans.

A defined contribution plan, by contrast, is a type of retirement plan that provides for an individual account for each participant. The participant's benefits are based solely on the amount contributed to the participant's account and any income, expenses, gains or losses, and any forfeitures of accounts of other participants that may be allocated to such participant's account. Examples of defined contribution plans include profit sharing plans (like 401(k) plans), employee stock ownership plans (ESOPs), and money purchase plans. A participant's basic retirement benefit in a defined contribution plan is the amount in his or her account at any given time. This is generally known as the participant's "account balance." Defined contribution plans commonly provide for retirement benefits to be paid in the form of a lump sum payment of the participant's entire account balance. Defined contribution plans by their nature do not offer subsidies.

It should be noted, however, that some defined benefit plans provide for lump sum payments, and some defined contribution plans provide for annuities.

Reference: IRS Notice 97-11, 1997-2 IRB 49 (Jan. 13, 1997) (Appendix C)

3-5: What are "survivor benefits," and why should a QDRO take them into account?

Federal law requires all retirement plans, whether they are defined benefit plans or defined contribution plans, to provide benefits in a way that includes a survivor benefit for the participant's spouse. The provisions creating these protections are contained in section 205 of ERISA and sections 401(a)(11) and 417 of the Code. The type of survivor benefit that is required by Federal law depends on the type of retirement plan. Plans also may provide for survivor (or "death") benefits that are in addition to those required by Federal law. Participants and alternate payees drafting a QDRO should read the plan's summary plan description and other plan documents to understand the survivor benefits available under the plan.

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's "annuity starting date" (this is the first day of the first period for which an amount is payable to the participant) in a special form called a "qualified joint and survivor annuity" (QJSA) unless the participant elects a different form and the spouse consents to that election. When benefits are paid as a QJSA, the participant receives a periodic payment (usually monthly) during his or her life, and the surviving spouse of the participant receives a periodic payment for the rest of the surviving spouse's life upon the participant's death. See Appendix C for a description of the QJSA. Federal law also generally requires that, if a married participant with a non-forfeitable benefit under one of these types of plans dies before his or her "annuity starting date," the plan must pay the surviving spouse of the participant a monthly survivor benefit. This benefit is called a "qualified preretirement survivor annuity" (QPSA). Appendix C also describes the QPSA.

Those defined contribution plans that are not required to pay retirement benefits to married participants in the form of a QJSA or QPSA (like most 401(k) plans) are required by Federal law to pay any balance remaining in the participant's account after the participant dies to the participant's surviving spouse. If the spouse gives written consent, the participant can direct that upon the participant's death any balance remaining in the account will be paid to a beneficiary other than the spouse, for example, the couple's children. Under these defined contribution plans, Federal law does not require a spouse's consent to a participant's decision to withdraw any portion (or all) of his or her account balance during the participant's life.

If a participant and his or her spouse become divorced before the participant's annuity starting date, the divorced spouse loses all right to the survivor benefit protections that Federal law requires be provided to a participant's spouse. If the divorced participant remarries, the participant's new spouse may acquire a right to the Federally mandated survivor benefits. A QDRO, however, may change that result. To the extent that a QDRO requires that a former spouse be treated as the participant's surviving spouse for all or any part of the survivor benefits payable after the death of the participant, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse. For example, if a QDRO awards all of the survivor benefit rights to a former spouse, and the participant remarries, the participant's new spouse will not receive any survivor benefit upon the participant's death. If such a QDRO requires that a defined benefit plan, or a defined contribution plan subject to the QJSA and QPSA requirements, treat a former spouse of a participant as the participant's surviving spouse, the plan must pay the participant's benefit in the form of a QJSA or QPSA unless the former spouse who was named as surviving spouse in the QDRO consents to the participant's election of a different form of payment.

It should also be noted that some retirement plans provide that a spouse of a participant will not be treated as married unless he or she has been married to the participant for at least a year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot treat the alternate payee as a surviving spouse if the marriage lasted for less than one year.

In addition, it is important to note that some retirement plans may provide for survivor benefits in addition to those required by Federal law for the benefit of the surviving spouse. Generally, however, the only way to establish a former spouse's right to survivor benefits such as a QJSA or QPSA is through a QDRO. A QDRO may provide that a part or all of such other survivor benefits shall be paid to an alternate payee rather than to the person who would otherwise be entitled to receive such death benefits under the plan. As discussed above (See, e.g., Question 3-3), a spouse or former spouse can also receive a right to receive (as a separate interest or as shared payments) part of the participant's retirement benefit as well as a survivor's benefit.

Reference: ERISA §§ 205, 206(d)(3)(F); IRC §§ 401(a)(11), 414(p)(5), 417; Advisory Opinion 2000-09A (**see** Appendices)

3-6: How may the participant's retirement benefit be divided if the retirement plan is a defined contribution plan?

An order dividing a retirement benefit under a defined contribution plan may adopt either a "separate interest" approach or a "shared payment" approach (or some combination of these approaches). See Question 3-3 for a discussion of these two approaches. Orders that provide the alternate payee with a separate interest, either by assigning to the alternate payee a percentage or a dollar amount of the account balance as of a certain date, often also provide that the separate interest will be held in a separate account under the plan with respect to which the alternate payee is entitled to exercise the rights of a participant. Provided that the order does not assign a right or option to an alternate payee that is not otherwise available under the plan, an order that creates a separate account for the alternate payee may qualify as a QDRO.

Orders that provide for shared payments from a defined contribution plan should clearly establish the amount or percentage of the participant's payments that will be allocated to the alternate payee and the number of payments or period of time during which the allocation to the alternate payee is to be made. A QDRO can specify that any or all payments made to the participant are to be shared between the participant and the alternate payee.

In drafting orders dividing benefits under defined contribution plans, parties should also consider addressing the possibility of contingencies occurring that may affect the account balance (and therefore the alternate payee's share) during the determination period. For example, parties might be well advised to specify the source of the alternate payee's share of a participant's account that is invested in multiple investments because there may be different methods of determining how to derive the alternate payee's share that would affect the value of that share. The parties should also consider how to allocate any income or losses attributable to the participant's account that may accrue during the determination period. If an order allocates a specific dollar amount rather

than a percentage to an alternate payee as a shared payment, the order should address the possibility that the participant's account balance or individual payments might be less than the specified dollar amount when actually paid out.

Reference: ERISA §§ 206(d)(3)(C); IRC § 414(p)(2)

3-7: How may the participant's retirement benefit be divided if the retirement plan is a defined benefit plan?

As indicated earlier, an order may adopt either the shared payment or the separate interest approach (or a combination of the two) in dividing retirement benefits in a defined benefit plan. See Question 3-3 for a discussion of these two approaches.

If shared payments are desired, the order should specify the amount of each shared payment allocated to the alternate payee either by percentage or by dollar amount. If the order describes the alternate payee's share as a dollar amount, care should be taken to establish that the payments to the participant will be sufficient to satisfy the allocation, and the order should indicate what is to happen in the event a payment is insufficient to satisfy the allocation. The order must also describe the number of payments or period of time during which the allocation to the alternate payee is to be made. This is usually done by specifying a beginning date and an ending date (or an event that will cause the allocation to begin and/or end). If an order specifies a triggering event that may occur outside the plan's knowledge, notice of its occurrence must be given to the plan before the plan is required to act in accordance with the order. If the intent is that all payments made under the plan are to be shared between the participant and the alternate payee, the order may so specify.

As discussed in Appendix C, a defined benefit plan may provide for subsidies under certain circumstances and may also provide increased benefits or additional benefits either earned through additional service or provided by way of plan amendment. A QDRO that uses the "shared payment" method to give the alternate payee a percentage of each payment may be structured to take into account any such future increases in the benefits paid to the participant. Such a QDRO does not need to address the treatment of future subsidies or other benefit increases, because the alternate payee will automatically receive a share of any subsidy or other benefit increases that are paid to the participant. If the parties do not wish to provide for the sharing of such subsidies or increases, the order should so specify.

If a separate interest is desired for the alternate payee, it is important that the order be based on adequate information from the plan administrator and the plan documents concerning the participant's retirement benefit and the rights, options, and features provided under the plan. See Question 2-1. In particular, the drafters of a QDRO should consider any subsidies or future benefit increases that might be available with respect to the participant's retirement benefit. The order may specify whether, and to what extent, an alternate payee is to receive such subsidies or future benefit increases. See Appendix C for a discussion of subsidies and possible future increases in a participant's benefits in a defined benefit plan.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(D); IRC §§ 414(p)(2), 414(p)(3)

3-8: May the QDRO specify the form in which the alternate payee's benefits will be paid?

A QDRO that provides for a separate interest may specify the form in which the alternate payee's benefits will be paid subject to the following limitations:

- The order may not provide the alternate payee with a type or form of payment, or any option, not otherwise provided under the plan
- The order may not provide any subsequent spouse of an alternate payee with the survivor benefit rights that Federal law requires be provided to spouses of participants under section 205 of ERISA (See Question 3-5) and

- For any tax-qualified retirement plan, the payment of the alternate payee's benefits must satisfy the requirements of section 401(a)(9) of the Code respecting the timing and duration of payment of benefits. In determining the form of payment for an alternate payee, an order may substitute the alternate payee's life for the life of the participant to the extent that the form of payment is based on the duration of an individual's life. As discussed in Appendix C, however, the timing and forms of benefit available to an alternate payee under a tax-qualified plan may be limited by section 401(a)(9) of the Code.

Alternatively, a QDRO may (subject to the limitations described above) give the alternate payee the right that the participant would have had under the plan to elect the form of benefit payment. For example, if a participant would have the right to elect a life annuity, the alternate payee may exercise that right and choose to have the assigned benefit paid over the alternate payee's life. However, the QDRO must permit the plan to determine the amount payable to the alternate payee under any form of payment in a manner that does not require the plan to pay increased benefits (determined on an actuarial basis).

A plan may by its own terms provide alternate payees with additional types or forms of benefit, or options, not otherwise provided to participants, such as a lump-sum payment option, but the plan cannot prevent a QDRO from assigning to an alternate payee any type or form of benefit, or option, provided generally under the plan to the participant.

Reference: ERISA §§ 206(d)(3)(A), 206(d)(3)(D), 206(d)(3)(E)(i)(III); IRC §§ 401(a)(9), 401(a)(13)(B), 414(p)(3), 414(p)(4)(A)(iii)

3-9: When can the alternate payee get the benefits assigned under a QDRO?

A QDRO that provides for shared payments must specify the date on which the alternate payee will begin to share the participant's payments. Such a date, however, cannot be earlier than the date on which the plan receives the order. With respect to a separate interest, an order may either specify the time (after the order is received by the plan) at which the alternate payee will receive the separate interest or assign to the alternate payee the same right the participant would have had under the plan with regard to the timing of payment. In either case, a QDRO cannot provide that an alternate payee will receive a benefit earlier than the date on which the participant reaches his or her "earliest retirement age," unless the plan permits payments at an earlier date. Question 3-10 describes how to determine this "earliest retirement age," which is often a date earlier than the earliest date on which the participant would be entitled to receive his or her retirement benefit.

The plan itself may contain provisions permitting alternate payees to receive separate interests awarded under a QDRO at an earlier time or under different circumstances than the participant could receive the benefit. For example, a plan may provide that alternate payees may elect to receive a lump sum payment of a separate interest at any time. As discussed in question 3-8 and in Appendix C, section 401(a)(9) of the Code may affect when benefits must be paid under tax-qualified retirement plans.

Reference: ERISA §§ 206(d)(3)(C), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 401(a)(9), 414(p)(2), 414(p)(3), 414(p)(4)

3-10: What is "earliest retirement age," and why is it important?

For QDROs, Federal law provides a very specific definition of "earliest retirement age," which is the earliest date as of which a QDRO can order payment to an alternate payee (unless the plan permits payments at an earlier date). The "earliest retirement age" applicable to a QDRO depends on the terms of the retirement plan and the participant's age. "Earliest retirement age" is the **earlier** of two dates:

- The date on which the participant is entitled to receive a distribution under the plan, or
- The later of either: (1) the date the participant reaches age 50, or (2) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

Drafters of QDROs should consult the plan administrator and the plan documents for information on the plan's "earliest retirement age." The following examples illustrate the concept of "earliest retirement age."

Example 1 - The retirement plan is a defined contribution plan that permits a participant to make withdrawals only when he or she reaches age 59½ or terminates from service. The "earliest retirement age" for a QDRO under this plan is the earlier of:

- When the participant actually terminates employment or reaches age 59½, or
- The later of the date the participant reaches age 50 or the date the participant could receive the account balance if the participant terminated employment.

Since the participant could terminate employment at any time and thereby be able to receive the account balance under the plan's terms, the later of the two dates described above is "age 50." The "earliest retirement age" formula for this plan can be simplified to read the earlier of:

- Actually reaching age 59½ or terminating employment or
- Age 50

Since age 50 is earlier than age 59½, the "earliest retirement age" for this plan will be the earlier of age 50 or the date the participant actually terminates from service.

Example 2 - The retirement plan is a defined benefit plan that permits retirement benefits to be paid beginning when the participant reaches age 65 and terminates employment. It does not permit earlier payments. The "earliest retirement age" for this plan is the earlier of:

- The date on which the participant actually reaches age 65 and terminates employment, or
- The later of age 50 or the date on which the participant reaches age 65 (whether he or she terminates employment or not).

Because age 65 is later than age 50, the second part of the formula can be simplified to read "age 65" so that the formula reads as follows: the "earliest retirement age" is the earlier of

- The date on which the participant reaches age 65 and actually terminates or
- The date the participant reaches age 65

Under this plan, therefore, the "earliest retirement age" will be the date on which the participant reaches age 65.

Reference: ERISA § 206(d)(3)(E); IRC § 414(p)(4)

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Appendices

Appendix A: Department of Labor Interpretive Guidance

- Advisory Opinion 1990-46A
- Advisory Opinion 1992-17A
- Advisory Opinion 1999-13A
- Advisory Opinion 2000-09A
- Advisory Opinion 2001-06A
- Advisory Opinion 2002-03A

- Advisory Opinion 2004-02A
- Field Assistance Bulletin 2003-3

Appendix B: ERISA Advisory Opinion Procedure

Appendix C: IRS Sample Language for a Qualified Domestic Relations Order

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Footnotes

1. The Department of Labor has jurisdiction to interpret the QDRO provisions set forth in section 206(d)(3) of ERISA and section 414(p) of the Code (except to the extent provided in section 401(n) of the Code) and the provisions governing fiduciary duties owed with respect to domestic relations orders and QDROs. This booklet was developed in consultation with the Department of the Treasury and the Internal Revenue Service.

2. As used in this booklet, the term "retirement plan" refers to plans defined in section 3(2) of ERISA and means generally any plan established or maintained by an employer or an employee organization (or both) that provides retirement income to employees or results in the deferral of income by employees for periods extending to the termination of covered employment or beyond.

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EXHIBIT 1

§ 14.23 QDROs to Secure Obligations

It is not widely known, but indemnity QDROs, also known as security interest QDROs or security QDROs, can be used to enforce a party's obligations under property or support provisions of a settlement agreement or judgment of divorce. Sometimes there is no better way to secure this obligation. QDROs are used to divide Employee Retirement Income Security Act ("ERISA") qualified plans, and because ERISA plans are exempt property in bankruptcy, indemnity QDROs should be considered in the negotiation of marital property rights and obligations. Some bankruptcy cases hold that an obligation under a QDRO is not a debt and not dischargeable in bankruptcy. *In re Gendreau*, 20 EBC 1135 (Bankr App Panel, 9th Cir Jan 31, 1996); ***see also*** *In re Long*, 148 BR 904 (W Mo 1992) and *In re Brown*, 168 BR 331 (N Ill 1994). Using a QDRO under these circumstances can preclude a post-judgment argument that a former spouse is a mere creditor who cannot reach the retirement plans.

Michigan statutes seem to clearly pave the way for post-judgment assignments from qualified plans to enforce divorce or separation obligations; however, see the California Court of Appeals holding that a former spouse could not use a QDRO to obtain reimbursement for tax payments the plan participant was supposed to pay, because the court found that the tax liability did not relate to marital property rights. *In re Marshall*, 19 EBC 2629 (Cal Ct App July 19, 1995). To avoid this kind of holding or the underlying theory, the indemnity QDRO should be specifically set forth in the settlement agreement and/or judgment of divorce or separate maintenance.

As referenced herein, the terms "obligor" and "participant" can be used interchangeably, as well as the terms "former spouse" and "alternate payee."

A QDRO must be made pursuant to state domestic relations law. IRC § 414(p)(1)(B)(ii); ERISA § 206(d)(3)(B)(ii)(II). Michigan statutes pave the way for indemnity QDROs. After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding, order the satisfaction of the judgment out of property, money, or other things in action, liquidated or unliquidated, not exempt from execution. MCL § 600.6104(3). IRAs and 401(a) qualified retirement plans are generally exempt from levy or execution, but the exemption does not apply to an order of a court pursuant to a judgment of divorce or separate maintenance or an order concerning child support. MCL § 600.6023(1)(k)(1), (2) (for IRAs); MCL § 600.6023(1)(l)(i), (ii) (for ERISA qualified plans).

While the court can order that an IRA be divided to fulfill an obligation that is in default, a QDRO is not the appropriate tool for division of an IRA. An IRA is divided pursuant to IRC § 408(d)(6), and the IRA custodian will likely require a complete assignment with no contingencies (i.e., the IRA custodian will not allow a security interest).

The exemptions provided in MCL § 600.6023 do not apply to any lien against property excluded from exemption by law. MCL § 600.6023(2). For purposes of this discussion, ERISA qualified plans are exempt from assignment, but the ERISA QDRO exception to the exemption makes them assignable, and MCL § 6023(2) confirms this treatment for state law purposes. "Suits … for divorce shall be conducted in the same manner as other suits in courts of equity; and the court shall have the power to … enforce its decrees, as in other cases." MCL § 552.12. In support cases, an award of support constitutes a lien against the payor's real and personal estate. MCL § 552.27; MCL § 552.625a. Though indemnity QDROs are widely used in Michigan, this author believes there is clear authority for them, and that they can ease the work of securing obligations in certain cases.

There is case law in California validating indemnity (security interest) QDROs. *In re Zamos*, 2002

Cal App Unpub LEXIS 9736 (Oct 21, 2002).

The court affirmed a QDRO which could restrain the co-trustees of the participant's pension from terminating, modifying, encumbering or distributing benefits from the pension plan.

Federal law clearly provides for indemnity QDROs through IRS Private Letter Rulings based on the IRC and ERISA. A QDRO must *relate to* the provision of child support, alimony or property rights of a spouse, former spouse, child or other dependent. IRC § 414(p)(1)(B); ERISA § 206(d)(3)(B)(ii).

IRS Private Letter Ruling 1992-34014 states that a lien placed on an individual's interest in his retirement plan giving his former spouse a security interest in such plan via QDRO was not a prohibited alienation, and was a permitted assignment.

IRS Private Letter Ruling 2002-52093 reaches the same conclusion on almost identical facts, but contains a more thorough explanation. It acknowledges the QDRO requirements by reciting the IRC § 414(p)(1)(A); the 414(p)(3) limits and 414(p)(4) exception confirm that a QDRO can place a lien on the plan giving the former spouse of the employee a security interest in the plan.

The U.S. Tax Court has stated, "Also, if a court order gives A an interest in B's interest under a plan, we do not search for the sometimes subtle State law distinction between whether A has been thereby given an ownership interest or merely a security interest," and "Under the statute ([IRC] section 414(p)(1)(A)(i) as enacted by REA '84), the status of an order as a QDRO is not affected by whether the order makes the alternate payee an owner of the interest under the plan or merely gives the owner a lien or other security interest in the plan." Clearly, then, the Tax Court recognized that a security interest in a qualified plan could be created. *Darby v Commissioner*, 97 TC 51 (1991) *dicta* at 58–59, 65.

Various obligations that could be secured by indemnity QDROs include:

(1) satisfaction of tax liabilities (e.g., when one party owes another an amount or is responsible for discharging a tax liability affecting the other);

(2) payment of marital debts or ongoing expenses;

(3) payment of attorneys' and experts' fees (if one party is to pay amounts to the other for such fees—only a spouse or former spouse may be an alternate payee under a QDRO);

(4) transfer of assets;

(5) release of security interests or mortgages;

(6) purchase or transfer of life insurance; and

(7) designations of beneficiary.

The indemnity QDRO security interest and lien would be effective on the assets remaining in the obligor's retirement plan after the QDRO assigning the alternate payee her/his share as part of the property division or support payment. A default would trigger payments to the alternate payee under the indemnity QDRO. Terms summarizing the intent and specifics of the indemnity QDRO must be stated in

the judgment. MCL § 552.101. Drafting issues must include: (a) the specific plan benefits to be used as security; (b) the specific events that trigger default and distribution; (c) those events that trigger release of the security interest; (d) how the indemnity QDRO will be effectuated; and (e) how tax issues will be handled.

The indemnity QDRO provisions must provide for a lien and security interest, and would have to fulfill all the normal requirements for a QDRO, including instructions regarding how long the QDRO would be effective, and when the benefits would be paid. These instructions should describe the release date if the QDRO becomes no longer necessary due to the fulfillment of the obligation, and the default date upon which benefits would be released to the alternate payee (e.g., participant's default, death or normal retirement date). The disposition of the alternate payee's interest upon the alternate payee's death before the release date, default date, participant's normal retirement date or participant's death should be discussed and negotiated within the limits of the Plan provisions and limitations, and should be specifically addressed in the QDRO as well as the settlement agreement or judgment. The QDRO could recite advisory language for the benefit of the parties and the court but not necessarily be binding on the Plan, as well as the obligations that are being secured and that payments made to the wrong party shall be forwarded to the correct party. Prudent practice will always require "constructive trust" language cover all obligations under the Judgment of Divorce and not just in the context of QDROs.

Plan administrators have the responsibility to determine whether a DRO submitted to them will qualify as a QDRO. Because indemnity QDROs are not in common use, the plan administrator should be contacted early in the process to work through potential problems.

EXHIBIT 2

TAPPING QUALIFIED FUNDS – A "WIN WIN"

10% Early Withdrawal Penalty Does Not Apply to Funds Assigned by QDRO

- Under IRC Section 72(t), a 10% penalty – imposed in addition to the regular income tax – applies to distributions from a qualified plan unless, in general, the recipient has reached 59.5 years of age or is disabled.

- Section 72(t)(2)(C) exempts from the 10% early withdrawal penalty distributions from a plan to an alternate payee.

- This presents a "window of opportunity" incident to the transfer of a qualified plan interest via a QDRO in a divorce settlement.

- Most "account balance" type plans – such as 401(k), or "tax savings plans", profit sharing plans, etc. – allow, and sometimes require, an alternate payee to withdraw his or her interest in a lump sum after the assignment.

- This provides a way for divorcing parties to access cash from a plan at a relatively low tax cost.

- As illustrated below, the cash can end up in the hands of either the alternate payee, the participant, or both.

- Further, to the extent the amount transferred exceeds cash needs, rolling the excess into an IRA provides an excellent retirement vehicle for the alternate payee. Some of the beneficial uses of this technique are illustrated below.

Example - Funds to Alternate Payee for Fees

- H 40, has assigned to W, also 40, $50,000 from his 401(k) via a QDRO pursuant to their divorce settlement.

- She needs $10,000 to pay professional fees incurred in her divorce.

- W's combined federal and state income tax rate is approximately 20%.

- W draws her $50,000 interest in the plan and makes a qualifying rollover of $37,500 into a new IRA.

- She uses $10,000 of the $12,500 she did not roll over to pay her fees.

- She reserves the other $2,500 to pay taxes on the $12,500 at her 20% combined federal and state income tax rate.

Note – Once funds are rolled into an IRA from a qualified plan, they can no longer be withdrawn without the 10% penalty unless one of the other exceptions (reaching age 59 ½ applies).

Hence, the "window of opportunity" afforded by a qualified plan distribution to an alternate payee.

Example - Funds to the Participant with the Alternate Payee a "Conduit"

- Assume H also needs $10,000 for professional fees.
- At age 40, he cannot access any funds in his 401(k) without the 10% penalty.
- It is agreed that he will transfer $62,500 to W and, further, that she will pay H $10,000 as part of the property settlement.
- W withdraws the entire $62,500 and, with the extra $12,500, pays H $10,000 and puts $2,500 in reserve for taxes.

EXHIBIT 3

QDRO USED TO SECURE FUNDS TO PAY ATTORNEY FEES
SILVERMAN V SILVERMAN
SUPREME JUDICIAL COURT OF VIRGINIA, #SJC-08819 (2/24/03)

EXECUTIVE SUMMARY

- **Child Support Arrearage** – H filed a petition seeking payment of a child support arrearage owing from W and payment of his attorney fees.
- **Trial Court Decision** – The trial court granted H's petition and ordered that the arrearage and $55,000 in legal fees be paid from W's qualified retirement plan account via a QDRO.
- **Appeal** – W appealed claiming it was a violation of ERISA to pay legal fees out of a qualified plan by means of a QDRO.
- **Appellate Court Decision** – The court ruled that it is permissible to tap qualified plan funds for attorney fees to the extent they relate directly to efforts to obtain payment of child support or alimony.

FACTS OF THE CASE

- W had been in default on child support payments to H.
- H petitioned the court for a modification of the judgment and also to pursue the child support arrearage.
- The trial court garnisheed W's wages and provided for payment of part of her child support obligation, current payments and installment payments on the arrearage, from her retirement plan by means of a QDRO.
- The trial court also provided for the payment of $55,000 of H's legal fees from W's retirement plan, again by means of a QDRO.
- W appealed, claiming that the award of attorney fees from her retirement plan is not within the scope of the ERISA exception to its anti alienation provisions to provide for payments related to alimony, child support or property settlement.

APPELLATE COURT DECISION

- The court noted that there is little question that a QDRO can be used to tap qualified retirement funds to satisfy a child support obligation.
- Correspondingly, the court said if the fees required to pursue the child support arrearage and the QDRO by which it will be paid could not also be paid from the retirement fund, it would frustrate the very purpose of the act allowing for use of retirement funds for child support.
- Because the attorney fees related to issues other than child support, the Court remanded the case back to the trial court for a determination of the portion of the $55,000 that related to child support.

COMMENTS ON THE CASE

- This case clearly indicates that qualified retirement funds are accessible as a source to satisfy an arrearage in either alimony or child support.
- Further, a QDRO can also be used to secure funds for legal fees necessary to (1) pursue collection of the support arrearage and (2) secure funds for same via a QDRO.

EXHIBIT 4

used for loan Balance Pay off

CHRYSLER PENSION PLAN

IT IS FURTHER ORDERED that Defendant is awarded 50% percent of the coverture portion of Plaintiff's pension with Chrysler Corporation (CPP), that being that which accrued from the date of the marriage (June 12, 1999) to the entry of this judgment of divorce. A qualified domestic relations order (QDRO) shall be issued that transfers this share of the pension. The cost of the QDRO shall be shared equally by the parties.

SERP PLAN

IT IS FURTHER ORDERED that Defendant is awarded 50% percent of the coverture portion of Plaintiff's CHRYSLER GROUP LLC SALARY EMPLOYEE RETIREMENT PENSION PLAN (**SERP**). The coverture portion shall be that portion which accrued from the date of the marriage (June 12, 1999) to the entry of this judgment of divorce. A qualified domestic relations order (QDRO) shall be issued that transfers this share of the pension. The cost of the QDRO shall be shared equally by the parties.

401K CHRYSLER GROUP LLC

IT IS FURTHER ORDERED that Defendant is awarded 50% percent of the Plaintiff's 401K plan held by Merrill Lynch with CHRYSLER GROUP LLC at the date of the Divorce, after repayment of the loan balance in the approximate amount of $22,000.00 which shall be repaid as follows: before the interest in the plan is divided between the parties, there will be a determination of the tax effected amount (loan balance plus the estimated tax at Wife's final 2014 effective tax rate including receipt of the loan balance payment) which the parties agree will be paid to the Wife and then paid back to the plan so that the loan balance is liquidated and the value of the Husband's 401(K) for purposes of equalization will be based upon the assumption that the loan has been repaid. Upon receipt of the funds for payment of the loan Husband will

BK

CMC

pay off the loan balance in full. The net effect is that each party has paid one half the loan and one half of the tax attributable to funds obtained to pay off the loan. A qualified domestic relations order (QDRO) shall be issued that transfers this share of the pension and to effectuate the division of the marital plan between the parties. The cost of the QDROS shall be shared equally by the parties.

STATUTORY INSURANCE PROVISION

IT IS FURTHER ORDERED that except as set forth herein, the rights of the parties hereto are terminated in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the other party in which the spouse was named or designated as beneficiary, to which he or she became entitled by assignment during the marriage or in anticipation hereof, whether such policy or contract was heretofore or shall hereafter be written or become effective.

The execution of this Judgment hereby constitutes a Release and Waiver of all rights that either party may have in a policy or contract of life insurance, endowment or annuity upon the life of the other, and all rights of either party in the same shall be forever barred.

Each party acknowledges that he/she has been advised by his/her respective counsel that it is the responsibility of each party to make the appropriate changes in the beneficiary designations for any policies of insurance on his or her life to effectuate the intent of this Judgment in light of recent conflicts between the Michigan statute, (MCL 552.101, MSA 25.131), and the decisions of the United States Circuit Court of Appeals which interpret the Employee Retirement Income Security Act (ERISA) regarding the effect of a divorce on insurance beneficiary designations.

BK

cmc

tax effected
loan repayment
QDRO

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

[redacted]
Plaintiff,

[redacted]

vs.

[redacted]
Defendant.

_____/

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_____/

QUALIFIED DOMESTIC RELATIONS ORDER
CHRYSLER GROUP LLC SALARIED EMPLOYEES' SAVINGS PLAN

At a session of said Court, held at the
Court House in the City of Detroit,
County of Wayne, State of Michigan, on this: _____

PRESENT: HONORABLE _____
CIRCUIT COURT JUDGE

Effect of this Order as a Qualified Domestic Relations Order: This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefits payable under an employer-sponsored Defined Contribution plan that is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"). It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under Section 414(p) of the Code, as amended, and Section 206(d)(3) of ERISA, as amended, and shall be interpreted and administered in conformity with such laws.

This Order is entered pursuant to the authority granted under the applicable domestic relations laws of the State of Michigan.

1. **PARTICIPANT INFORMATION:**

The name, last known address, social security number and date of birth of the Plan "Participant" are:

Name:	[redacted]
Address:	[redacted]
Social Security Number:	**See Attachment 1**
Birth Date:	**See Attachment 1**

2. **ALTERNATE PAYEE INFORMATION:**

The name, last known address, social security number and date of birth of the "Alternate Payee" are:

Name:	[redacted]
Address:	[redacted]
Social Security Number:	**See Attachment 1**
Birth Date:	**See Attachment 1**
Relationship to Participant:	**Former Spouse**

THE ALTERNATE PAYEE SHALL HAVE THE DUTY TO NOTIFY THE PLAN ADMINISTRATOR'S AUTHORIZED AGENT IN WRITING OF ANY CHANGES IN HER MAILING ADDRESS SUBSEQUENT TO THE ENTRY OF THIS ORDER AT:

CHRYSLER BENEFIT EXPRESS
Attn: Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069
Phone: (888) 456-7800

3. **PLAN:**

The name of the plan to which this Order applies is the **Chrysler Group LLC Salaried Employees' Savings Plan (hereinafter referred to as the "Plan").** Further, any successor plan to the Plan or any other plan(s), to which liability for provision of the Participant's benefits described below is incurred, shall also be subject to the terms of this Order. Also, any benefits accrued by defined contribution plan sponsored by the Participant's employer, where liability for benefits accrued under such predecessor plan or defined contribution plan has been transferred to the Plan, shall also be subject to the terms of this Order.

4. **MARITAL HISTORY:**

[redacted]

5. **FOR PROVISION OF MARITAL PROPERTY RIGHTS:**

This Order relates to the provision of marital property rights to the Alternate Payee as a result of the Judgment of Divorce between the Participant and the Alternate Payee dated October 31, 2014.

6. **AMOUNT OF THE ALTERNATE PAYEE'S BENEFIT:**

This Order assigns to the Alternate Payee an amount equal to Twenty-Six Thousand Four Hundred Fifty-Six and 23/100 Dollars ($26,456.23) of the Participant's *vested* account balance accumulated under the Plan as of the date such amount is segregated from the Participant's account.

Once the Alternate Payee's assigned amount is segregated from the Participant's account, such amount shall be adjusted by any earnings (dividends, interest, gains and losses) attributable thereto from the date of segregation to the date of total distribution. The Alternate Payee's share of the benefits shall be allocated on a pro-rata basis among all of the accounts and/or investment funds maintained on behalf of the Participant under the Plan.

It is the intent of the parties and the order of this Court that the dollar amount specified above shall be assigned to the Alternate Payee, and that any outstanding loans shall have no bearing on, and shall not reduce, such amount. If there are insufficient funds to assign the above-specified amount to the Alternate Payee, the Plan is ordered to pay 100% of the assignable amount to the Alternate Payee, and the Plan is further ordered by this Court to inform the parties and their attorneys of the insufficiency.

7. **COMMENCEMENT DATE AND FORM OF PAYMENT TO THE ALTERNATE PAYEE:**

The Alternate Payee's benefit will be payable as an in kind transfer as soon as administratively feasible after qualification of the Order.

8. **THE ALTERNATE PAYEE'S RIGHTS AND PRIVILEGES:**

On and after the date that this Order is deemed to be a Qualified Domestic Relations Order, but before the Alternate Payee receives her benefits under the Plan, she shall be entitled to all the rights and election privileges that are afforded to Plan beneficiaries including, but not limited to, the rules regarding the right to designate a beneficiary for death benefit purposes and the right to direct plan investments, only to the extent permitted under the provisions of the Plan.

9. **DEATH PROCEDURES:**

If the Participant predeceases the Alternate Payee prior to payment of the Alternate Payee's assigned benefit under the Plan, the Alternate Payee's benefit will not be affected. In the event of the Participant's death, the account balance, which remains the property of the Participant, will be payable to the Participant's designated beneficiary or in accordance with Plan procedures.

This Order does not require the Participant to name the Alternate Payee as the beneficiary for the benefits not assigned to the Alternate Payee.

In case of the death of the Alternate Payee prior to the transfer of the Alternate Payee's assets from the Plan, the assigned benefit will be paid to the Alternate Payee's designated beneficiary or, if none, to the Alternate Payee's estate.

10. CERTIFICATION OF NECESSARY INFORMATION:

All payments made pursuant to this Order shall be conditioned on the certification by the Alternate Payee and the Participant to the Administrator of such information as the Administrator may reasonably require from such parties to make the necessary calculation of the benefit amounts contained herein.

11. SAVINGS CLAUSE:

This Order is not intended and shall not be construed in such a manner as to require the Plan:

a) To provide any type or form of benefit, or any option, not otherwise provided under the terms of the Plan;

b) To provide increased benefits determined on the basis of actuarial value; or

c) To pay of any benefits to the Alternate Payee that are required to be paid to another alternate payee under an order that was previously deemed to be a QDRO.

12. RETENTION OF JURISDICTION:

This matter arises from an action for divorce in this Court, under the case number set forth at the beginning of this document. Accordingly, this Court has jurisdiction to issue this Order.

In the event that the Plan Administrator or its authorized agent determines that this Order is not a Qualified Domestic Relations Order, both parties shall cooperate with the Plan Administrator or its authorized agent to make the changes necessary in order for the parties to obtain an amended order that meets the requirements for a Qualified Domestic Relations Order. For this purpose, this Court expressly reserves jurisdiction over the divorce proceeding involving the Participant and the Alternate Payee and the Participant's interest in the Plan.

13. TAX TREATMENT OF DISTRIBUTIONS MADE UNDER THIS ORDER:

For purposes of Sections 402(e)(1) and 72 of the Internal Revenue Code, any Alternate Payee who is the spouse or former spouse of the Participant shall be treated as the distributee of any distribution or payments made to the Alternate Payee under the terms of this Order, and as such, will be required to pay the appropriate federal, state and local income taxes on such distribution.

14. **INADVERTENT PAYMENTS:**

In the event that the Plan Trustee inadvertently pays to either party any benefits that are assigned to the other party pursuant to the terms of this Order, the party in receipt shall return such inadvertent benefit payments to the Plan within ten (10) days of notice of receipt.

15. **EFFECT OF PLAN TERMINATION:**

If the Plan is terminated, the Alternate Payee shall be entitled to receive her portion of the Participant's benefit, as stipulated herein, in accordance with the Plan's termination provisions for participants and beneficiaries.

16. **CONTINUED JURISDICTION:**

The Court retains jurisdiction with respect to this Order to the extent required to maintain its qualified status and the original intent of the parties, as stipulated herein. The Court also retains jurisdiction to enter such further orders as are necessary to enforce the assignment of benefits to the Alternate Payee, as set forth herein, including the re-characterization thereof, as a division of benefits under another plan, as applicable, in the event that the Participant or Plan Administrator fail to comply with the provisions contained above requiring said payments to the Alternate Payee.

17. **ACTIONS BY PARTICIPANT:**

The Participant shall not take any actions, affirmative or otherwise, that can circumvent the terms and provisions of this Qualified Domestic Relations Order, or that could diminish or extinguish the rights and entitlements of the Alternate Payee, as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, he (or his estate) shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of his actions or inactions and to the extent of the Alternate Payee's full entitlements hereunder.

(this space intentionally left blank)

18. **OVERPAYMENTS:**

In the event that the Plan Administrator determines that an overpayment has been made to the Participant and/or the Alternate Payee for any reason, and the parties cannot come to an agreement regarding their respective liability toward the Plan's recoupment of such overpayments, the Court shall reserve jurisdiction regarding the allocation of such repayments to the Plan between the Participant and the Alternate Payee.

Dated this _____ day of _____, ____
By the Court:

_____ _____
CIRCUIT COURT JUDGE

APPROVED AS TO CONTENT AND FORM

[redacted]
PLAINTIFF

[redacted]
DEFENDANT

Martin W. Bordoley
PLAINTIFF'S ATTORNEY

Denise R. Alexander
DEFENDANT'S ATTORNEY

Drafted for legal counsel by

QDROEXPRESS, L.L.C.
22919 EUREKA ROAD
TAYLOR, MI 48180
TEL: (734) 675-8207
FAX: (734) 671-3741

Loan repayment equalization

E. **Retirement Accounts**:

1. **William Beaumont Hospital Employees' Retirement Plan:** Husband is awarded 50% of Wife's interest in the William Beaumont Hospital Employees' Retirement Plan, including all components as defined by MCL 552.101(5) as of the date of entry of the judgment of divorce, pursuant to a qualified domestic relations order, to be prepared by Robert Treat, with the cost of preparation to be equally divided between the parties. Wife is awarded the balance of the pension not awarded to Husband.

2. **Beaumont Hospital 403(b) Plan, MFS Heritage Trust Company Custodian Brother Rice Tax Sheltered Annuity, Alliance Benefit Group of Michigan-Brother Rice 401(k) Plan : The parties are each awarded on half of the aggregate value of the aforemention plans. There is an existing loan against the Husband's Brother Rice 401(K) plan. Before the plans are equalized, there will be a determination of the tax effected amount (loan balance plus the estimated tax at Husband's final 2014 effective tax rate including receipt of the loan balance payment) which the parties agree will be transferred from the Wife's 403(b) Plan in addition to any equalization amount so that the loan balance is liquidated and the value of the Husband's 401(K) for purposes of equalization will be based upon the assumption that the loan has been repaid.** (By way of example, if the total loan amount is $40,000.00, in addition to the equalizing amount, Husband would receive $40,000 to pay off the loan plus the anticipated tax payment).

This shall be accomplished by awarding Husband 100% of his interest in the MFS Heritage Trust Company Custodian Brother Rice Tax Sheltered Annuity and 100% of his interest in the Alliance Benefit Group of Michigan-Brother Rice 401(k) Plan plus such additional funds from Wife's interest in Beaumont Hospital's 403(b) Plan, as is necessary to equal the amount awarded above, through a Qualified Domestic Relations Order to be prepared by Robert Treat, the cost of preparation to be equally divided between the parties.

Wife shall be entitled to the balance remaining in her Beaumont Hospital 403(b) Plan not awarded to Husband hereunder.

F. **Payment of Retirement Account Loan**

Until Husband receives the funds from Wife's interest in Beaumont Hospital's 403(b) Plan as outlined in E.(2) above, each party shall pay ½ of the monthly loan amount of the loan taken against Husband's interest in the Brother Rice 401(k) Plan. Upon receipt of the funds from Wife's 403(b) Plan, Husband shall reimburse Wife for all loan payments she has made since May 1, 2014, plus an additional amount equal to 20% of Wife's loan payments.

[redacted] updated 2/12/15

Value and Offset Spreadsheet (Equlization)

			Valuation Date 6/10/14		
Patricia's Plan					
[redacted] 403(b)			242,807.56		
Less: grossed up amt. used to pay of loan (24.5%)	35,480.34 / (1-.2425) =		(46,838.73)	**6/30/14 value - ? UPDATE ?**	
Agree on effective tax rate of 20% fed + 4.25 st.?					
Robert's Plans					
[redacted] TSA			45,826.67	6/30/14 value	
[redacted] 401(k) (not reduced by loan)			103,827.98	6/30/14 value	
Total After Loan Paid			345,623.48		
One-Half Total After Loan Paid			172,811.74		
Amount to [redacted] to Bring Him to One-Half Total After Loan Paid			23,157.09		
Tot. amt. QDRO to Robert (for loan pmt and for equalization after loan pmt)			**69,995.82**		

EXHIBIT 5

STATE OF INDIANA
COUNTY OF GRANT

IN THE GRANT SUPERIOR COURT I
2019 TERM

IN RE THE MARRIAGE OF:

DEBBIE SAMPLE,
Petitioner,

and

CAUSE NO. 27D01-2010-DR-123456

ROBERT SAMPLE,
Respondent.

QUALIFIED DOMESTIC RELATIONS ORDER
GENERAL MOTORS RETIREMENT SAVINGS PLAN

Effect of This Order As a Qualified Domestic Relations Order: This order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefits payable under an employer sponsored Defined Contribution plan that is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA") as amended. It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under section 414(p) of the Code and Section 206(d)(3) of ERISA and shall be interpreted and administered in conformity with such laws.

This Order is entered pursuant to the authority granted under the applicable domestic relations laws of the State of Indiana.

1. **PARTICIPANT INFORMATION:**

The name, last known address, social security number and date of birth of the plan "Participant" are:

Name:	**Robert Sample**
Address:	**123 Main St.** **Marion, IN 46953**
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**

2. **ALTERNATE PAYEE INFORMATION:**

The name, last known address, social security number and date of birth of the "Alternate Payee" are:

Name:	**Bob Sample, Jr.**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**

Relationship to Participant: Child

3. CUSTODIAL PARENT INFORMATION:

The name, last known address, social security number and date of birth of the "Custodial Parent" are:

Name:	**Debbie Sample**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**

The parties' personal information will be included on a separate attachment to the Plan to protect their privacy.

THE ALTERNATE PAYEE SHALL HAVE THE DUTY TO NOTIFY THE PLAN ADMINISTRATOR IN WRITING OF ANY CHANGES IN HER MAILING ADDRESS SUBSEQUENT TO THE ENTRY OF THIS ORDER AT:

Fidelity Employer Services Company LLC
QDRO Administration Group
P.O. Box 770003
Cincinnati, OH 45277-0066
Attn: General Motors

4. PLAN:

The name of the plan to which this Order applies is the **General Motors Retirement Savings Plan (hereinafter referred to as the "Plan").** Further, any successor plan to the Plan or any other plan(s), to which liability for provision of the Participant's benefits described below is incurred, shall also be subject to the terms of this Order. Also, any benefits accrued by defined benefit plan sponsored by the Participant's employer, where liability for benefits accrued under such predecessor plan or defined benefit plan has been transferred to the Plan, shall also be subject to the terms of this Order.

5. MARITAL HISTORY:

Date of Marriage:	November 25, 2001
Date of Divorce:	December 15, 2009
Valuation Date:	October 1, 2020

6. FOR PROVISION OF CHILD SUPPORT RIGHTS:

This Order relates to the provision of child support rights to the Alternate Payee as a result of the Judgment of Divorce between Participant and Alternate Payee dated March 15, 2016.

7. AMOUNT OF ALTERNATE PAYEE'S BENEFIT:

This Order assigns to the Alternate Payee a portion of the Participant's total vested account balance under the Plan in an amount equal to Ten Thousand and 00/100 ($10,00.00) dollars effective as of the valuation date, October 1, 2020 (or the closest

valuation date thereto). The Alternate Payee's award will be paid proportionally from all standard plan investment options as of the date of account segregation.

The Alternate Payee's award is entitled to earnings (defined as gains, losses, dividends and interest) from the Valuation Date to the date that the award is segregated from the Participant's account. From and after the Date of Segregation, the Alternate Payee's award shall be held in an account under the Plan and shall be entitled to all earnings attributable to the investments therein.

In the event there is an outstanding loan balance as of the Valuation Date, the loan balance will not be included for purposes of calculating the total vested account balance to be divided. In the event the Plan does not allow loans, this language will be disregarded.

The Alternate Payee's award will be transferred proportionately from all contribution sources as of the Valuation Date and all standard plan investment options in which the Participant's account is invested as of the Date of Segregation.

The check will be made payable to the Alternate Payee's custodial parent or legal guardian identified in this Order f/b/o the child Alternate Payee and mailed to the address specified in the Attachment.

8. COMMENCEMENT DATE AND FORM OF PAYMENT TO ALTERNATE PAYEE:

The Alternate Payee's interest in the Plan shall be paid f/b/o the child Alternate Payee, in a lump sum distribution as soon as administratively feasible following the date that this Order is determined to be a QDRO. The amount distributed to the Alternate Payee will be based on the value of the Alternate Payee's account on the date the distribution is processed.

9. DEATH OF THE PARTICIPANT:

Once the Order is qualified, the death of the Participant prior to or subsequent to the segregation of assets will not affect the Alternate Payee's right to benefits calculated pursuant to Section 6 of this Order.

10. DEATH OF THE ALTERNATE PAYEE:

In the event of the Alternate Payee's death after the qualification of this Order, either prior to or subsequent to the segregation of assets for the Alternate Payee, the Alternate Payee's award will be distributed pursuant to the administrative procedures established for the Plan. To the extent allowed by the Plan, all beneficiary designations will be made after qualification of the Order and segregation of the award into a separate account for the Alternate Payee pursuant to the administrative procedures established for the Plan.

11. LIMITATIONS:

This Order is not intended, and shall not be construed in such a manner as to require the Plan:

a) To provide any type or form of benefit option not otherwise provided under the terms of the Plan; or

b) To require the Plan to provide increased benefits determined on the basis of actuarial value; or

c) To require the payment of any benefits to the Alternate Payee that are required to be paid to another Alternate Payee under an Order that was previously deemed to be a QDRO.

12. RETENTION OF JURISDICTION:

This matter arises from an action for divorce or legal separation in this court, under the case number set forth at the beginning of this document. Accordingly, this court has jurisdiction to issue this Order.

In the event that the Plan Administrator determines that this Order is not a Qualified Domestic Relations Order, both parties shall cooperate with the Plan Administrator to make the changes necessary in order for the parties to obtain an amended Order that meets the requirements for a Qualified Domestic Relations Order. For this purpose, this court expressly reserves jurisdiction over the dissolution proceeding involving the Participant and the Alternate Payee and the Participant's interest in the Plan.

13. TAX TREATMENT OF DISTRIBUTIONS MADE UNDER THIS ORDER:

The Participant is responsible for taxes on all distributions for child support payments.

14. CONTINUED JURISDICTION:

The Court shall retain jurisdiction with respect to this Order to the extent required to maintain its qualified status and the original intent of the parties as stipulated herein. The Court shall also retain jurisdiction to enter such further Orders as are necessary to enforce the assignment of benefits to the Alternate Payee as set forth herein, including the re-characterization thereof, as a division of benefits under another plan, as applicable in the event that Participant or Plan Administrator fail to comply with the provisions contained above requiring said payments to Alternate Payee.

15. EFFECT OF PLAN TERMINATION:

In the event that the Plan is terminated, whether on a voluntary or involuntary basis, and the Participant's benefits become guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"), the Alternate Payee's benefits, as stipulated herein, shall also be guaranteed to the same extent in accordance with the Plan's termination rules and in the same ratio as the Participant's benefits are guaranteed by the PBGC.

16. CHILD SUPPORT ENFORCEMENT AGENCY INFORMATION:

Payments due to the Alternate Payee shall be made payable to the Indiana Disbursement Unit, for the benefit of (f/b/o) the Alternate Payee and her custodian and forwarded to the **Indiana Department of Child Services, P.O. Box 7083, Indianapolis, IN 46207**. The case number will appear on the check.

17. OVERPAYMENTS:

Neither Party shall accept any benefits from the Plan which are the property of the other Party. In the event that the Plan Administrator inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms

of this Order, the Participant shall forthwith return such benefits to the Plan. In the event that the Plan Administrator inadvertently pays to the Alternate Payee any benefits that are not assigned to the Alternate Payee pursuant to the terms of this Order, the Alternate Payee shall forthwith return such benefits to the Plan.

IT IS SO ORDERED_____

_____
HONORABLE JEFFREY D. TODD
JUDGE, GRANT SUPERIOR COURT I

APPROVED AS TO CONTENT AND FORM

_____
Debbie Sample
Petitioner

_____
Robert Sample
Respondent, In pro per

_____
Denise Alexander-Pyle
Attorney for Petitioner

Drafted for the Court by:

Divorce **S**olutions, LLC
26400 Lahser Rd., Suite 345
Southfield, MI 48033
(248) 354-0495
(248) 354-2197 Fax

Attachment A
(Not to be entered in Court)

Participant:

Name:	**Robert Sample**
Address:	**123 Main St.** **Marion, IN 46953**
Social Security Number:	**111-22-3333**
Date of Birth:	**October 1, 1970**

Alternate Payee:

Name:	**Bob Sample, Jr.**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**444-55-6666**
Date of Birth:	**August 1, 2015**

Custodial Parent:

Name:	**Debbie Sample**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**777-88-0000**
Date of Birth:	**April 1, 1970**

Divorce Solutions, LLC

October 1, 2020

Denise Alexander-Pyle, Esq.
2427 W. 500 S.
Marion, IN 46953
Via Email Only

Re: Sample, Debbie v. Robert
Case No. 27D01-2010-DC-123456

Dear Ms. Alexander-Pyle:

Enclosed please find a draft copy of the proposed General Motors Retirement Savings Plan Domestic Relations Order pursuant to the legal action in the above captioned case.

Please carefully review for accuracy and to ensure that it agrees with the intent of the judgment. If any changes need to be made, please notify us immediately. After all the signatures have been obtained, please send the Order to the following address for qualification by the Plan Administrator:

Fidelity Employer Services Company LLC
QDRO Administration Group
P.O. Box 770003
Cincinnati, OH 45277-0066
Attn: General Motors

Please feel free to call me with any questions or comments at (248) 354-0495.

Sincerely,
Divorce **S**olutions, LLC

David W. Roessler, CDFA

Divorce Solutions, LLC • 26400 Lahser, Suite 345 • Southfield, Indiana 48033
Phone: 248.354.0495 • Fax: 248.354.2197

STATE OF INDIANA
COUNTY OF GRANT

IN THE GRANT SUPERIOR COURT I
2019 TERM

IN RE THE MARRIAGE OF:

DEBBIE SAMPLE,
Petitioner,

and

CAUSE NO. 27D01-2010-DR-123456

ROBERT SAMPLE,
Respondent.

_____/

QUALIFIED DOMESTIC RELATIONS ORDER
GENERAL MOTORS HOURLY-RATE EMPLOYEES PENSION PLAN

Effect of This Order As a Qualified Domestic Relations Order: This Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefits payable under an employer sponsored defined benefit pension plan that is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under section 414(p) of the Code and Section 206(d)(3) of ERISA and shall be interpreted and administered in conformity with such laws.

This Order is entered pursuant to the authority granted under the applicable domestic relations laws of the State of Indiana.

1. PARTICIPANT INFORMATION:

The name, last known address, social security number and date of birth of the plan "Participant" are:

Name:	**Robert Sample**
Address:	**123 Main St.** **Marion, IN 46953**
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**

2. ALTERNATE PAYEE INFORMATION:

The name, last known address, social security number and date of birth of the "Alternate Payee" are:

Name:	**Bob Sample, Jr.**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**
Relationship to Participant:	**Child**

3. CUSTODIAL PARENT INFORMATION:

The name, last known address, social security number and date of birth of the "Custodial Parent" are:

Name:	**Debbie Sample**
Address:	**453 Elm St.**
	Marion, IN 46953
Social Security Number:	**XXX-XX-XXXX**
Birth Date:	**XX/XX/XXXX**

The parties' personal information will be included on a separate attachment to the Plan to protect their privacy.

THE ALTERNATE PAYEE SHALL HAVE THE DUTY TO NOTIFY THE PLAN ADMINISTRATOR IN WRITING OF ANY CHANGES IN HER MAILING ADDRESS SUBSEQUENT TO THE ENTRY OF THIS ORDER AT:

Fidelity Employer Services Company LLC
QDRO Administration Group
P.O. Box 770003
Cincinnati, OH 45277-0066
Attn: General Motors

4. PLAN:

The name of the plan to which this Order applies is the **General Motors Hourly-Rate Employee's Pension Plan (hereinafter referred to as the "Plan").** Further, any successor plan to the Plan or any other plan(s), to which liability for provision of the Participant's benefits described below is incurred, shall also be subject to the terms of this Order. Also, any benefits accrued by defined benefit plan sponsored by the Participant's employer, where liability for benefits accrued under such predecessor plan or defined benefit plan has been transferred to the Plan, shall also be subject to the terms of this Order.

5. MARITAL HISTORY:

Date of Marriage:	November 25, 2001
Date of Divorce:	March 15, 2016

6. FOR PROVISION OF CHILD SUPPORT RIGHTS:

This Order relates to the provision of child support rights to the Alternate Payee as a result of the Judgment of Divorce between Participant and Alternate Payee dated March 15, 2016.

7. AMOUNT OF ALTERNATE PAYEE'S BENEFIT:

From the benefits otherwise payable to the Participant each month, this Order assigns to the Alternate Payee an amount equal to Three Hundred and 00/100 ($300.00) dollars of the total monthly benefit for the Participant or One-Hundred (100%) percent of the Participant's available total monthly benefit if the benefit is or becomes insufficient. For the purposes of this Order, the total monthly benefit for the Participant is inclusive of any ancillary benefits as defined by the Plan.

The child support award shall be taken from the benefit calculated for the lifetime of the Participant and there shall be no further actuarial adjustment to the child support award.

8. COMMENCEMENT DATE AND FORM OF PAYMENT TO ALTERNATE PAYEE:

The payments to the Alternate Payee shall commence with the next benefit payment following the qualification of this Order, and in a manner consistent with the terms of the Plan. No distributions shall be made to the Alternate Payee prior to the Participant's actual benefit commencement date.

9. DEATH OF THE PARTICIPANT:

The child support payments will continue until further Order of the Court or the death of the Participant, whichever comes first. After the child support obligation has been met, the benefit shall revert to the Participant.

10. DEATH OF THE ALTERNATE PAYEE:

If the Alternate Payee predeceases the Participant, the Alternate Payee's assigned share of the benefit, as stipulated herein shall revert to the Participant.

11. LIMITATIONS:

This Order is not intended, and shall not be construed in such a manner as to require the Plan:

a) To provide any type or form of benefit option not otherwise provided under the terms of the Plan; or

b) To require the Plan to provide increased benefits determined on the basis of actuarial value; or

c) To require the payment of any benefits to the Alternate Payee that are required to be paid to another Alternate Payee under an Order that was previously deemed to be a QDRO.

12. RETENTION OF JURISDICTION:

This matter arises from an action for divorce or legal separation in this court, under the case number set forth at the beginning of this document. Accordingly, this court has jurisdiction to issue this Order.

In the event that the Plan Administrator determines that this Order is not a Qualified Domestic Relations Order, both parties shall cooperate with the Plan Administrator to make the changes necessary in order for the parties to obtain an amended Order that meets the requirements for a Qualified Domestic Relations Order. For this purpose, this court expressly reserves jurisdiction over the dissolution proceeding involving the Participant and the Alternate Payee and the Participant's interest in the Plan.

13. TAX TREATMENT OF DISTRIBUTIONS MADE UNDER THIS ORDER:

For purposes of Sections 402 and 72 of the Internal Revenue Code, the Alternate Payee is a child of the Participant, thus the Participant will be responsible for any

federal and/ or state income taxes on any distributions or payments made to the Alternate Payee under the terms of this Order.

14. CONTINUED JURISDICTION:

The Court shall retain jurisdiction with respect to this Order to the extent required to maintain its qualified status and the original intent of the parties as stipulated herein. The Court shall also retain jurisdiction to enter such further Orders as are necessary to enforce the assignment of benefits to the Alternate Payee as set forth herein, including the re-characterization thereof, as a division of benefits under another plan, as applicable in the event that Participant or Plan Administrator fail to comply with the provisions contained above requiring said payments to Alternate Payee.

15. EFFECT OF PLAN TERMINATION:

In the event that the Plan is terminated, whether on a voluntary or involuntary basis, and the Participant's benefits become guaranteed by the Pension Benefit Guaranty Corporation ("PBGC"), the Alternate Payee's benefits, as stipulated herein, shall also be guaranteed to the same extent in accordance with the Plan's termination rules and in the same ratio as the Participant's benefits are guaranteed by the PBGC.

16. CHILD SUPPORT ENFORCEMENT AGENCY INFORMATION:

Payments due to the Alternate Payee shall be made payable to the Indiana Disbursement Unit, for the benefit of (f/b/o) the Alternate Payee and her custodian and forwarded to the **Indiana Department of Child Services**, **P.O. Box 7083**, **Indianapolis, IN 46207**. The case number will appear on the check.

(This section intentionally left blank)

17. OVERPAYMENTS:

In the event that the Plan Administrator determines that an overpayment has been made to the Participant and/or the Alternate Payee for any reason, and the parties cannot come to an agreement regarding their respective liability toward the Plan's recoupment of such overpayments, the Court shall reserve jurisdiction regarding the allocation of such repayments to the Plan between the Participant and Alternate Payee.

IT IS SO ORDERED_____

_____
HONORABLE JEFFREY D. TODD
JUDGE, GRANT SUPERIOR COURT I

APPROVED AS TO CONTENT AND FORM

_____
Debbie Sample
Petitioner

_____
Robert Sample
Respondent, In pro per

_____
Denise Alexander-Pyle
Attorney for Petitioner

Drafted for the Court by:

Divorce **S**olutions, LLC
26400 Lahser Rd., Suite 345
Southfield, MI 48033
(248) 354-0495
(248) 354-2197 Fax

Participant:

Name:	**Robert Sample**
Address:	**123 Main St.** **Marion, IN 46953**
Social Security Number:	**111-22-3333**
Date of Birth:	**October 1, 1970**

Alternate Payee:

Name:	**Bob Sample, Jr.**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**444-55-6666**
Date of Birth:	**August 1, 2015**

Custodial Parent:

Name:	**Debbie Sample**
Address:	**453 Elm St.** **Marion, IN 46953**
Social Security Number:	**777-88-0000**
Date of Birth:	**April 1, 1970**

Divorce Solutions, LLC

October 1, 2020

Denise Alexander-Pyle, Esq.
2427 W. 500 S.
Marion, IN 46953
Via Email Only

Re: Sample, Debbie v Robert
Case No. 27D01-2010-DC-123456

Dear Ms. Alexander-Pyle:

Enclosed please find a draft copy of the proposed General Motors Hourly-Rate Employee's Pension Plan Domestic Relations Order pursuant to the legal action in the above captioned case.

Please carefully review for accuracy and to ensure that it agrees with the intent of the judgment. If any changes need to be made, please notify us immediately. After all the signatures have been obtained, please send the Order to the following address for qualification by the Plan Administrator:

Fidelity Employer Services Company LLC
QDRO Administration Group
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Attn: General Motors

Please feel free to call me with any questions or comments at (248) 354-0495.

Sincerely,
Divorce **S**olutions, LLC

David W. Roessler, CDFA

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND -
FAMILY DIVISION

[redacted]

Plaintiff,

-vs-

[redacted]

Defendant.

[redacted]

95-502877-DM

[redacted] Sosnick

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ORDER DIRECTING TRANSFER
OF ANNUITY FUNDS

At a session of said Court held in the Court House,
Pontiac, Michigan, on JUN 1 8 1999

PRESENT: HON. EDWARD SOSNICK
CIRCUIT JUDGE
Circuit Judge

This matter is before the Court on Jackson National Life Insurance Company's ("Jackson National") Motion for Clarification of Order on which the Court heard oral argument on June 9, 1999. At this hearing the Court confirmed that the December 29, 1998 Order for Clarification of Amended Judgment of Divorce to Permit Correction of Friend of the Court Records ("December 29 Order") was intended to direct Jackson National to transfer certain assets it held on behalf of Defendant [redacted] to Plaintiff in order to effect the transfer of Plaintiff's interest in the such assets (annuity contracts) pursuant to the terms of the Amended Judgment of Divorce and Qualified Domestic Relations order, and to satisfy the Defendant's outstanding spousal and child support obligations. The Court being otherwise fully advised of the premises;

IT IS HEREBY ORDERED that the December 29 Order is clarified in accordance with the above and Jackson National shall transfer the funds in Jackson National annuity contract numbers [redacted], all held in the name of [redacted] Pension Plan and Annuity, to Plaintiff for deposit into her Individual Retirement Account as directed by Plaintiff. In connection with such transfer, any outstanding loan balances shall be charged against Defendant's one-half (1/2) share interest in such pension before transfer.

IT IS FURTHER ORDERED that Jackson National is released and discharged from any and all liability to any party in connection with the liquidation of the annuity

contracts identified above.

Circuit Judge

APPROVED AS TO FORM:

Denise Alexander (P26304)
Attorney for Plaintiff

Phillip C. Korovesis (P40579)
Attorney for Jackson National Life
Insurance Company

CREATIVE USE OF QUALIFIED DOMESTIC RELATIONS ORDERS AND TAX EFFICIENT WITHDRAWAL STRATEGIES

Denise Alexander-Pyle

Expand your use of QDROS.

They are not just for dividing pension plans, but payment of other domestic relations obligations. There are situations where more than one QDRO for the same plan may be appropriate.

Hot Tip #1

Hot Tip #2

401K and related plans (such as a 403B) are a great source of cash for payment of attorney fees, marital debts, down payments on post dissolution home, business start-ups, etc.

The 10% early withdrawal penalty is waived as part of a domestic relations order provided the funds are not rolled into another plan or IRA first and a non-participant's lower tax rate can be used to benefit both parties.

Determine whether a future bankruptcy is likely when allocating retirement accounts for payment of debts.

Hot Tip #3

Make sure you anticipate and agree upon the amount of funds to be held for taxes, taking into consideration the final overall tax rate that will likely be used to cover the recipient's taxes.

Hot Tip #4

QDROS are an ideal tool to transfer funds from retirement accounts to fund short or longer term spousal maintenance payments, especially where other income sources are limited. The tax on funds will still be the responsibility of the recipient, especially if a single lump sum is being paid. Make sure you examine all risks, especially where support might otherwise be terminated early and consult a tax expert.

Hot Tip #5

Multiple QDROS for the same plan may be used to fund support and property obligations, especially where future contributions and employer matches can be captured.

Hot Tip #6

If there are going to be subsequent withdrawals from a pension using either a single QDRO with multiple payments or an additional QDRO, make sure the plan is put on notice to protect against loans or the attachment of other interests.

Hot Tip #7

Look at pension plans as a source to collect support and property settlement arrearages. The Participant will be charged for taxes attributable to withdrawals in satisfaction of support arrearages.

Hot Tip #8

CREATIVE USE OF QUALIFIED DOMESTIC RELATIONS ORDERS AND TAX EFFICIENT WITHDRAWAL STRATEGIES

Denise Alexander-Pyle

Section Four

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OCTOBER 23, 2020

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EVIDENCE

This paper is meant to be more of a reference tool than a story to read from beginning to end. The Rules of Evidence will be examined with citations to current case law and other rules and statutes as applicable. This paper was originally directed to a Texas audience. It has been reworked and updated to be applicable to a national audience, including citations to several state statutes and cases throughout. While most federal and state rules are substantively similar, there are differences from state to state, some large and some minor. This paper does not discuss the distinctions from state to state. It focuses on Federal Rules of Evidence and includes major cases from many states that will help the practitioner understand the Rules of Evidence, generally, including ideas and techniques to implement in trial. Your state may have nuances that are not addressed herein. Nevertheless, states routinely look to federal law or other states' laws when considering how to apply the rules of evidence, especially as technology continues to develop. Accordingly, the practitioner should draw from any source that could help admit or exclude evidence.

I. FRE Article I. General Provisions

A. Scope and Applicability of the Rules

The Texas Rules of Evidence apply to Texas courts. Tex. R. Evid. 101(b). Similarly, the Federal Rules of Evidence apply to federal courts. Fed. R. Evid. 101(a), 1101. And other state rules will apply to those respective state courts. However, "[w]here the Federal Rules of Evidence are similar, [states] may look to federal case law for guidance in interpreting the [state] evidentiary rules." *See Reid Road Mun. Utility Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 856 n.6 (Tex. 2011); *accord State v. Almanza*, 820 S.E.2d 1, 5 (Ga. 2018); *Phillips v. O'Neil*, 407 P.3d 71, 74 (Ariz. 2017). Reference to any kind of written material or any other medium includes electronically stored information. Fed. R. Evid. 101(b)(6).

B. Purpose

The purpose of the rules is to have fair proceedings, eliminate unjustifiable expense and delay, and promote the development of evidence law to ascertain the truth and secure just determinations. Tex. R. Evid. 102. As such, the trial court judge "must conduct a jury trial so that inadmissible evidence is not suggested to the

jury by any means." Tex. R. Evid. 103(d).

C. Rulings on Evidence

A party may claim error in a ruling to admit or exclude evidence only if that error affected a substantial right of the party. Fed. R. Evid. 103(a). Similarly, that claim of error, if the ruling admitted evidence, must be timely made on the record with a motion to strike and state the specific ground, unless apparent from the context. Fed. R. Evid. 103(a)(1). If the ruling excluded evidence, an offer of proof must be made, unless the substance was apparent from the context. Fed. R. Evid. 103(a)(2). Rule 103 states that, "[o]nce the court rules definitively on the record--either before or at trial--a party need not renew an objection or offer of proof to preserve a claim of error for appeal." Fed. R. Evid. 103(b). This will be discussed more below in the section on objections and preservation of error. "The court may make any statement about the character or form of the evidence, the objection made, and the ruling." Fed. R. Evid. 103(c). Additionally, the court may direct the offer of proof be made in a question-and-answer format. *Id.* The court may take notice of plain error affecting a substantial right, even if that error was not preserved. Fed. R. Evid. 103(e).

D. Preliminary Questions

The court is the gatekeeper for the admission of evidence. It must decide any preliminary questions concerning whether a witness is qualified to testify, privileges exist, or evidence is admissible, and is not bound by the rules of evidence in its decision, except for those applying to privileges. Fed. R. Evid. 104(a); *see, e.g.*, *Vela v. State*, 209 S.W.3d 128, 130–31 (Tex. Crim. App. 2006) (explaining that preliminary hearing under Rule 104(a) is used to determine whether expert is qualified under Rule 702 and relevant under Rules 401 and 402). This preliminary step, however, does not require that the trial court be persuaded that the proffered evidence is actually authentic; it only requires the proponent to produce sufficient evidence to support a finding that the evidence is authentic. *United States v. Sliker*, 751 F.2d 477, 499–500 (2nd Cir. 1984); *Tienda v. State*, 358 S.W.3d 633, 638 (Tex. Crim. App. 2012). Authenticity will be discussed more in that section below.

If the relevance of a piece of evidence hinges on whether a fact exists, the proponent must provide sufficient evidence to support a finding that the fact does exist. Tex. R. Evid. 104(b). The court has discretion to

admit the proposed evidence on condition that the proof be introduced later. *Id.* This is known as the doctrine of conditional relevance. *Fischer v. State*, 268 S.W.3d 552, 563 (Tex. Crim. App. 2008) (Price, J., concurring and dissenting). "Simply put, a trial judge cannot err in most cases by overruling a relevancy objection so long as the challenged evidence might be connected up before the end of trial. And it is not the judge's duty to notice whether the evidence is eventually connected up in fact. Instead, the objecting party must reurge his relevancy complaint after all the proof is in, ask that the offending evidence be stricken, and request that the jury be instructed to disregard it. Otherwise, his objection will be deemed forfeited on appeal." *Id.* at 563 n.8 (quoting *Fuller v. State*, 829 S.W.2d 191, 198–99 (Tex. Crim. App. 1992) (internal quotations omitted)); *accord United States v. Tony*, 948 F.3d 1259, 1263 (10th Cir. 2020); *but see Com. v. Bright*, 974 N.E.2d 1092, 1101 (Mass. 2012) ("questions of conditional relevance require no complex jury instructions and merge imperceptibly into the weight of the evidence. A jury would naturally disregard evidence they found not to be relevant to the case based on their determination of a predicate fact.") (citations and quotations omitted). A search of the case law shows that this doctrine is discussed far more often in criminal cases than in civil ones.

All hearings on preliminary questions must be conducted outside the presence of the jury if it would involve: (1) the admissibility of a confession in a criminal case; (2) a defendant in a criminal case is a witness and requests it; or (3) justice so requires. Tex. R. Evid. 104(c); *see Hampton v. State*, 843 S.E.2d 542, 549 (Ga. 2020); *Jonas v. Willman*, 930 N.W.2d 60, 73 (Neb. App. 2019). The defendant in a criminal case who testifies outside the jury's hearing on a preliminary question is not subject to cross-examination on other issues in the case. Tex. R. Evid. 104(d).

Preliminary questions, however, do not limit a party's right to introduce evidence that is relevant to the weight or credibility of other evidence. Tex. R. Evid. 104(e). But the proponent of the evidence must still show how that evidence is relevant to the weight or credibility of the other evidence. *See, e.g.*, *Izaguire v. Cox*, No. 10-07-00318-CV, 2008 WL 4427272, at *7 (Tex. App.—Waco Oct. 1, 2008, no pet.) (mem. op.) (holding no abuse of discretion by excluding new evidence that attacked the weight and credibility of other evidence because party introducing new evidence did not show how it was relevant).

E. Evidence that is not Admissible Against Other Parties or for Other Purposes

Evidence that is only admissible for certain purposes or against certain parties must, on request, be restricted to its proper scope with an instruction given to the jury accordingly. Tex. R. Evid. 105(a); *see also Russell v. Anderson*, 966 F.3d 711, 720 n.2 (8th Cir. 2020); *Marks v. State*, 94 So.3d 409, 413 (Ala. 2012). Error is preserved only if the party claiming error: (1) requested that the evidence be limited if the evidence was, in fact, admitted without limitation; or (2) limited the evidence to its proper scope when offering it, but the evidence was excluded altogether. Tex. R. Evid. 105(b); *see, e.g.*, *Estes v. State*, 487 S.W.3d 737, 761–62 (Tex. App.—Fort Worth 2016) (holding that appellant failed to preserve error because he did not renew request for a limiting instruction after testimony he had objected to in preliminary hearing was offered), *rev'd on other grounds*, No. PD-0429-16, 2018 WL 2126740 (Tex. Crim. App. May 9, 2018); *see Fry v. State*, 748 N.E.2d 369, 373 (Ind. 2001).

F. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a statement, written or recorded, any adverse party may introduce, at that time, any other part or statement that should be considered at the same time. Tex. R. Evid. 106; *Dolo v. State*, 942 N.W.2d 357, 364 (Minn. 2020) ("Rule 106 therefore addresses the *timing* of when certain additional material is admitted. . . . In making fairness determinations under Rule 106, district courts must consider whether the additional material must be admitted contemporaneously because, if not, the opposing party must wait until later in the trial to supply the evidence necessary to avoid misleading the jury. In other words, fairness requires that district courts consider whether the content of the admitted excerpt needs to be explained or clarified by admitting the additional material at that time to ensure an accurate understanding of the admitted excerpt and to avoid misleading the factfinder.") (citations and quotations omitted). In Texas, Rules 106 and 107 "comprise the rule of optional completeness, which was designed to guard against the possibility of confusion, distortion, or false impression that could rise from [the] use . . . of an act, writing, conversation, declaration, or transaction out of proper context." *Elmore v. State*, 116 S.W.3d 801, 807 (Tex. App.—Fort Worth 2003, pet. ref'd) (internal quotations omitted) (quoting *Livingston v. State*, 739 S.W.2d 311, 339 (Tex. Crim. App. 1987)).

G. Rule of Optional Completeness

Texas appears to be the only jurisdiction to include this Rule. If a party introduces part of an act, declaration, conversation, writing, or recorded statement, any adverse party may inquire into any other part on the same subject. Tex. R. Evid. 107. The adverse party may also introduce any other act, declaration, conversation, writing, or recorded statement *necessary* to explain or help the factfinder fully understand that part offered by the opponent. *Id.* The rule of optional completeness is an exception to the hearsay rule in Texas. But Rule 107 is limited by Rule 403 if the additional evidence's probative value is substantially outweighed by its unfair prejudicial effect. Tex. R. Evid. 403; *Walters v. State*, 247 S.W.3d 204, 218 (Tex. Crim. App. 2007). Rule 403 is discussed in more detail below in the section on relevance. The Rule of Completeness under Rule 106 in other jurisdictions is not an exception to hearsay. *See, e.g., United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) ("Rule 106 does not compel admission of otherwise inadmissible hearsay evidence.") (quotations omitted).

II. FRE Article II. Judicial Notice

The Rules of Evidence provide a court with the ability to take judicial notice when the fact is generally known within the court's jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201. The federal rules do not provide any specifics beyond the Rule, but some states specify certain facts that can be judicially noticed. *See, e.g.*, Cal. Evid. Code § 452 (e.g. laws of others states, legislative enactments, and court records from any state or federal court); Fla. Stat. Ann. § 90.202 (e.g. acts of Congress, laws of other states or nations, and official actions of legislative, executive, and judicial departments of U.S. or any state); Tex. R. Evid. 202–204 (e.g. other states' laws, foreign law, and municipal and county ordinances);

Practice Note: A court may not, however, take judicial notice of testimony from a previous trial or even testimony from a prior temporary orders hearing in the same case. *Lage v. Esterle*, 591 S.W.3d 416, 422 (Ken. App. 2019) ("Britney's testimony from the ECO hearing does not pass the indisputability test of KRE 201."); *Guyton v. Monteau*, 332 S.W.3d 687, 693 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("In order for testimony from a prior hearing or trial to be considered in a subsequent proceeding, the transcript of that testimony

must be properly authenticated and entered into evidence."); *but see In re M.H.*, No. 2-19-0595, 2019 WL 6313519, at *8 (Ill. App. Nov. 22, 2019) (explaining that court cannot take judicial notice of prior testimony contrary to rule against hearsay, unless witness is unavailable to testify). Similarly, that testimony may not be considered on appeal unless properly entered into evidence. *See, e.g.*, *In re M.C.G.*, 329 S.W.3d 674, 675 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Practice Note: A trial court may take judicial notice of what is in its file, but it may not necessarily take judicial notice of the truth of those documents. *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied) ("A court may take judicial notice of its own file and the fact that a pleading has been filed in a case . . . . 'A court may not, however, take judicial notice of the truth of allegations in its records.' . . . Thus, unless a party's inventory and appraisal has been admitted into evidence, it may not be considered as evidence of a property's characterization of value."); *but cf. Vannerson v. Vannerson*, 857 S.W.2d 659, 671 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (holding that, because inventory was sworn to and filed with the trial court, even though inventory was not introduced into evidence, trial court could rely on inventory in its judgment; additionally, no harm occurred because properly offered trial exhibit contained same information as was in inventory); *see also Sosinsky v. Grant*, 8 Cal. Rptr. 2d 552, 561–62 (Cal. App. 1992) ("While we have no quarrel with the fact that a judge, after hearing a factual dispute between litigants A and B, may choose to believe A, and make a finding of fact in A's favor, and while we have no quarrel that at some subsequent time it may be proper to take judicial notice *that the judge did in fact make that particular finding* in favor of A, the taking of judicial notice that the judge *made* a particular factual finding is a far cry from the taking of judicial notice that the 'facts' found by the judge must necessarily be the true facts, i.e. must necessarily be 'the truth.'") (emphasis in original).

Practice Note: Your jurisdiction will determine whether a court may take judicial notice of scientific literature. *Compare Glockzin v. State*, 220 S.W.3d 140, 145–46 (Tex. App.—Waco 2007, pet. ref'd) (Texas courts hold that courts cannot take judicial notice of scientific literature), *with Jones v. United States*, 548 S.2d 35, 42 (D.C. App. 1988) (D.C. courts take judicial notice of scientific literature to rebut experts), *and United States v.*

Medina, 749 F.Supp. 59, 61 (E.D.N.Y. 1990) (federal court should take judicial notice of scientific literature to "assist it in evaluating advances in scientific techniques.").

A. Adjudicative Facts

An adjudicative fact is any well settled fact, "one which is so well known by all reasonably intelligent people in the community or its existence is so easily determinable with certainty from sources considered reliable, that it would not be good sense to require formal proof." Ray, Law of Evidence, Judicial Notice, § 151 (1980); *accord Harper v. Killion*, 348 S.W.2d 521, 522 (Tex. 1961). A fact is not subject to reasonable dispute when: (1) it is generally known within the territorial jurisdiction of the trial court; or (2) it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Tex. R. Evid. 201(b).

When the above requirements are established, and a party requests it, the court must take judicial notice. Tex. R. Evid. 201(c)(2); *see Hernandez v. Hous. Lighting & Power Co.*, 795 S.W.2d 775, 776–77 (Tex. App.—Houston [14th Dist.] 1990, no writ). Even if the mandatory requirements are not asserted, a court has the discretion to take judicial notice, whether requested or not, at any stage of the proceeding. Tex. R. Evid. 201(c)(1), (d). Even the court of appeals may take judicial notice for the first time on appeal. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994).

The trial court has a duty to notify the parties that it has taken or will take judicial notice of something. Fed. R. Evid. 201(e); *Cobb v. State*, 835 S.W.2d 771, 773 (Tex. App.—Texarkana 1992), *rev'd on other grounds*, 851 S.W.2d 871 (Tex. Crim. App. 1993). A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. Tex. R. Evid. 201(e). In the absence of prior notification, the request may be made after judicial notice has been taken. *Id.* The party opposing the trial court's action must be given an opportunity to be heard on the issue of propriety of the court's action and make a proper objection to preserve error. *See In re M.W.*, 959 S.W.2d 661, 664 (Tex. App.—Tyler 1997, writ denied). The court must, in a civil case, instruct the jury as to the conclusiveness of a judicially noticed fact. Tex. R. Evid. 201(f).

III. FRE Article III. Presumptions

"A presumption is a rule which draws a particular inference as to the existence of one fact, not actually known, arising from its usual connection with other particular facts which are known or proved." *Beck v. Sheppard*, 566 S.W.2d 569, 570–571 (Tex. 1978) (internal quotations omitted). In civil cases, the party against whom a presumption is directed has the burden to rebut it, unless statute or rule provides otherwise. Fed. R. Evid. 301. The burden of persuasion does not shift. *Id.* Not all states have formally adopted rules of evidence related to presumptions.

A. Presumptions vs. Inferences

A presumption affects the duty of a party offering further testimony. *Strain v. Martin*, 183 S.W.2d 246, 247 (Tex. App.—Eastland 1944, no writ). An inference involves the weighing of evidence already produced. *Id.* Thus, inferences are based upon facts that are proved. Unrebutted presumptions may establish a fact in issue but only as an "artificial legal equivalent of the evidence otherwise necessary to do so." *Id.* Presumptions can be based upon inferences, but an inference based upon another inference is conjecture and does not prove anything. *Id.* at 247–48; *see also Roberts v. U.S. Home Corp*., 694 S.W.2d 129, 135 (Tex. App.—San Antonio 1985, no writ) (citing *Rounsaville v. Bullard*, 276 S.W.2d 791, 794 (Tex. 1955)).

B. Rebuttable Presumptions

A presumption establishes a fact as proved when the fact from which it may be inferred is proved. *Lobley v. Gilbert*, 236 S.W.2d 121, 123–24 (Tex. 1951). The burden of proof remains on the party offering the fact that gives rise to the presumption, but in effect, it assumes that it has established the fact, prima facie. *Page v. Lockley*, 176 S.W.2d 991, 998 (Tex. App.—Eastland 1943), *rev'd on other grounds*, 180 S.W.2d 616 (Tex. 1944). When the adversely affected party introduces evidence contrary to the existence of the presumed fact, the presumption stops, leaving it to the trier of fact to weigh the bare inference against the evidence to the contrary. *Southland Life Ins. Co. v. Greenwade*, 159 S.W.2d 854, 858 (Tex. 1942).

C. Irrebuttable or Conclusive Presumptions

There are very few presumptions that are legally conclusive as to the fact(s) stated or proved. Most presumptions, whether based on statute or case law, are rebuttable. During a marriage, absent very unusual

circumstances, there is an irrebuttable presumption that a fiduciary relationship exists between a husband and wife. *Miller v. Miller*, 700 S.W.2d 941, 946–47 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

D. Purpose of Presumptions

The reasons for and purposes of presumptions are numerous. They include the following:

"1. To permit instruction to the jury on the relationship between certain facts;

2. To promote convenience or to bring out the real issues in dispute;

3. To save the court's time by favoring a finding consonant with the balance of probability;

4. To correct an imbalance resulting from one party's greater access to proof concerning the presumed fact;

5. To avoid an impasse and its consequent unfairness;

6. To serve a social or economic policy that favors a contention by giving such contention the benefit of the presumptions; and

7. To provide a shorthand description of the initial assignment of the burdens of persuasion and of going forward with the evidence on an issue." Murl A. Larkin & Cathleen C. Herasimchuk, *Article III: Presumptions*, 30 Hous. L. Rev. 241, 243–44 (1993) (internal citations omitted).

E. Presumptions - To Instruct or not to Instruct

1. Directed Verdicts

The genuine importance of presumptions is realized only after the party bearing the burden has rested. A true presumption operates to invoke a rule of law that compels the jury to reach a conclusion in the absence of evidence to the contrary. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 756–57 (Tex. 1975), *abrogated on other grounds*, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978). If the party with the burden of producing evidence of a particular fact fails to meet that burden, it is proper for the court to direct a verdict against that party on the issue not proved. The reverse is also true. If the burden has been satisfied and no controverting evidence has been admitted, the producing party can be favored with a directed verdict because there is no decision for the jury on that issue. *Sanders v. Davila*, 593 S.W.2d 127, 130 (Tex. App.—Amarillo 1979, writ ref'd. n.r.e.).

2. Jury Instructions

Not all states allow for jury trials in divorce or parent-child cases. If your state allows for them, then be sure to understand how presumptions can affect the jury. There is some question as to how the court should instruct the jury regarding presumptions. An instruction, which recites verbatim a presumption, risks reversal on appeal. *See Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) ("The threshold inquiry in ascertaining the constitutional analysis applicable to this kind of jury instruction is to determine the nature of the presumption it describes. That determination requires careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.") (citations omitted). The complaints range from a comment on the evidence to a misplaced burden of persuasion. *See, e.g.*, *Tex. A & M Univ. v. Chambers*, 31 S.W.3d 780, 785 (Tex. App.—Austin 2000, pet. denied) ("Including a presumption in the jury charge which has been rebutted by controverting facts is an improper comment on the weight of the evidence."); *Hailes v. Gentry*, 520 S.W.2d 555, 558–59 (Tex. App.—El Paso 1975, no writ) ("[Presumptions] are not evidence of something to be weighed along with the evidence.").

3. Spoliation Presumption

One area where a jury instruction regarding a presumption can be appropriate is in cases of spoliation of evidence. One of the most severe penalties for spoliation is a rebuttable presumption that the evidence was damaging to the spoliating party, combined with a shift in the burden of proof so that the spoliating party must prove the evidence was not damaging. Several states allow for spoliation instructions, but the procedure and burden vary. Invariably, however, the evidence must have existed and must have been destroyed—the definition of spoliation. *See, e.g.*, *Bunn Builders, Inc. v. Womack*, 2011 Ark. 231, 2011 WL 2062393, at *6 (2011) ("We hold that under Arkansas law, a circuit court is not required to make a specific finding of bad faith on the part of the spoliator prior to instructing the jury with AMI 106, and we decline to adopt the Eighth Circuit's standard requiring the circuit court to do so."); *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004) ("(1) the evidence was 'in existence'; (2) the evidence was 'in the possession of or under control of the party' charged with its destruction; (3) the evidence 'would have been admissible at trial'; and (4) 'the party responsible for its

destruction did so intentionally.'); *Trevino v. Ortega*, 969 SW2d 950, 954–55, 960 (Tex. 1998) (trial court should first determine whether duty to preserve evidence existed; second, whether spoliating party breached that duty; and third, whether spoliation prejudiced the non-spoliating party).

F. Burden of Proof

The common meaning of this term among litigators is the amount of evidence required to establish the facts pleaded, as well as a sufficient amount of evidence necessary to convince the trier of fact to find in the offering party's favor. While simplistic in usage, an academic examination reveals that there are two separate and distinct burdens that are interdependent for a valid judgment.

1. Burden of Producing Evidence

This burden is based on the premise that the proponent must produce satisfactory evidence to the judge of a particular fact to be proved. 1 Roy R. Ray, Texas Practice, Law of Evidence § 336 (1972). Absent a presumption of the facts to be proved, if the party with that responsibility does not produce the requisite evidence, the results will be an adverse ruling, i.e., a directed verdict. This burden of producing evidence rests initially on the party who pleads the existence of a particular fact. When the initial burden to produce evidence has been met, the burden shifts to the opposing party.

2. Burden of Persuasion

The burden of persuasion comes only after the proponent has met its burden of producing evidence sufficient to prove the contested issue. Simply stated, it is the task of convincing the trier of fact, after producing satisfactory evidence, that the alleged facts are true. If the advocate is successful in meeting the burden of evidence and in persuading the factfinder, the ultimate outcome is a favorable verdict. Unlike the burden of producing evidence, the burden of persuasion seldom shifts from one party to the other. It remains with the party who seeks any affirmative relief.

G. Standard of Proof (Burden of Persuasion)

Though referred to as the burden of proof in practice, a more accurate term would be the standard of proof required in persuading the judge or jury. The standard of proof represents the persuasive boundaries set by the

court. In jury cases, the boundaries are affixed in the court's charge.

1. Persuading by a Preponderance of the Evidence

With few exceptions, this is the most common standard utilized in family law cases. The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced and admitted in this case.

2. Persuading by Clear and Convincing Evidence

The exception to the usual preponderance standard in most family law cases is the burden to persuade by clear and convincing evidence. Less than beyond a reasonable doubt and more than a preponderance, this burden is the measure or degree of proof that will produce in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *See, e.g.*, Tex. Fam. Code Ann. § 101.007.

Practice Note: Topics related to family law that must meet the higher burden of clear and convincing may vary from state to state, but the Supreme Court of the United States has required at least clear and convincing evidence to terminate the parent child relationship, leaving it to the state to determine exactly what burden to use. *See* ; *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

IV. FRE Article IV. Relevance and Its Limits

A. Relevant Evidence

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Tex. R. Evid. 401; *PPC Transp. v. Metcalf*, 254 S.W.3d 636, 642 (Tex. App.—Tyler 2008, no pet.).

If there is some logical connection, either directly or by inference, between the evidence and a fact to be proved, the evidence is relevant. *PPC Transp.*, 254 S.W.3d at 642. In practice, this is a test of logic and common sense. There are no degrees of relevancy—a piece of evidence either is or is not relevant. All relevant evidence is admissible unless it is shown that the evidence should be excluded for some other reason. Tex. R. Evid. 402.

B. Exclusion of Relevant Evidence

In deciding whether to exclude relevant evidence, a court must weigh the probative value of the evidence

against its potential for unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence, and must examine the necessity and probative effect of the evidence. Tex. R. Evid. 403; *Goodson v. Castellanos*, 214 S.W.3d 741, 754 (Tex. App.—Austin 2007, pet. denied). "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *In re K.Y.*, 273 S.W.3d 703, 710 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Because the guiding principle in a suit affecting the parent-child relationship is the best interest of the child, Rule 403 provides for an extraordinary remedy and should be used "sparingly." *Goodson*, 214 S.W.3d at 754.

1. Unfair Prejudice

Prejudice as applied under this section refers to emotional, irrational, or other similarly improper grounds on which to base a decision. *United States v. Looking*, 419 F.3d 781, 785 (8th Cir. 2005) ("Evidence is not unfairly prejudicial because it tends to prove guilt, but because it tends to encourage the jury to find guilt from improper reasoning. Whether there was unfair prejudice depends on whether there was an undue tendency to suggest decision on an improper basis.") (quotations omitted); *Roberts v. Dall. Ry. & Terminal*, 276 S.W.2d 575, 577–78 (Tex. App.—El Paso 1953, writ ref'd n.r.e.). For example, "relevant photographic evidence is admissible unless it is merely calculated to arouse sympathy, prejudice or passion of the jury where the photographs do not serve to illustrate disputed issues or aid in understanding the case." *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 389 (Tex. 1998) (internal quotations omitted).

If an attorney trying to keep a piece of evidence out has failed to block the evidence based on relevance, authenticity, hearsay, or the original writing rule, the final step is the requirement to balance the evidence's probative value against the potential for unfair prejudice, or other harm, under Rule 403. Although Rule 403 may be used in combination with any other rule of evidence to assess the admissibility of electronic evidence, courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the following circumstances: offensive language, computer animations, summaries, and reliability or accuracy. *See Monotype Corp. PLC v. Int'l Typeface Corp.*, 43 F.3d 443, 450 (9th Cir. 1994) (language); *Friend v. Time Mfg. Co.*, No. 03-343-TUC-CKJ, 2006 WL 2135807, at *7 (D. Ariz. July 28, 2006) (animations); *St. Clair v.*

Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773, 774–75 (S.D. Tex. 1999) (reliability); 5 McLaughlin, Weinstein, & Berger, Weinstein's Federal Evidence § 1006.08[3] (2d ed. 1998) (summaries).

2. Confusing the Issues

Confusing the issues refers to situations where evidence confuses or distracts the jury from the main issues of the case. *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007). This includes evidence that may take an inordinate amount of time to present. *Id.*

3. Misleading the Jury

Misleading the jury, on the other hand, refers to situations where the jury will give undue weight to evidence "on other than emotional grounds." *Id.*

4. Undue Delay

If the admission of evidence creates undue delay, outweighing the probative value of the evidence, the court may exclude it. *Mo., K. & T. Ry. v. Bailey*, 115 S.W. 601, 607–08 (Tex. App.—Dallas 1908, writ ref'd).

5. Needlessly Presenting Cumulative Evidence

If the evidence offered is merely cumulative of other evidence already admitted, the court may exclude it. *R.R. Comm'n v. Shell*, 369 S.W.2d 363, 373 (Tex. App.—Austin 1963), *aff'd*, 380 S.W.2d 556 (Tex. 1964). However, visual evidence is generally not cumulative of testimony on the same subject because it has significant probative value apart from testimonial evidence. *In re K.Y.*, 273 S.W.3d at 710.

C. Character Evidence

While the use of character evidence in civil cases is limited by the rules of evidence, in family law, several important exceptions make the use of character evidence relevant and commonly used.

Evidence about prior instances of conduct used to show that a person acted in conformity on a particular occasion is generally inadmissible. Tex. R. Evid. 404(a); *but see* Tex. R. Evid 405(b) (specific instances of conduct to prove character or trait admissible if character is an essential element of a charge, claim, or defense). However, under Rule 404(b), such evidence may be admissible for other purposes, such as showing proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Tex. R.

Evid. 404(b)(2). Further, evidence of a person's habit or routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person on a particular occasion was in conformity with the habit or routine practice. Tex. R. Evid. 406. Although evidence of specific acts is limited, character evidence through testimony of a person's reputation or by testimony in the form of an opinion is admissible. Tex. R. Evid. 405(a)(1). If reputation or opinion testimony is admitted, evidence of specific instances of conduct is permitted on cross-examination. *Id.*

Similarly, offers or acceptances of consideration, along with conduct or statements made during compromise negotiations, is inadmissible, unless it is used to prove a person's bias, prejudice, or interest. Tex. R. Evid. 408. And any offer or promise to pay for anything related to an injury is inadmissible to prove liability. Tex. R. Evid. 409.

Family law often overlaps with criminal law, as family violence or sexual abuse can instigate both types of cases. But a guilty plea that is later withdrawn, a nolo contendere plea, or a statement made during proceedings for either of those pleas or made during plea discussions with the prosecuting authority, if those discussions did not result in a guilty plea or resulted in a later-withdrawn guilty plea, are not admissible against the defendant who made the plea or participated in those discussions. Tex. R. Evid. 410(a). The only exception to this falls under Rules 106 and 107, when part of the discussion is introduced and the rest of the discussion should be introduced for fairness. Tex. R. Evid. 410(c); *see also* Tex. R. Evid. 106, 107.

Practice Note: In custody cases, evidence of the prior conduct of a parent is regularly presented to show that future behavior is likely to be in conformity. One termination case has drawn a relevant distinction: "The evidence regarding [father's] prior criminal behavior, convictions, and imprisonment was not offered to prove conduct in conformity or to impeach his credibility as a witness. Instead, it was relevant and probative to whether he engaged in a course of conduct that endangered [the child]." *In re J.T.G.*, 121 S.W.3d 117, 133 (Tex. App.—Fort Worth 2003, no pet.) (internal citations omitted). A modification case held that, "[w]hile evidence of past misconduct or neglect may not of itself be sufficient to show present unfitness in a suit affecting the parent-child relationship, such evidence is permissible as an inference that a person's future conduct may be measured by her

past conduct as related to the same or similar situation." *Kirby v. Chapman*, 917 S.W.2d 902, 911 (Tex. App.—Fort Worth 1996, no writ); *accord Green v. Beaumaster*, No. C1-01-1026, 2001 WL 1606830, at *3 (Minn. App. 2001); *cf. Shioji v. Shioji*, 712 P.2d 197, 205 n.3 (Utah 1985) ("[P]ast conduct is relevant in custody proceedings only if it is indicative of harm to the children or predictive of future detrimental conduct") (citing *In re Custody of Saloga*, 421 N.E.2d 991, 996 (Ill. App. 1981)). Another modification case held that a parent's prior conduct can give rise to a material and substantial change in circumstances of the child. *In re A.L.E.*, 279 S.W.3d 424, 429–30 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

V. FRE Article V. Privileges

Our rules of privilege stem from the common law notion that certain relationships are so important that they ought to be afforded a degree of protection. Unless protected under a privilege, or other constitutional or statutory authority, no person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another from doing any of those. Tex. R. Evid. 501, 502 (required reports privileged by statute). If the law governing a report does not require the report be made, any reports that are made in accordance with that law are not privileged. *Star-Telegram, Inc. v. Schattman*, 784 S.W.2d 109, 111 (Tex. App.—Fort Worth 1990, no writ). Although federal rules only cover the attorney-client privilege and work-product privilege, Texas, and many other states, cover a multitude of privileges. The privileges below are directly from the Texas Rules of Evidence.

A. Lawyer-Client Privilege

The recognition of the lawyer-client privilege dates back to common law and is designed to protect confidential communications between attorney and client, which are made to facilitate the rendition of legal services. *Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 647 (Tex. 1995) (orig. proceeding), *superseded on other grounds by* Tex. R. Civ. P. 192.3(g). The purpose of the lawyer-client privilege is to promote unrestrained communication between attorney and client by eliminating the fear that the attorney will disclose confidential information in any legal proceeding. *West v. Solito*, 563 S.W.2d 240, 245 (Tex. 1978) (orig. proceeding). Although not all communications between attorney and client are privileged, those communications which fall

within the lawyer-client privilege are protected from disclosure. *Sanford v. State*, 21 S.W.3d 337, 342 (Tex. App.—El Paso 2000, no pet.), *abrogated on other grounds by Motilla v. State*, 78 S.W.3d 352 (Tex. Crim. App. 2002). The court in *Sanford* noted: "Underlying this privilege is an attorney's need to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* (quoting *Strong v. State*, 773 S.W.2d 543, 547 (Tex. Crim. App. 1989)). Thus, the aspirational purpose of the privilege is the promotion of communication between attorney and client unrestrained by fear that these confidences may later be revealed. *Strong*, 773 S.W.2d at 547; *Sanford*, 21 S.W.3d at 342; *cf. Costco Wholsale Corp. v. Superior Court*, 219 P.3d 736, 740–41 (Cal. 2009).

1. Three-Part Test

A three-part test must be met before the lawyer-client privilege may attach to protect information. First, the communication must be between those individuals included in Rule 503(b) of the Texas Rules of Evidence. *See* Tex. R. Evid. 503(b). Second, the communication sought to be protected must be "confidential." Tex. R. Evid. 503(a)(5). Third, the communication sought to be protected must have been made to facilitate the rendition of legal services to the client. Tex. R. Evid. 503(b)(1).

a) Individuals Included

Rule 503(b)(1) of the Texas Rules of Evidence provides protection for communications between the following individuals:

(1) Lawyer and Client

To determine the applicability of the lawyer-client privilege under Rule 503 of the Texas Rules of Evidence, an individual is considered a "client" of the attorney if he "is rendered professional legal services by a lawyer" or "consults a lawyer with a view to obtaining professional legal services from that lawyer." Tex. R. Evid. 503 (a)(1). A client may be a person, public officer, or corporation, association, or other organization or entity, and may be either public or private. *Id.* If a professional relationship exists between the attorney and client wherein the attorney provides professional legal services to the client, communications made for the purpose of rendering legal services are protected from disclosure by the lawyer-client privilege. *In re Ford Motor Co.*, 988

S.W.2d 714, 719 (Tex. 1998) (orig. proceeding). As long as a professional relationship exists in which professional legal services are provided by the lawyer to the client, litigation need not be pending in order for the lawyer-client privilege to apply. *Huie v. DeShazo*, 922 S.W.2d 920, 922 (Tex. 1996) (orig. proceeding). Actual employment of the attorney is not required for the applicability of the lawyer-client privilege. Communications between the lawyer and the client during an initial consultation are privileged if the communication takes place in the attorney's capacity of rendering professional legal services and if the communication is related to the client's legal problems. Tex. R. Evid. 503 (a)(1); *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328, 332 (Tex. App.—Austin 2000, pet. denied). The fiduciary relationship between an attorney and his client extends even to preliminary consultations between the client and the attorney regarding the attorney's possible retention. *Braun v. Valley Ear, Nose, and Throat Specialists*, 611 S.W.2d 470, 472–73 (Tex. App.—Corpus Christi 1980, no writ). All that is required under Texas law is that the parties, either explicitly or by their conduct, manifest an intention to create the lawyer-client relationship. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). Furthermore, payment of a fee to the attorney is not required to give rise to the lawyer-client relationship. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

(2) Representatives of the Lawyer

The protection afforded to communications between the lawyer and client is extended to protect communications with "representatives" of the attorney. Tex. R. Evid. 503(b)(1)(A)–(B). A lawyer's representatives include those employed by the lawyer to assist in the rendition of professional legal services to the client and specifically include accountants who provide services that are reasonably necessary to the lawyer's rendition of professional legal services. Tex. R. Evid. 503(a)(4)(A)–(B). Communications with legal assistants, secretaries, and investigators also fall within the protection provided by the lawyer-client privilege. Tex. R. Evid. 503(a)(4)(A); *Bearden v. Boone*, 693 S.W.2d 25, 27–28 (Tex. App.—Amarillo 1985, orig. proceeding). One caveat, however, is that images of underlying facts (e.g., a private investigator's photos) are excepted from work product protection. Tex. R. Civ. P. 192.5(c)(4). It is also important to note that the attorney's "representative"

must be hired by, or at the direction or request of, the attorney. Once the lawyer-client relationship exists and the "representative" is hired by or at the direction of the attorney, the client's direct payment to the representative is immaterial. *See, e.g.*, *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197–98 (Tex. 1993) (orig. proceeding).

(3) Representatives of the Client

Communications with a client's representative also fall within the protections provided by the lawyer-client privilege. Tex. R. Evid. 503(b)(1). An individual is a client's representative for purposes of the lawyer-client privilege if that person is authorized to obtain or act upon professional legal services on behalf of the client, or if that person, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client. Tex. R. Evid. 503(a)(2).

b) Confidential Communications Protected

Only confidential communications are protected from disclosure by the lawyer-client privilege. Tex. R. Evid. 503(b); *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 49 (Tex. 2012) (orig. proceeding); *see also People v. Miles*, 464 P.3d 611, 668 (Cal. 2020); *State v. Ogle*, 670 P.2d 222, 223 (Or. App. 1983) (holding that, because trial date is matter of public record, lawyer's telling client of trial date was not confidential). Whether a communication is confidential is largely determined by the client's intent. A communication is confidential if the client communicates it to the attorney or his representative and the client does not intend that the information be disclosed to third persons, other than to those in furtherance of the rendition of legal services to the client or to those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5); *Ates v. State*, 21 S.W.3d 384, 394 (Tex. App.—Tyler 2000, no pet.). A communication between attorney and client in the presence of a third party who is not the attorney's representative is not confidential and, therefore, is unprotected by the lawyer-client privilege. *Ledisco Fin. Servs., Inc. v. Viracola*, 533 S.W.2d 951, 959 (Tex. App.—Texarkana 1976, no writ).

Practice Note: When a client wishes to discuss issues relevant to the representation of the client while a third party is present, the attorney should advise the client that the presence of the third party waives the lawyer-client privilege and that the third party's testimony regarding the contents of the discussion may be required or

compelled.

(1) Lawyer-client Privilege Protects Entire Contents of Confidential Communication

If the requirements for the lawyer-client privilege are met, the lawyer-client privilege will protect the contents of the complete communication. *In re Seigel*, 198 S.W.3d 21, 27 (Tex. App.—El Paso 2006, orig. proceeding). For example, once the lawyer-client privilege protects the disclosure of a particular statement within a document, the entire document is protected from disclosure. *In re Valero Energy Corp.*, 973 S.W.2d 453, 457–58 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding).

(2) Confidential Information Protected from Eavesdroppers

Because the lawyer-client privilege is defined by the intent of the client, the privilege is not destroyed by an eavesdropper who overhears the confidential communications between attorney and client. Tex. R. Evid. 503(a)(5); *Ates*, 21 S.W.3d at 393–94; *but see Clark v. State*, 261 S.W.2d 339, 342–43 (Tex. Crim. App. 1953) (holding that, because client did not take precautions to avoid eavesdroppers, communication was properly admitted). Therefore, if a communication that was overheard by a third party was not intended to be heard by or disclosed to a third party, the lawyer-client privilege may remain intact. *See In re Small*, 346 S.W.3d 657, 662–63 (Tex. App.—El Paso 2009, orig. proceeding).

Practice Note: If documents or other evidence is intended to be confidential, those communications should be preserved and maintained as confidential; otherwise, any privilege that may have existed could be forfeited. *See Burnett v. State*, 642 S.W.2d 765, 777 (Tex. Crim. App. 1982) (en banc) (Dally, J., dissenting).

(3) Contracts for Representation and Attorney's Fees

Evidence relating to the retention or employment of an attorney and the attorney's fees paid is not protected by the lawyer-client privilege. *Duval Cty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634–35 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). One exception exists, however: evidence showing the retention or employment of an attorney is protected from disclosure if disclosure of the lawyer-client relationship would tend to implicate the client in the commission of a crime. *Jim Walter Homes, Inc. v. Foster*, 593 S.W.2d 749, 752 (Tex. App.—Eastland 1979, no writ).

c) Communications Made for the Purpose of Providing Legal Assistance

The third requirement for protection of a communication by the lawyer-client privilege is that it must have been in the context of providing legal services to the client. Specifically, Rule 503 provides protection for confidential communications made to facilitate "the rendition of professional legal services to the client." Tex. R. Evid. 503(a)(5), (b)(1). Although the scope of the lawyer-client privilege is broad, a material fact may not be concealed under the lawyer-client privilege merely because it is disclosed to an attorney. *Huie*, 922 S.W.2d at 923. The lawyer-client privilege will not apply to protect communications made if the attorney is not acting in his capacity as attorney. *In re Tex. Farmers Ins.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding). For example, if an attorney acts as an accountant, the communications between the attorney and client in relation to the accounting services provided are not protected under the lawyer-client privilege. *Harlandale Indep. Sch. Dist.*, 25 S.W.3d at 332.

2. Asserting the Lawyer-client Privilege

a) Who May Assert the Lawyer-client Privilege?

The lawyer-client privilege belongs to the client. *In re XL Specialty Ins. Co.*, 373 S.W.3d at 49; *Chance v. Chance*, 911 S.W.2d 40, 63 (Tex. App.—Beaumont 1995, writ denied). The lawyer-client privilege may be claimed or invoked only by the client or the client's representative. Tex. R. Evid. 503(c). Specifically, Rule 503(c) allows "the client; the client's guardian or conservator; a deceased client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization" to assert the lawyer-client privilege on behalf of the client. *Id.* The client's attorney is presumed under Rule 503(c) to have the authority to invoke the attorney client privilege; however, the attorney may only do so on behalf of the client. *Id.* The attorney may not invoke the lawyer-client privilege on his own behalf. *Turner v. Montgomery*, 836 S.W.2d 848, 850 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The lawyer's representative also has the authority to claim the lawyer-client privilege on behalf of the client. *Bearden*, 693 S.W.2d at 28. In *Bearden*, the court of appeals held that a private investigator, as a representative of the attorney, had the authority to claim the lawyer-client privilege on behalf of the client and that the information he acquired through his investigation

was protected from disclosure under the lawyer-client privilege. *Id.*

b) When Must the Privilege Be Asserted?

The lawyer-client privilege must be asserted at the time the response to the question requesting the privileged information is due.

c) Evidence Presented to Support the Assertion of Privilege

Evidence to support the assertion of the lawyer-client privilege may be required. For example, documents are not afforded the protections of the lawyer-client privilege without some evidence supporting the assertion of privilege. *Eckermann v. Williams*, 740 S.W.2d 23, 25 (Tex. App.—Austin 1987, orig. proceeding). The test for determining whether a communication is confidential looks to the nature of the communication, not the subject matter. *Keene Corp. v. Caldwell*, 840 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). A party makes a prima facie claim of privilege by pleading that a communication is confidential, supported by attorney affidavits and detailed privilege logs, and possibly submitting the documents for in-camera review. *Marathon Oil Co. v. Moye*, 893 S.W.2d 585, 591 (Tex. App.—Dallas 1994, orig. proceeding). The burden of proof then shifts to the opposing party to refute the claim. *Id.*

Practice Note: When the privileged documents themselves are the only evidence that the privilege exists, you must request that the court perform an in-camera review and produce the documents to the court for the court to make its determination. *See Tilton v. Moye*, 869 S.W.2d 955, 957 (Tex. 1994) (orig. proceeding); *Weisel Enters., Inc. v. Curry*, 718 S.W.2d 56, 58 (Tex. 1986) (orig. proceeding). The court of appeals, in an original proceeding, may perform an in-camera review of these documents to make that determination as well. *See, e.g.*, *In re Fairway Methanol LLC*, 515 S.W.3d 480, 494 (Tex. App.—Houston [14th Dist.] 2017, orig. proceeding).

d) Duration of the Lawyer-client Privilege

The lawyer-client privilege continues even after the conclusion of the lawsuit or the employment of the attorney and will protect disclosure of confidential information for as long as the client asserts the privilege. *Bearden*, 693 S.W.2d at 28. The lawyer-client privilege even continues after the death of the client. Tex. R. Evid. 503(c)(3). The privilege may be claimed or waived by "the client; the client's guardian or conservator; a deceased

client's personal representative; or the successor, trustee, or similar representative of a corporation, association, or other organization or entity--whether or not in existence." *Id.*

3. Exceptions to the Lawyer-client Privilege

Rule 503(d) of the Texas Rules of Evidence provides the exclusive list of exceptions to the lawyer-client privilege. This rule provides that no lawyer-client privilege exists in the following circumstances:

1. When the attorney's services were sought or obtained in order to enable crime or fraud.

2. When the communication is relevant to an issue between parties who assert claims through the same deceased client.

3. When a client sues a lawyer for breach of duty by the lawyer to the client.

4. When a lawyer acts as attesting witness to a document, no lawyer-client privilege exists as to communications relevant to an issue concerning the attested document.

5. In litigation where one attorney represents two or more clients, no lawyer-client privilege exists as to matters that are of mutual interest between or among the clients.

4. Lawyer-client Privilege Distinguished from Attorney Work-Product

Although the lawyer-client privilege and the attorney work-product privilege may, many times, protect the same material, it is important for the practitioner to distinguish one from the other so that each may be properly asserted. The lawyer-client privilege protects confidential client communications from disclosure. Tex. R. Evid. 503. The attorney-work-product privilege protects the material prepared and mental impressions developed in anticipation of litigation. Tex. R. Civ. P. 192.5; *see* Fed. R. Evid. 502(g)(2).

While the lawyer-client privilege belongs to and protects the client, the work-product protection belongs to and protects the attorney. *Pope v. State*, 207 S.W.3d 352, 257–58 (Tex. Crim. App. 2006). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). "The privilege continues indefinitely, beyond the litigation for which the materials were originally prepared." *In re Bexar Cty. Criminal Dist. Attorney's Office*, 224 S.W.3d 182, 186 (Tex. 2007) (orig. proceeding).

The attorney work-product privilege acts as a limitation to the scope of discovery. Work product is defined in Rule 192.5(a) of the Texas Rules of Civil Procedure as "material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents." Tex. R. Civ. P. 192.5(a). "Core" work product, which consists of work product of an attorney or an attorney's representative containing the mental impressions, opinions, conclusions, or legal theories of the attorney or attorney's representative, is not discoverable. Tex. R. Civ. P. 192.5(b)(1). Other work product not qualifying as "core" work product is protected from discovery unless the party requesting the discovery shows substantial need for the discovery in the preparations of the case. Tex. R. Civ. P. 192.5(b)(2).

5. Ethical Duty of Attorneys not to Disclose Client Confidences

The ethical duty of the lawyer not to disclose confidences of the client should be distinguished from the lawyer-client privilege not to disclose confidential information. An attorney owes the client a professional duty not to disclose client "confidences" and "secrets." Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(b); *cf.* Model Rules of Prof'l Conduct R. 1.6. The ethical duty of the attorney under the Rules of Professional Conduct is much broader and prohibits the attorney from disclosing any information gained about the client without the client's consent, except under the specific circumstances provided in the rules.

B. Husband-Wife Privileges

In Texas, two privileges arising out of the marital relationship exist; many other states have similar husband-wife privileges. *See* Tex. R. Evid. 504; *see, e.g.,* Fla. Stat. Ann. § 90.504; Ky. R. Evid. 504; N.D. R. Evid. 504; Wis. Stat. Ann. § 905.05. First, a husband and wife have the privilege of refusing to disclose, and to prevent the disclosure of, confidential communications. Tex. R. Evid. 504(a). Second, spouses have the right to refuse to testify against each other in a criminal case. Tex. R. Evid. 504(b).

1. Confidential-Communications Privilege

Communications made privately between spouses during the marriage, which were not intended for disclosure to any third party, are protected from disclosure. Tex. R. Evid. 504(a). This spousal privilege belongs to the communicating spouse and may be asserted by that spouse or by the non-communicating spouse on behalf of the communicating spouse. Tex. R. Evid. 504(a)(3). The protection from disclosure of communications made during the marriage survives the divorce of the spouses or the death of the communicating spouse. Tex. R. Evid. 504(a)(2).

a) Communications Protected

The marital-communications privilege protects verbal and written communications. *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App.—Houston [1st Dist.] 1990, no writ). A spouse has no privilege to refuse to disclose the actions or conduct of the other spouse. *Id.* (citing *Pereira v. United States*, 347 U.S. 1, 6 (1954)). Communications between spouses in front of third parties are not protected. *Bear v. State*, 612 S.W.2d 931, 932 (Tex. Crim. App. 1981). It should be noted that, in civil cases, the confidential-communications privilege permits a spouse to refuse to testify regarding the contents of a confidential communication made between husband and wife during the marriage; however, it may not be asserted by a spouse to avoid being called by the opposing party as a witness. Tex. R. Evid. 504; *see also Marshall v. Ryder Sys., Inc.*, 928 S.W.2d 190, 195 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("Only in criminal cases is there a broad, general privilege protecting a person from being a witness against his or her spouse.").

b) Exceptions to the Husband Wife Confidential Communications Privilege.

The exceptions to the husband-wife communications privilege are located in Rule 504(a)(4). Of particular relevance to the family law practitioner are the exceptions permitting disclosure of confidential marital communications in proceedings between spouses in civil cases and in proceedings in which a spouse is accused of committing a crime against the other spouse, any minor child, or a member of either spouse's household. Tex. R. Evid. 504(a)(4)(B), (C). Certainly, such exceptions substantially eliminate the husband-wife confidential communications privilege in family law matters, and in fact, noted practitioners have commented that the confidential communications privilege has no application in the area of family law. *See* Warren Cole, Sally H.

Emerson, and Linda B. Thomas, "Evidence: Predicates, Presumptions, and Privileges" p. S-33, Advanced Family Law Course 1996. Statements between spouses relating to the present dispute between them are an additional exception to the husband-wife confidential communications privilege. In *Earthman's Inc. v. Earthman*, the Houston First Court of Appeals held that the admission of evidence as to communications between spouses, made prior to the parties' divorce, was permissible to the extent that the communications related to the controversy that gave rise to the lawsuit between them. 526 S.W.2d 192, 206 (Tex. App.—Houston [1st Dist.] 1975, no writ).

2. Privilege not to Testify in Criminal Proceedings against Spouse

The spouse of the accused in a criminal proceeding has a right to refuse to testify as a witness for the state. Tex. R. Evid. 504(b)(1). The privilege belongs to the spouse of the accused only and may not be asserted by the accused to prevent the other spouse from acting as a witness. Tex. R. Evid. 504(b)(3). The spouse of the accused may not refuse to testify in proceedings in which the accused is charged with a crime against that spouse, against any minor, or against a member of either spouse's household. Tex. R. Evid. 504(b)(4)(A); *Huddleston v. State*, 997 S.W.2d 319, 320–21 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that the husband-wife privilege did not apply to prevent defendant's spouse from testifying in prosecution for sexual assault and kidnapping of a minor who was unrelated to the husband and the wife).

C. Communications to Members of the Clergy

1. Clergy Privilege is Broad in Scope

Every state has enacted some form of clergy privilege. *See* Christine P. Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. 1015, 1020 n.21 (2017) (collecting statutes). Review your state's statute or rule to determine how broad the privilege is. The clergy privilege in Texas is quite broad in scope. Rule 505 provides no exceptions to the clergy privilege. Tex. R. Evid. 505. The privilege protects confidential communications made to a member of the clergy who is acting in his capacity as a "spiritual advisor." *Id.* Communications made to a member of the clergy acting in a capacity other than spiritual advisor, such as administrator, are not privileged. *Kos v. State*, 15 S.W.3d 633, 639 n.4 (Tex. App.—Dallas 2000, pet. ref'd). The privilege is not limited only to penitent communications, however. *Easley v. State*, 837 S.W.2d 854, 856 (Tex.

App.—Austin 1992, no writ). If communications to a member of the clergy are made with a reasonable expectation of confidentiality, the privilege will apply, even if the statements were made in the presence of third parties. *Nicholson v. Wiitig*, 832 S.W.2d 681, 685 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding); *cf.* Cal. Evid. Code § 1032 (". . . in the presence of no third person so far as the penitent is aware . . . ."). Even the identity of one who has communicated with a member of the clergy is privileged. *Simpson v. Tennant*, 871 S.W.2d 301, 308–09 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). The clergy privilege may be claimed by the person who communicated to the clergy, the communicant's guardian or conservator, or the clergy member on behalf of the communicant. Tex. R. Evid. 505(c).

2. Exception in Cases of Neglect or Abuse of Child

The Texas Rules of Evidence provide no exceptions to the clergy privilege, but Section 261.202 of the Texas Family Code states that privileged communications, except those between attorney and client, "may not be excluded" in a proceeding involving the abuse or neglect of a child. Tex. Fam. Code Ann. § 261.202; *Gonzalez v. State*, 45 S.W.3d 101, 107 (Tex. Crim. App. 2001). Additionally, as required by Section 261.101 of the Texas Family Code, members of the clergy have an affirmative duty to report any cause to believe that a child's welfare has been adversely affected by abuse or neglect. Tex. Fam. Code Ann. § 261.101; *Gonzalez*, 45 S.W.3d at 107 n.12.

Not every state, however, waives the privilege in cases of child abuse. Review your state's laws to determine whether the privilege remains in place. *See* Bartholomew, *Exorcising the Clergy Privilege*, 103 Va. L. Rev. at 1073–74 n.288 (twenty states make clergy mandatory reporters), n.289 (seventeen states require anyone who suspects child abuse to report), n.290 (states that deny privilege), n.291 (states that allow privilege despite reporting requirements).

3. Waiver of Privilege in Custody Cases

In a suit for conservatorship, where the character of the conservators is necessarily at issue, a spouse who communicated confidential information to a member of the clergy waives the privilege by calling the clergy member as a character witness. Tex. R. Evid. 511(a)(2). Therefore, on cross-examination of the clergy member

by the other spouse, confidential communications to the clergy member will not be protected from disclosure by the privilege. *Gonzalez*, 45 S.W.3d at 107.

D. Physician-Patient Privilege

In civil proceedings, unless an exception applies, confidential communications between a patient and physician, which are not intended to be disclosed to third persons who were not present or participating in the diagnosis and treatment, are privileged from disclosure. Tex. R. Evid. 509(a); *see also, e.g.*, Colo. Rev. Stat. Ann. § 13-19-107(d); Iowa Code Ann. § 622.10; Mich. Comp. Laws Ann. § 600.2157. The privilege serves to encourage full disclosure to facilitate the rendition of professional services by the physician and to prevent unnecessary disclosure of highly personal information. *Ex Parte Abell*, 613 S.W.2d 255, 262–63 (Tex. 1981). Texas courts, among others around the nation, have held that medical records also fall within the zone of privacy protected by the United States Constitution. *See, e.g.*, *In re Columbia Valley Reg'l Med. Ctr.*, 41 S.W.3d 797, 802–03 (Tex. App.—Corpus Christi 2001, orig. proceeding); *In re Xeller*, 6 S.W.3d 618, 625 (Tex. App.—Houston 1999, orig. proceeding). The physician-patient privilege does not exist under the Federal Rules of Evidence. *Perkins v. United States*, 877 F.Supp. 330, 332 (E.D. Tex. 1995); *see, generally*, Fed. R. Evid. 501. The physician-patient privilege is similar to the lawyer-client privilege to the extent that the determination of whether the communication is confidential is largely determined by the communicator's intent. Tex. R. Evid. 509(a)(3). The physician-patient privilege may be invoked by the patient, the patient's representative, or the patient's physician on behalf of the patient. Tex. R. Evid. 509(d). However, there are a number of exceptions to the physician-patient privilege, which are contained in Rule 509(e).

Practice Note: Read this privilege together with the hearsay exception of statements for the purpose of medical diagnosis or treatment. It is interesting to consider that the hearsay exception includes statements made to third parties in the hopes that they would assist with diagnosis or treatment, while the privilege does not.

1. Releases

One of the exceptions to the privilege, often relevant in family law proceedings, is the waiver or release of confidential information by the written consent of the patient or representative of the patient. Tex. R. Evid.

509(f).

The consent must be in writing and signed by the patient, or representative of the patient, and must be drafted to specify the information or records to be covered by the release, the purpose for the release, and the person to whom the information is to be released. Tex. R. Evid. 509(f)(1)–(2). There is no requirement that the release cover all the information or records in the physician's file. *See, generally*, Tex. R. Evid. 509. The release should be narrowly drawn to permit release of only the relevant information. The exceptions to the medical and mental health privileges apply when the pleadings sufficiently show (1) the records sought to be discovered are relevant to the condition in issue and (2) the condition is relied upon as part of a party's claim or defense. Tex R. Evid. 509(e)(4), 510(d)(5); *R.K. v. Ramirez*, 887 S.W.2d 836, 842–43 (Tex. 1994) (orig. proceeding).

2. Patient-Litigant Exception

The court in *R.K.* discusses the exception to the physician-patient privilege when the condition is part of a claim or defense: "The patient-litigant exception to the privileges applies when a party's condition relates in a significant way to a party's claim or defense." *R.K.*, 887 S.W.2d at 842–43 (citing Tex. R. Evid. 509(d)(4)); *see also, e.g.*, La. Code Evid. art. 510(B)(2)(d); Utah R. Evid 506(d)(1). Patient-litigant communications and patient records should not be subject to discovery if the patient's condition is simply an evidentiary, intermediary, or tangential issue of fact, rather than an "ultimate" or "central" issue for a claim or defense. *R.K.*, 887 S.W.2d at 842. "The scope of the exception should be tied in a meaningful way to the legal consequences of the claim or defense. This is accomplished . . . by requiring that the patient's condition, to be a 'part' of a claim or defense, must itself be a fact to which the substantive law assigns significance." *Id.* The court provided the example of alleging a testator to be incompetent, which would be an allegation of a mental "condition," and incompetence, if found, is a factual determination to which legal consequences attach, i.e. the testator's will is no longer valid. *Id.* at 842–43. "This approach is consistent with the language of the patient- litigant exception because a party cannot truly be said to 'rely' upon a patient's condition, as a legal matter, unless some consequence flows from the existence or non-existence of the condition." *Id.* at 843.

If the trial court, after reviewing documents submitted in camera, finds that this first step is satisfied, it

must ensure that the production of documents, if any, is no broader than necessary by considering the competing interests at stake. *Id.* The exception only allows for the discovery of records "relevant to an issue of the . . . condition of a patient." *Id.* Therefore, even though a condition may be part of a claim or defense, patient records should only be disclosed to the extent necessary for relevant evidence relating to the condition alleged. *Id.* Thus, courts that review claims of privilege and inspect records in camera should confirm that both the request for records and the records themselves are closely related in time and scope to the claims made to avoid unnecessary intrusions into private matters. *Id.* "Even when a document includes some information meeting this standard, any information not meeting this standard remains privileged and must be redacted or otherwise protected." *Id.*

This approach has several advantages: most importantly, some protection of a patient's privacy interest will remain intact. *Id.* Access to the medical and mental health information will be disclosed only if the patient's condition itself is a fact issue with legal significance and only to the extent necessary to satisfy the discovery needs of the requesting party. *Id.*

"To summarize, the exceptions to the medical and mental health privileges apply when (1) the records sought to be discovered are relevant to the condition at issue, and (2) the condition is relied upon as a part of a party's claim or defense, meaning that the condition itself is a fact that carries some legal significance. Both parts of the test must be met before the exception will apply. Even then, when requested, the trial court must perform an in-camera inspection of the documents produced to assure that the proper balancing of interests . . . occurs before production is ordered." *Id.*

3. HIPAA

The court in *Collins* discusses the impact of federal HIPAA legislation on the use of medical records at trial: "Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. The development of national standards for electronic medical records management was central to the goal of simplification. Envisioning increasing privacy concerns associated with the move toward electronic record-keeping, Congress simultaneously authorized the secretary of the United States Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical

records. The privacy rules HHS enacted strike a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. The privacy rules prohibit the disclosure of protected health information except in specified circumstances. A person who discloses protected health information in violation of the privacy rule is subject to a fine of up to $50,000, and imprisonment of no more than a year, or both. Health information means any information, whether oral or recorded in any form or medium. With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules. A requirement is contrary if it would be impossible for a covered entity to comply with both the state law requirement and the HIPAA privacy rules, or if the requirement would undermine HIPAA's purposes.

"While the rules strongly favor the protection of individual health information, they permit disclosure of health information in a number of circumstances. In a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. A health care provider receives satisfactory assurances when the requestor provides a written statement and documentation demonstrating that the requestor has made a good faith attempt to notify the subject of the request, and the subject has been given an opportunity to object. Alternatively, the requestor may provide satisfactory assurances that reasonable efforts have been made to obtain a qualified protective order limiting the use of the information to the legal proceeding and providing for its return or destruction. Finally, health care information may be disclosed if the patient has executed a valid written authorization. Any disclosure the health care provider makes in reliance on a written authorization must be consistent with its terms." *In re Collins*, 286 S.W.3d 911, 917–18 (Tex. 2009) (orig. proceeding) (internal citations and quotations omitted).

HIPAA does not provide for a private right of action. Any violations may be reported to HHS, which is the only party authorized to investigate and penalize violations.

E. Privilege Relating to Mental-Health Information

Any communication or records between a patient and a professional relating to the identity, diagnosis, evaluation, or treatment of a patient's mental and emotional condition or disorder is privileged and exempt from disclosure in civil proceedings. Tex. R. Evid. 510(a)–(b); *see also, e.g.*, Ga. Code Ann. § 24-5-501(a)(5), (6); 740 Ill. Comp. Stat. Ann. § 110/3; 50 Pa. Stat. Ann. § 7111. The purpose behind such a rule is to encourage "the full communication necessary for effective treatment." *R.K.*, 887 S.W.2d at 840. The Supreme Court of the United States held that the mental health privilege is necessary in order to ensure effective psychotherapy, which "depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffee v. Redmond*, 518 U.S. 1, 10 (1996).

1. SAPCR

The comment to the current Rule 510 of the Texas Rules of Evidence points out that the omission of the specific exception to the mental-health privilege from the rule does not eliminate the application of the mental-health privilege in a SAPCR case. Tex. R. Evid. 510 cmt. to 1998 change. Rather, the comment notes that the applicability of the mental-health privilege is determined under Rule 510(d)(5), which provides an exception to the privilege when a party relies upon the condition of the patient's mental health as part of the party's claim or defense, and under the requirements set forth by the Texas Supreme Court in *R.K. v. Ramirez*. *Id.*; *see R.K.*, 887 S.W.2d at 842–43. In *R.K.*, the Supreme Court of Texas held that mental-health information of a party to a suit affecting the parent-child relationship is not protected by privilege if the fact finder must make a factual determination concerning the condition itself. *R.K.*, 887 S.W.2d at 843; *cf.* Fla. Stat. Ann. § 90.503(4)(c); 740 Ill. Comp. Stat. Ann. § 110/10; Utah R. Evid. 506(d)(1)(A). The court explained, however, that the exception to the mental-health privilege is not without limits and held that, in applying the exception, the court must balance the need for the information with the privacy interests protected by the privilege. *R.K.*, 887 S.W.2d at 843. A more recent case, *Garza*, has applied *R.K.* as follows: "Generally, the diagnosis of a patient by a physician and the communications between a patient and physician are privileged. Likewise, with regard to a person's mental health, the diagnosis of the patient and communications between the patient and a mental-health professional are privileged. However, these privileges are not absolute. An exception to both privileges applies to a

communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any party relies upon the condition as a part of the party's claim or defense." *Garza v. Garza*, 217 S.W.3d 538, 554–55 (Tex. App.—San Antonio 2006, no pet.). In *Garza*, the mother's medical condition relating to her personality and bipolar disorders was relevant to the issue of whether appointing her as sole managing conservator was in her children's best interests. *Id.* at 555. Both parties' medical and mental conditions were relevant to the determination of which party should be named as the conservator. *Id.* No abuse of discretion occurred when the trial court allowed that information into evidence, especially where the trial court did not allow all of mother's medical and mental-health records in evidence, but instead took care to exclude references that predated the marriage. *Id.*

2. Court-Ordered Evaluations

Under Rule 510(d)(4), communications regarding a patient's mental or emotional health to a mental-health professional appointed by the court to perform an examination are not privileged as long as the patient had been previously informed that the communications would not be privileged. *Subia v. Tex. Dep't of Human Servs.*, 750 S.W.2d 827, 830 (Tex. App.—El Paso 1988, no writ), *disapproved of on other grounds by In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002), (trial court erred in admitting testimony of court-appointed psychologist when neither the court nor the psychologist informed the mother that the communications between the mother and the psychologist would not be privileged).

3. Disclosure of Child's Mental-Health Records to Parent

Although the Supreme Court of Texas did not directly address the issue of the assertion of the mental-health privilege in *Abrams v. Jones*, that case deserves discussion due to its support for protecting the mental-health records of a minor from disclosure. 35 S.W.3d 620 (Tex. 2000). In *Abrams*, when the father-joint-managing conservator was denied access to the notes taken by the daughter's psychologist during therapy sessions, he filed suit against the psychologist seeking to compel the release of the psychologist's notes. *Id.* at 623. The father, who had been granted a right of access to the psychological records under the parties divorce decree in accordance with Section 153.073 of the Texas Family Code, alleged that such a right granted him a

greater right of access to mental health records than parents generally have under Chapter 611 of the Texas Health and Safety Code. *Id.* at 624. Specifically, the father argued that the right of access to mental health records under Section 153.073(a)(3), granted to him in the parties' divorce decree, permitted him access to all the child's psychological records at all times. *Id.* The Supreme Court of Texas held that the right of access to psychological records of the child under Section 153.073(a)(3) provides no greater right of access than is granted to parents who are not divorced and that Section 153.073 merely ensures that the right of access of divorced parents appointed as managing conservators is the same as that of non-divorced parents. *Id.* Accordingly, the court held that the determination of whether the records should be ordered to be released is governed by Chapter 611 of the Texas Health and Safety Code. *Id.* The court held that the applicable sections of Chapter 611 of the Texas Health and Safety Code do not provide parents unrestricted access to mental health records of their children. *Id.* at 626. The court recognized that the purpose behind Chapter 611 is to "closely guard a patient's communications with a mental-health professional." *Id.* (quoting *Thapar v. Zezulka*, 994 S.W.2d 635, 638 (Tex. 1999)). Furthermore, although many times it is necessary for a parent to have access to the child's records, unrestrained access to all the child's mental-health records would act as an obstacle to full disclosure by the patient, thereby preventing the goals of therapy from being met. *Id.* In its analysis, the court discussed the protections afforded to both the child and the parent under Chapter 611 and specifically addressed the fact that the rights of the parent are protected by Chapter 611 of the Texas Health and Safety Code by providing recourse to a parent who is denied access to his child's mental health records. *Id.*; Tex. Health & Safety Code Ann. §§ 611.0045(e), 611.005(a). Obviously, this holding may have a significant impact upon the family law practitioner's ability to obtain access to the psychological records of children the subject of a lawsuit. Although your state may not have similar statutes in place regarding mental health records or a parent's right to a child's mental health records, the *Abrams* case provides a useful overview of the importance of protecting mental-health records and balancing a parent's right to access, which you can use as a sword or a shield in your particular situation.

4. Alcohol and Drug Rehabilitation Records

Federal regulations provide that records of alcohol and drug rehabilitation treatment are confidential. *See*

42 C.F.R. Part 2, Confidentiality of Alcohol and Drug Abuse Patient Records; *see also In re K.C.P.*, 142 S.W.3d 574, 582 (Tex. App.—Texarkana 2004, no pet.). The regulations, however, apply to information held by a treatment center, so discovery directed at a patient may still be effective. Section 2.64 of Title 42 of the Code of Federal Regulations requires confidentiality of records of facilities that are "federally assisted," meaning that they are "being carried out under a license, certification, registration, or other authorization granted by any department or agency of the United States." 42 C.F.R. §§ 2.12(a)(ii), (b)(2), 2.64(a). Applicable records may be disclosed if requested with an opportunity for the patient to respond and after a hearing and determination that (1) other ways of obtaining the information are not available or would not be effective, and (2) the public interest and need for disclosure outweigh the potential injury to the patient, the physician-patient relationship, and the treatment services. 42 C.F.R. § 2.64(a), (b), (c), (d). The order disclosing the records must provide for their protection from unnecessary disclosure. 42 C.F.R. § 2.64(e). Furthermore, Section 2.63 authorizes disclosure of patient statements if it is "necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse or neglect." 42 C.F.R. § 2.63(a)(1).

F. Privilege against Self Incrimination in Civil Cases

The *Speer* case gives an excellent summary of the application of the privilege against self-incrimination in civil cases. *In re Speer*, 965 S.W.2d 41, 45–47 (Tex. App.—Fort Worth 1998, orig. proceeding).

1. The Rule

"Both the United States Constitution and the Texas Constitution guarantee an accused the right not to be compelled to testify or give evidence against himself. A party does not lose this fundamental constitutional right in a civil suit. Thus, the privilege against self-incrimination may be asserted in civil cases wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 45 (internal citations and quotations omitted). Because the United States Constitution protects a witness, the witness should answer each question accordingly: "On the advice of counsel, I decline to answer the question pursuant to the Fifth Amendment of the United States Constitution." If your state's constitution contains a similar privilege against self-incrimination, then your client should also include that provision as part of the answer. A party or witness retains his privilege

against self-incrimination and has the right to assert the privilege to avoid civil discovery if he reasonably fears the answers would tend to incriminate him. *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *Ex parte Butler*, 522 S.W.2d 196, 197–98 (Tex. 1975). However, the privilege covers only statements or information that may lead to criminal prosecution; information which may lead to civil liability is not protected. *Butler*, 522 S.W.2d at 198. Non-compelled testimonial communications are not protected by the privilege. *Wielgosz v. Millard*, 679 S.W.2d 163, 166–67 (Tex. App.—Houston [14th Dist.] 1984, no writ). One invoking the privilege need not show that the disclosure of the information sought to be protected alone will support conviction. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Rather, if the potentially- incriminating information or documents would provide a link to the incrimination of the one claiming the privilege, the Fifth Amendment privilege will protect the information from disclosure. *Id.*; *see also People v. Houar*, 850 N.E.2d 327, 333–34 (Ill. App. 2006); *DeSiena v. DeSiena*, 91 N.Y.S.3d 175, 177 (N.Y. Sup. 2018); *U.S. Steel & Carnegie Pension Fund v. Decatur*, 528 A.2d 165, 166–67 (Penn. 1987). Further, there is no requirement that any criminal charges be pending if the threat or hazard of criminal prosecution is "real and appreciable" if the potentially incriminating evidence were disclosed. *State v. Boyd*, 2 S.W.3d 752, 755 (Tex. App.—Houston [14th Dist.] 1999), *rev'd on other grounds*, 38 S.W.3d 155 (Tex. Crim. App. 2001); *accord United States v. Doe*, 465 U.S. 605, 614 n.13 (1984); *Hoffman*, 341 U.S. at 486. If the individual asserting the privilege has been granted immunity from, acquitted of, or pardoned of the criminal conduct at issue, the state may compel testimony in a civil proceeding. *In re Verbois*, 10 S.W.3d 825, 829 (Tex. App.—Waco 2000, orig. proceeding). If the party continues to assert the privilege, however, that silence does not preclude an adverse inference, and ruling based on that inference, in a civil proceeding. *Id.* But it is important to note that if the acquittal, immunity, or pardon granted is not complete, or if possible liability exists for a related crime, the privilege will still apply. *Kastigar v. United States*, 406 U.S. 441, 448–49 (1972). The privilege against self-incrimination provides the right of testimonial silence. U.S. Const. amend. V. In a civil case, however, it does not allow a witness to refuse to be called as a witness. *Butler*, 522 S.W.2d at 197–98.

2. The Test

In a civil suit, the witness's decision to invoke the privilege against self-incrimination is not absolute. Instead, the trial court is entitled to determine whether assertion of the privilege appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. *Id.* at 198. The court's inquiry is necessarily limited, though, because the witness need only show that a response is likely to be hazardous to him. *Id.* The witness cannot be required to disclose the very information that the privilege protects. *Id.* Before the trial court may compel the witness to answer, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate." *Id.* (quoting *Hoffman*, 341 U.S. at 487).

Thus, the court must study each question for which the privilege is claimed and forecast whether an answer to the question could tend to incriminate the witness in a crime. *Warford v. Beard*, 653 S.W.2d 908, 911 (Tex. App.—Amarillo 1983, no writ). Some cases have apparent ramifications from answering; others, though, are not so apparent. *Id.* The latter situation presents a difficult problem because the witness must reveal enough to demonstrate danger without revealing the very information he or she seeks to conceal. *Id.* After the witness has given the reasons for refusing to answer, the judge must then evaluate those reasons by the high standard of review stated previously. *Id.* It is the trial court's duty to consider the witness's evidence and argument on each individual question and determine whether the privilege against self-incrimination is meritorious. *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.] 1988, no writ).

3. Assertion and Waiver

The privilege is applied differently in civil and criminal cases. When a criminal defendant voluntarily testifies on his own behalf, he is subject to the same rules of cross-examination as any other witness. In that situation, if a criminal defendant voluntarily states a part of the testimony, he waives his right against self-incrimination and cannot afterwards assert the privilege to suppress other testimony, even if that testimony would incriminate him.

The same reasoning does not apply in civil cases. Because of the difference between the civil and criminal context, the Supreme Court of the United States allows juries in civil cases to make negative inferences based

upon the assertion of the privilege. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). And as previously discussed, the civil witness, unlike the defendant in a criminal case, is not the exclusive arbiter of his right to exercise the privilege. *Warford*, 653 S.W.2d at 911. Furthermore, the assertion of the privilege against self-incrimination must be raised in response to each specific inquiry or it is waived. *Tex. Dep't of Pub. Safety v. Sanchez*, 82 S.W.3d 506, 513 (Tex. App.—San Antonio 2002, no pet.). Each assertion of the privilege rests on its own circumstances and blanket assertions of the privilege are not allowed. *Id.* Thus, a civil defendant can be forced to choose between asserting his privilege against self-incrimination or losing his civil suit. *See Gebhardt v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App.—San Antonio 1995, orig. proceeding).

4. Pretrial Privilege

Because the privilege against self-incrimination must be asserted selectively in civil litigation, it follows that selective assertion of the privilege does not result in waiver. *Id.* For example, filing a verified denial does not constitute waiver of a civil defendant's right to subsequently assert the privilege against self-incrimination in response to interrogatories. *Burton*, 749 S.W.2d at 508. Answering all deposition questions but one does not constitute waiver of a civil defendant's right to assert the privilege. *Butler*, 522 S.W.2d at 198–99. Likewise, answering some interrogatories does not result in waiver of the right to assert the privilege against self-incrimination in response to other interrogatories. *Speer*, 965 S.W.2d at 46. The privilege must be asserted prior to or at the time the response is due per the rules of discovery. *See, e.g.*, Tex. R. Civ. P. 193.3, 196.2, 197.2. Denying requests for admissions also does not result in waiver of the privilege against self- incrimination. *See, e.g.*, Tex. R. Civ. P. 198.2. Some states do not allow a party to assert the privilege in refusing to answer requests for admissions. *See, e.g.*, *Katin v. City of Lubbock*, 655 S.W.2d 360, 363 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (citing to previous version of current TRCP 198.3). While others allow the factfinder to make a negative inference on the refusal to answer the admissions. *See, e.g.*, *Wilson v. Misko*, 508 N.W.2d 238, 253 (Neb. 1993).

5. Document Production

The privilege against self-incrimination also applies to documentary evidence: "The seizure of a man's private books and papers to be used in evidence against him is not substantially different from compelling him to

be a witness against himself." *Warford*, 653 S.W.2d at 908 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)) (internal quotations omitted). However, in order to be privileged, the incriminating documents must have a strong personal connection to the witness, i.e., documents "which he himself wrote or which were written under his immediate supervision." *Id.* at 912. It follows then that documents that belong to or were prepared by others are not protected, even if they contain incriminating matters. *Id.* The court may order the disputed documents to be produced in camera for an inspection. *Speer*, 965 S.W.2d at 47.

G. Trade Secret Privilege

The court in *Cooper Tire* discusses the trade-secret privilege in depth: "A trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it. Rule 507 of the Texas Rules of Evidence provides for the protection of trade secrets: A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

"The trade secret privilege seeks to accommodate two competing interests. First, it recognizes that trade secrets are an important property interest, worthy of protection. Second, it recognizes the importance placed on fair adjudication of lawsuits. Rule 507 accommodates both interests by requiring a party to disclose a trade secret only if necessary to prevent fraud or injustice. Disclosure is required only if necessary for a fair adjudication of the requesting party's claims or defenses.

"The party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. If the resisting party meets its burden, the burden shifts to the party seeking the trade secret discovery to establish that the information is necessary for a fair adjudication of its claim. It is an abuse of discretion for the trial court to order production once trade secret status is proven if the party seeking production has not shown necessity for the requested materials.

"To determine whether a trade secret exists, the following six factors are weighed in the context of the surrounding circumstances: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and to its competitors; (5) the amount of effort or money expended in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

"The party claiming a trade secret is not required to satisfy all six factors because trade secrets do not fit neatly into each factor every time.

"The Texas Supreme Court has not stated conclusively what would or would not be considered necessary for a fair adjudication; instead, the application depends on the circumstances presented. The degree to which information is necessary depends on the nature of the information and the context of the case. However, . . . the test cannot be satisfied merely by general assertions of unfairness. Just as a party who claims the trade secret privilege cannot do so generally but must provide detailed information in support of the claim, so a party seeking such information cannot merely assert unfairness but must demonstrate with specificity exactly how the lack of the information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat." *In re Cooper Tire & Rubber Co.*, 313 S.W.3d 910, 914–15 (Tex. App.—Houston [14th Dist.] 2010, orig. proceeding) (internal citations and quotations omitted); *cf. Bridgestone/Firestone, Inc. v. Superior Court*, 9 Cal. Rptr. 4th 1384, 1390–93 (Cal. App. 1992); *Bright House Networks, LLC v. Cassidy*, 129 So. 501, 505–06 (Fla. App. 2014); *Pincheira v. Allstate Ins. Co.*, 164 P.3d 982, 991 (N.M. App. 2007).

H. Waiver of Privileges

Once a privilege is waived, it is waived "for all times and all purposes." *Lucas v. Wright*, 370 S.W.2d 924, 927 (Tex. App.—Beaumont 1963, no writ). If confidential information is disclosed inadvertently, the party asserting the privilege has the burden of proving that no waiver occurred. *Giffin v. Smith*, 688 S.W.2d 112, 114 (Tex. 1985) (orig. proceeding).

1. Disclosure to Third Parties

An individual seeking to avoid disclosure based upon the assertion of a privilege waives such privilege if he or she voluntarily discloses or consents to the disclosure of the privileged information. Tex. R. Evid. 511(a)(1); *see also, e.g.*, Wis. Stat. Ann. § 905.11; *Lanari v. People*, 827 P.2d 495, 499 (Colo. 1992) (en banc).

2. Waiver by Calling Witness for Character Testimony

When a party to a suit calls as a character witness a person to whom privileged communications have been made, any privileges arising from the communications relevant to the character of the party are waived. Tex. R. Evid. 511(a)(2); *see also Beckette v. State*, 355 A.2d 515, 521 (Md. Ct. Spec. App. 1976). For example, the communications to clergy privilege is waived if the party who made confidential communications to a member of the clergy calls the clergy-member as a character witness at trial. *Gonzalez*, 45 S.W.3d at 107.

3. Privileged Matter Disclosed Under Compulsion or Without Opportunity to Claim Privilege

One does not waive his or her claim of privilege by providing disclosure of information or documents under order of the court compelling such disclosure. Tex. R. Evid. 512(a). Additionally, a privilege is not waived by disclosure if the disclosure was made without opportunity to claim the privilege. Tex. R. Evid. 512(b).

4. Offensive Use of Privilege Waives Privilege

A party seeking affirmative relief from the court cannot use a privilege to conceal information that forms the basis of that party's request for relief. *Denton*, 897 S.W.2d at 761; *Ginsberg v. Fifth Court of Appeals*, 686 S.W.2d 105, 107–08 (Tex. 1985) (orig. proceeding). In *Ginsberg*, the Texas Supreme Court held that an offensive use of privilege is impermissible and explained that when a party asserts a claim for affirmative relief, that party cannot restrict access, by the assertion of privilege, to information that would otherwise be pertinent and relevant to that party's ability to maintain the cause of action. *Ginsberg*, 686 S.W.2d at 108. The Court further reasoned that although a party may have an absolute right to assert a privilege, that party may be forced to choose between maintaining the assertion of privilege or maintaining his cause of action. *Id.* at 107.

VI. FRE Article VI. Witnesses

A. Competency

Generally, every person is competent to testify, unless the rules provide otherwise. *See, e.g.*, Fed. R. Evid. 601; Del. R. Evid. 601; Tex. R. Evid. 601 (also defining who is incompetent). This includes children that possess sufficient intellect to truthfully relate transactions with respect to which they are questioned. *See, e.g.*, Tex. R. Evid. 601(a)(2); *State v. Buesco*, 137 A.3d 516, 527 (N.J. 2016); *Tamblyn v. State*, 465 P.3d 440, 450 (Wyo. 2020)

Practice Note: Rule 601 creates a presumption of competence, so if a child or other person who may not have sufficient intellect testifies, it is the burden of the party opposing that witness to show the court that the witness is incompetent, and a finding that a person has sufficient intellect is reviewed for an abuse of discretion. *Hollinger v. State*, 911 S.W.2d 35, 38–39 (Tex. App.—Tyler 1995, pet. ref'd).

B. Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Tex. R. Evid. 602. If the witness is not testifying as an expert, discussed further below in the section on experts, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences that are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. Tex. R. Evid. 701.

C. Mode and Order of Interrogation/Presentation

The court has wide discretion in controlling the ebb and flow of questioning and is charged with exercising reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. Tex. R. Evid. 611(a).

D. Leading Questions

Leading questions are ordinarily permissible on cross and, to the extent necessary to develop the witness's testimony, also on direct examination. Tex. R. Evid. 611(c). When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. *Id.* This Rule has not changed the long-standing proposition that the trial court has discretion to allow leading questions and that no

abuse of discretion exists unless the objecting party can show that he or she was unduly prejudiced by the questions. *Newsome v. State*, 829 S.W.2d 260, 270 (Tex. App.—Dallas 1992, no pet.).

The exceptions to the rule against leading include:

1. When the questions relate to acts not controverted, "or where the point sought to be established is already proven and in these questions the established facts may be recapitulated";

2. When the witness is hostile and unwilling to give the evidence;

3. To refresh the witness's memory when the purpose of justice requires it;

4. To arrive at facts when modesty or delicacy prevents a full answer to a general interrogatory;

5. When the witness is confused or agitated;

6. When questioning an individual who is slow in understanding, has a limited vocabulary, or is ignorant;

7. When the witness is a child; and

8. When the witness has given an ambiguous answer, and a leading question may clarify the attested to facts or circumstances. *Carter v. State*, 127 S.W. 215, 217 (Tex. Crim. App. 1910); *accord Holbert v. State*, 457 S.W.2d 286, 289 (Tex. Crim. App. 1970) ("It is within the sound discretion of the trial court to permit the counsel for the state on direct examination to ask leading questions to a hostile witness or to refresh a witness's memory."); *Davis v. State*, 272 S.W. 480, 482 (Tex. Crim. App. 1925) (explaining that leading questions admissible "where persons are hard of hearing, or deaf, or illiterate or stupid; they are also admissible where the witness' vocabulary is limited"); *Bishop v. State*, 160 S.W. 705, 706 (Tex. Crim. App. 1913) ("witness was unlettered and unable to understand and was a reluctant witness"); *Clark v. State*, 952 S.W.2d 882, 886 (Tex. App.—Beaumont 1997, no pet.) (leading questions permitted for "troubled young girl" who had been in state custody for over two years); *Trevino v. State*, 783 S.W.2d 731, 733 (Tex. App.—San Antonio 1989, no pet.) (leading questions allowed where victim was fifteen at the time of trial, attended special education classes, had difficulty communicating in English, and had difficulties with memory recall).

Under the Federal Rules of Evidence advisory committee notes, leading questions were broadened to include not only adverse parties but those associated with them, as well as hostile witnesses. Fed. R. Evid. 611(c),

advisory committee notes. Witnesses identified with an adverse party include:

1. an employee, *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984). (Leading questions should have been allowed because they were directed at a nurse who was an employee of the defendants/doctors.);

2. a past employee, *Stahl v. Sun Microsystems, Inc.*, 775 F.Supp. 1397 (D. Colo. 1991);

3. a paramour, *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984);

4. co-workers, *Ellis v. City of Chicago*, 667 F.2d 606 (7th Cir. 1981);

5. members of the same association, *N.L.R.B. v. Sw. Colo. Contractors Ass'n*, 379 F.2d 360 (10th Cir. 1967);

6. close friends, *United States v. Brown*, 603 F.2d 1022 (1st Cir. 1979); and

7. witnesses whose testimony changes during trial, *United States v. DeBose*, 410 F.2d 1273 (6th Cir. 1969). Texas follows this same rule. *Bryant v. State*, 282 S.W.3d 156, 169 (Tex. App.—Texarkana 2009, pet. ref'd) ("If the trial court faces a situation in which (1) a party has called a witness to testify, (2) that witness's testimony has surprised the sponsoring party, and (3) that testimony is otherwise injurious to the sponsoring party's cause, then the trial court has the discretion to permit the sponsoring party to treat the witness as hostile.").

E. Writing Used to Refresh Memory

If a witness's memory fails, a writing may be used to refresh the witness's memory. Tex. R. Evid. 612. There is often confusion about the difference between a recorded recollection under the hearsay exception of Rule 803(5) and a writing used to refresh memory under Rule 612. The court in *Welch* discusses the distinction: "A witness testifies from present recollection what he remembers presently about the facts in the case. When that present recollection fails, the witness may refresh his memory by reviewing a memorandum made when his memory was fresh. After reviewing the memorandum, the witness must testify either his memory is refreshed or his memory is not refreshed. If his memory is refreshed, the witness continues to testify and the memorandum is not received as evidence. However, if the witness states that his memory is not refreshed, but has identified the memorandum and guarantees the correctness, then the memorandum is admitted as past recollection recorded." *Welch v. State*, 576 S.W.2d 638, 641 (Tex. Crim. App. 1979); *accord Aquamarine Assocs. v. Burton Shipyard, Inc.*, 659 S.W.2d 820, 822 (Tex. 1983) (Robertson, J., dissenting). "Where the memorandum, statement or writing

is used to refresh the present recollection of the witness and it does, then the memorandum does not become part of the evidence, for *it is not the paper that is evidence*, but the recollection of the witness." *Wood v. State*, 511 S.W.2d 37, 43 (Tex. Crim. App. 1974) (emphasis added); *accord Aquamarine Assocs.*, 659 S.W.2d at 822.

However, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions that relate to the testimony of the witness. Tex. R. Evid. 612(b).

Practice Note: Use of an otherwise privileged writing to refresh a party's memory, while testifying, will constitute a waiver of that privilege. *City of Denison v. Grisham*, 716 S.W.2d 121, 123 (Tex. App.—Dallas 1986, orig. proceeding). Note, however, that in a civil case, when a witness reviews material before testifying, the trial court has the discretion to decide whether to grant the adverse party the "certain options" stated in subsection (b) "if . . . justice requires" it. Tex. R. Evid. 612.

F. The Rule - Exclusion of Witnesses from the Courtroom

"The Rule" refers to Federal Rule of Evidence 615 (or your state's equivalent); some rules of civil procedure also include this rule. *See, e.g.* Tex. R. Civ. P. 267(a). The *Drilex* case provides a discussion of the Rule: "Sequestration minimizes witnesses' tailoring their testimony in response to that of other witnesses and prevents collusion among witnesses testifying for the same side. The expediency of sequestration as a mechanism for preventing and detecting fabrication has been recognized for centuries. English courts incorporated sequestration long ago, and the practice came to the United States as part of our inheritance of the common law. Today, most jurisdictions have expressly provided for witness sequestration by statute or rule.

"In Texas, sequestration in civil litigation is governed by Texas Rule of Evidence 614 and Texas Rule of Civil Procedure 267. These rules provide that, at the request of any party, the witnesses on both sides shall be removed from the courtroom to some place where they cannot hear the testimony delivered by any other witness in the cause. Certain classes of prospective witnesses, however, are exempt from exclusion from the courtroom, including: (1) a party who is a natural person or his or her spouse; (2) an officer or employee of a party that is not a natural person and who is designated as its representative by its attorney; or (3) a person whose presence is

shown by a party to be essential to the presentation of the cause.

"When the Rule is invoked, all parties should request the court to exempt any prospective witnesses whose presence is essential to the presentation of the cause. The burden rests with the party seeking to exempt an expert witness from the Rule's exclusion requirement to establish that the witness's presence is essential. Witnesses found to be exempt by the trial court are not placed under the Rule.

"Once the Rule is invoked, all nonexempt witnesses must be placed under the Rule and excluded from the courtroom. Before being excluded, these witnesses must be sworn and admonished that they are not to converse with each other or with any other person about the case other than the attorneys in the case, except by permission of the court, and that they are not to read any report of or comment upon the testimony in the case while under the rule. Thus, witnesses under the Rule generally may not discuss the case with anyone other than the attorneys in the case.

"Witnesses exempt from exclusion under [the Rule] need not be sworn or admonished. . . . A violation of the Rule occurs when a nonexempt prospective witness remains in the courtroom during the testimony of another witness, or when a nonexempt prospective witness learns about another's trial testimony through discussions with persons other than the attorneys in the case or by reading reports or comments about the testimony. When the Rule is violated, the trial court may, taking into consideration all of the circumstances, allow the testimony of the potential witness, exclude the testimony, or hold the violator in contempt." *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 116–17 (Tex. 1999) (internal citations, quotations, and footnotes omitted).

G. Impeachment

Rule 607 permits the impeachment of any witness, including by the party calling the witness. Tex. R. Evid. 607. Prior inconsistent statements can impeach a witness, but some states hold that that evidence may not be considered for probative or substantive value. *Compare Willover v. State*, 70 S.W.3d 841, 846 n.8 (Tex. Crim. App. 2002) (explaining that prior inconsistent statements are hearsay and allowed for impeachment purposes only, unless an exception to the hearsay rule applies), *with State v. Copeland*, 300 S.E.2d 63, 69 (S.C. 1982) (relying on *Gibbons v. State*, 286 S.E.2d 717, 721 (Ga. 1982), and explaining that prior statements are closer in

time to event and, thus, more reliable). Prior inconsistent statements offered solely to impeach the witness's credibility, however, would not constitute hearsay because they are not offered for the truth of the matter asserted. *Del Carmen Hernandez v. State*, 273 S.W.3d 685, 688 (Tex. Crim. App. 2008).

The court in *Michael* gives an excellent summary of the means of impeachment: "There are five major forms of impeachment: two are specific, and three are nonspecific. The two specific forms of impeachment are impeachment by prior inconsistent statements . . . and impeachment by another witness. The three non-specific forms of impeachment are impeachment through bias or motive or interest, impeachment by highlighting testimonial defects, and impeachment by general credibility or lack of truthfulness. Specific impeachment is an attack on the accuracy of the specific testimony (i.e., the witness may normally be a truthteller, but she is wrong about X), while non-specific impeachment is an attack on the witness generally (the witness is a liar, therefore she is wrong about X)." *Michael v. State*, 235 S.W.3d 723, 725–26 (Tex. Crim. App. 2007).

1. Character for Truthfulness

Character evidence is raised under Rules 404–406, as explained above in the section on relevance. Similar rules also exist under Article VI that deal with impeachment.

a) Rehabilitation by Character Evidence

The court in *Michael* discusses when impeachment by a prior inconsistent statement permits rehabilitative evidence of character for truthfulness: "Impeaching a witness with a prior inconsistent statement is not necessarily an attack on credibility that would allow rehabilitative evidence of character for truthfulness under Rule of Evidence 608(a). Although rehabilitation may be permitted under 608(a), it is not automatic. . . .

"At the outset, every witness is assumed to have a truthful character. If that character is attacked, Rule 608(a) allows the presentation of evidence of that witness's good character. . . . When a witness's credibility has been attacked . . ., the sponsoring party may rehabilitate the witness only in direct response to the attack. The wall attacked at one point may not be fortified at another and distinct point. Generally, a witness's character for truthfulness may be rehabilitated with good character witnesses only when the witness's general character for truthfulness has been attacked.

"Impeachment by a prior inconsistent statement . . . is normally just an attack on the witness's accuracy, not his character for truthfulness. As Wigmore explained: The exposure of an error of a witness on one material point by his own self-contradictory statements is a recognized mode of impeachment. It serves as a basis for further inference that he is capable of having made errors on other points. This possibility of other errors, however, is not attributable to any specific defect; it may be supposed to arise from a defect of knowledge, of memory, of bias, or of interest, or, by possibility only, of moral character. Thus, though the error may conceivably be due to dishonest character, it is not necessarily, and not even probably, due to that cause.

"There are circumstances, however, where the cross-examiner's intent and method clearly demonstrate that he is not merely attacking the conflict in the witness's testimony between one or more specific facts, but mounting a wholesale attack on the general credibility of the witness. If the inconsistent statement is used to show that the witness is of dishonest character, then it follows that the opposing party should be allowed to rehabilitate this witness through testimony explaining that witness's character for truthfulness. Alternatively, if this testimony is used to show some other defect, then such evidence should not be allowed. . . .

"Prior to the adoption of the Texas Rules of Evidence, case law held that impeachment with prior inconsistent statements was an attack on credibility, allowing character evidence to rehabilitate a witness. In *O'Bryan v. State*, the defendant impeached a State's witness's testimony with his prior sworn testimony concerning dates, times, and descriptions of the defendant's clothing. In rebuttal the State presented evidence of the witness's reputation for truth and veracity. The Court likened impeachment by self-contradiction to an attack on a witness's 'veracity character,' and held that the testimony was permissible. The Court did not explain, however, why this form of impeachment necessarily impugned a witness's character for truthfulness.

"The Federal Rules of Evidence modified the common-law position held by some states, including Texas, that allowed rehabilitation evidence of truthful character when the witness was impeached by self-contradiction. Although the text of Federal Rule 608(a) does not make an explicit delineation between impeachment by self-contradiction and other forms of impeachment, the advisory committee notes state: Whether evidence in the form of contradiction is an attack upon the character of a witness must depend in part upon the circumstances. Texas

Rule 608(a) is identical to Federal Rule 608(a). . . .

"Some courts had held that rehabilitation should be permitted when the witness is subject to a slashing cross-examination. [However,] the question should not be whether the cross-examination is slashing but whether the overall tone and tenor of the cross-examination implied that the witness is a liar.

"It may be quite obvious that a witness's character for truthfulness has been attacked directly, as by a question such as, 'Were you lying then or are you lying now?' or another witness's testimony that the witness is a liar or is untruthful. When a party uses prior inconsistent statements to impeach someone, the cross-examiner's intent may not be as clear. . . . [T]here are several reasons why one's statements may be inconsistent, and most of them do not imply dishonest character.

"[T]he question . . . is whether a reasonable juror would believe that a witness's character for truthfulness has been attacked by cross-examination, evidence from other witnesses, or statements of counsel (e.g., during voir dire or opening statements)." *Michael*, 235 S.W.3d at 725, 726–28.

b) Impeachment by Evidence of a Criminal Conviction

A witness's character for truthfulness may also be attacked by introducing evidence of a conviction of a felony or crime of moral turpitude, if the probative value outweighs the prejudicial effect to a party, and it is elicited from the witness or established by a public record. Tex. R. Evid. 609(a); *see Smith v. State*, 439 S.W.3d 451, 457–58 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Crimes of moral turpitude involve a grave infringement of the moral sentiment of the community or show a moral indifference to the opinion of the good and respectable members of the community.") (internal citations and quotations omitted), *abrogated on other grounds*, *Meadows v. State*, 455 S.W.3d 166 (Tex. Crim. App. 2015). If the conviction or release from confinement for it is more than ten years old, the conviction is admissible for impeachment only if its probative value substantially outweighs its prejudicial effect. Tex. R. Evid. 609(b). No evidence of a conviction is admissible if that conviction has been pardoned, annulled, certified rehabilitated, or the equivalent, or if probation has been satisfactorily completed with no further convictions for a felony or crime of moral turpitude. Tex. R. Evid. 609(c). If an appeal is pending, jurisdictions conflict whether the conviction is admissible. *Compare* Mich.

R. Evid. 609(f) (conviction currently on appeal is inadmissible), *and* Tex. R. Evid. 609(e) (same), *and St. Clair v. Commonwealth*, 140 S.W.3d 510, 564 (Ky. 2004) (same), *with* Fed. R. Evid. 609(e) (conviction currently on appeal admissible, including pendency), Miss. R. Evid. 609(e) (same); N.C. R. Evid. 609(e) (same). Notice must be given of the intent to use the conviction. Tex. R. Evid. 609(f).

c) Religious Beliefs

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of their nature, the witness's credibility is impaired or enhanced. Tex. R. Evid. 610. This may not preclude, however, the questioning of the witness regarding church affiliation for purpose of establishing bias or prejudice. *See id.*

2. Prior Inconsistent Statement

In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and *before* further cross-examination concerning, or extrinsic evidence of such statement, may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. Tex. R. Evid. 613(a)(1), (3), (4), and cmt. to 2015 Restyling. If written, the writing need not be shown to the witness at that time, but on request, the same shall be shown to opposing counsel. Tex. R. Evid. 613(a)(2). If the witness unequivocally admits having made such statement, extrinsic evidence of the same shall not be admitted. Tex. R. Evid. 613(a)(4). This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2). Tex. R. Evid. 613(a)(5); *see* Tex. R. Evid. 801(e)(2). If a proper predicate is not laid, the inconsistent statement may be excluded and further cross-examination on the subject blocked. *Alvarez-Mason v. State*, 801 S.W.2d 592, 595 (Tex. App.—Corpus Christi 1990, no pet.).

H. In-Chambers Interviews of Children

A majority of jurisdictions around the country allow for in-chambers interviews of children and have at least some case law related to it. Judge Dean Rucker and Sally Pretorius have considered this issue in depth in their paper: Kids Say the Darndest Things—An Academic and Demonstrative Look at the In Chambers

Conference. State B. Tex., 41st Annual Advanced Family Law ch. 15 (2015). Several portions of their paper have been used herein and updated. The authors express their thanks for permission to use Judge Rucker's and Sally's paper. Each state will have their own procedure for requesting and conducting in-chambers interviews. The below focuses on Texas' procedure, although the strategy and ethical dilemmas could apply to most jurisdictions. *See also, e.g.,* Colo. Rev. Stat. Ann. § 14-10-126; Ind. Code Ann. § 31-17-2-9; Ky. Rev. Stat. § 403.290; Mo. Ann. Stat. § 452.385; Mont. Code Ann. § 40-4-214; N.D. R. Ct. 8.13.

1. Initial Determination

Section 153.009 of the Texas Family Code sets forth the procedure of requesting and conducting in-chambers interviews of children in Texas custody cases. Tex. Fam. Code Ann. § 153.009.

Before requesting an in-chambers interview, the practitioner must first consider what information the child will discuss with the judge and whether a jury will decide that issue. The court may request an in-chambers interview for any of the purposes identified in Section 153.009, discussed below. Tex. Fam. Code Ann. § 153.009(a). The interview may even occur after a child has testified in open court. *Fettig v. Fettig*, 619 S.W.2d 262, 268 (Tex. App.—Tyler 1981, no writ).

2. What Can Be Discussed?

In nonjury trials or hearings, a party, amicus, or attorney ad litem can request an in-chambers interview regarding the child's choice of who will have the exclusive right to determine the child's primary residence. *Id.* If the child is twelve years or older, the judge ***shall*** interview the child. *Id.* If the child is under twelve years, the judge ***may*** interview the child. *Id.* If the purpose is for the child to tell the judge his or her wishes regarding possession, access, or any other issue in the case, then the judge ***may*** interview the child, regardless of the child's age. *Id.* § 153.009(b). This interview does not diminish the judge's discretion in determining any of these issues based on the best interest of the child. *Id.* § 153.009(c).

In a jury trial, the judge may not interview the child in chambers regarding any issue that the jury will decide. *Id.* § 153.009(d). A party is entitled to a jury verdict in a custody case on:

1. the appointment of a sole managing conservator;

2. the appointment of joint managing conservators;

3. the appointment of a possessory conservator;

4. the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;

5. the determination of whether to impose a geographic restriction for the child's primary residence; and

6. if a geographic restriction is imposed, the determination of the geographic area within which the child's primary residence must be. *Id.* § 105.002(c)(1).

Accordingly, issues other than those listed above can be discussed in an in-chambers interview. *Id.* § 153.009(d). One court has held that asking the child what happens in each parents' home is allowable. *Turner v. Turner*, 47 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2001, no pet.). At least one court, however, has held that the interview should not be used to determine whether it is in the best interest of a child to testify. *Callicott v. Callicott*, 364 S.W.2d 455, 458 (Tex. App.—Houston 1963, writ ref'd n.r.e.) (relying on *Cline v. May*, 287 S.W.2d 226, 228 (Tex. App.—Amarillo 1956, no writ) (holding that trial court has no discretion to refuse to allow competent child to testify)).

A party is not entitled to a jury verdict on child support, terms or conditions of possession and access, or rights and duties other than determining the child's primary residence. *Id.* § 105.002(c)(2). Moreover, a party cannot even demand a jury trial regarding adoption or parental adjudication. *Id.* § 105.002(b).

3. Who Can Attend?

The trial court has discretion to allow an attorney for a party, the amicus attorney, the guardian ad litem for the child, or the attorney ad litem for the child to be present at the interview. *Id.* § 153.009(e). The court has discretion to refuse to interview a child (1) under the age of twelve regarding primary residence, or (2) of any age regarding any other issue. *In re Marriage of Stockett*, 570 S.W.2d 151, 153 (Tex. App.—Amarillo 1978, no writ).

4. Making a Record

If a child is twelve years or older, and a party, the amicus attorney, the attorney ad litem for the child, or the court requests that a record be made of the interview, the court shall cause that a record is made. *Id.* §

153.009(f). The record of the interview shall be part of the record in the case. *Id.* A trial court abuses its discretion by sealing the record and not allowing the parties access to it, contrary to statute. *Glud v. Glud*, 641 S.W.2d 688, 689–90 (Tex. App.—Waco 1982, no writ). The party's lack of access to the record denies that party the ability to present his case on appeal. *Id.*; *see* Tex. R. App. P. 44.1(a)(2). But any error is harmless if the party fails to request the record initially. *Wilkinson v. Evans*, 515 S.W.2d 734, 737 (Tex. App.—Dallas 1974, writ ref'd n.r.e.)

5. Waiving Error

If no one requests that a record be made or that anyone in particular attend the interview, any error for failing to make a record or that a particular person did not attend is waived. *In re S.E.K.*, 294 S.W.3d 926, 929 (Tex. App.—Dallas 2009, pet. denied); *Voros v. Turnage*, 856 S.W.2d 759, 763 (Tex. App.—Houston [1st Dist.] 1993, writ denied); *Fettig*, 619 S.W.2d at 268; *Kimery v. Blackstock*, 538 S.W.2d 503, 504 (Tex. App.—Waco 1976, no writ). Furthermore, the trial court has no duty to announce what portions of the interview it deemed relevant or important, such that counsel has the opportunity to rebut the child's testimony. *Fettig*, 619 S.W.2d at 268. These provisions do not relate to a fundamental right, so they are waivable. *Wilkinson*, 515 S.W.2d at 737.

Although the court may interview children after the close of evidence, *Fettig*, 619 S.W.2d at 268, a motion for new trial is too late to request such interview for the first time, *Hamilton v. Hamilton*, 592 S.W.2d 87, 87–88 (Tex. App.—Fort Worth 1979, no writ). Moreover, an oral suggestion that the court may want to interview the children does not qualify as an application under the statute, such that the interview is mandatory for children 12 and older regarding primary residence. *Hamilton*, 592 S.W.2d at 88.

6. Using the Interview as Evidence

What the child tells the judge is evidence that the judge may consider and that can support the judgment. *Long v. Long*, 144 S.W.3d 64, 69 (Tex. App.—El Paso 2004, no pet.); *Voros*, 856 S.W.2d at 763. Accordingly, if a judge refuses to interview a child under 12 regarding primary residence, or any child regarding any other matter, an offer of proof or bill of exception is required to show that the child is competent to testify and what the child would have told the judge. *O. v. P.*, 560 S.W.2d 122, 125 (Tex. App.—Fort Worth 1977, no writ).

If no record exists when an interview occurs, the reviewing court on appeal must presume facts existed

that support the trial court's judgment. *Ohendalski v. Ohendalski*, 203 S.W.3d 910, 916 (Tex. App.—Beaumont 2006, no pet.); *Long*, 144 S.W.3d at 69. The Supreme Court of Texas, however, has clarified this presumption and explained that it only applies when the interview is required—i.e., when the child is 12 or older and tells the judge his or her wishes regarding primary residence. *Forbes v. Wettman*, 598 S.W.2d 231, 232 (Tex. 1980) (orig. proceeding). In *Forbes*, an order gave father possession of the children, but mother refused to return the children to father. *Id.* Father filed a petition for writ of habeas corpus, wherein the trial court interviewed the children, who were under 12, but did not make a record. *Id.* The trial court refused the habeas corpus, and mother argued that the record was incomplete, so the court had to presume the facts from the missing portion supported the trial court's judgment. *Id.* The supreme court disagreed and held that, because the interview was not mandatory, the record was not incomplete, such that the presumption existed. *Id.*

7. Effect on the Child

The attorney, and probably more-so the parent, needs to consider the effect that an in-chambers interview will have on the child. Experts have posited both the positive and negative effects an interview may have.

a) The Positive

One positive effect is the ability to empower the child by giving the child a voice in his or her future. In her article, *The Child's Voice*, Justice Debra H. Lehrmann cites to research by Judith Wallerstein in *The Unexpected Legacy of Divorce*, wherein she sets forth:

"[C]hildren feel distress over visitation schedules that keep them from having input as to how they spend their free time. . . . Involving the child in the process of developing an access schedule and parenting plan may give the child a sense of empowerment over his or her life. Although involving the children in this way will not give them more control over their schedules on a day-to-day basis, it may make adherence to the schedule more palatable, since it gives them input in the decision making process." Justice Debra Lehrmann, *The Child's Voice--An Analysis of the Methodology Used to Involve Children in Custody Litigation* at 885 (Texas Bar Journal, November 2002) (citations omitted).

Although an interview can empower a child, Justice Lehrmann cautions "not to take psychological

research indicating that children should be involved in the process of reorganizing the family to mean that children should be brought into the lawsuit without forethought. Attention must remain focused on reliable data that indicates that children must not become embroiled in their parent's conflict." *Id.*

b) Alienation

Alienation is always a concern with the in-chambers interview, although it does not exist in every case. This can most likely occur by a parent trying to coach a child prior to the interview to try to make the other parent look bad or to tell the judge what the coaching parent wants the child to say. This may even occur without specific coaching for the interview itself. If a child has been living with a parent who regularly talks bad about the other parent, that can stay with the child long-term.

If alienation is an issue, an expert may be necessary to determine whether the child has been alienated and to what degree. If alienation has occurred, the judge should be made aware of it because the child's statements may be biased, rather than showing what the child actually desires. The interview may allow the judge a better glimpse into the degree of alienation as well.

c) Manipulation

Alienation is related to manipulation. Jonathan Gould, Ph.D, ABPP states:

"A corollary is a parent who manipulates a child to express a preference to live with him or her when that parent may not have presented the child with all the available and necessary information to make a responsible decision. There are two alternative concerns that may come from a parent's manipulation through providing limited and biased information that the child uses as the basis for his or her decision. One outcome is that the child learns later in life that s/he has been manipulated by the parent and focused his/her anger at being manipulated toward that parent. The second outcome is that the child feels a sense of guilt and remorse over rejecting the other parent based upon biased or incomplete information provided by the custodial parent. A third outcome is that the child learns not to trust the previously trusted parent and reaches out to the other parent to find that the other parent is unwilling or unable to repair the damage done by the earlier decision." Jonathan Gould & David Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim.

Law. 303, 310 (2009).

d) The "Fun" Parent

A child will also often be influenced by who the child sees as the "fun" parent, as opposed to the parent who has rules and guidelines for the child. Those rules may make the child see that parent as mean or restrictive and express a desire to the judge that the child does not want to live with that parent. This factor must be understood and addressed if necessary, and judges should be sensitive to it. Thoughtful questions by the judge can help to reveal this factor if it exists.

e) Clash of Personalities

If a child and parent have an extreme difference in personalities, it should be considered whether the child being with that parent, and for how much time, is best for the child. For instance, if a child and a parent constantly yell and argue in front of other children, if violence erupts during the periods of possession, or if the child constantly runs away from home while in the possession of the parent, what is truly in the child's best interest? While this behavior should not be rewarded, it may be attributable to puberty or events that have occurred during the child's life and is something that must be considered when conducting an in-chambers conference because the child may be the only credible source of this information.

f) Maturity of the Child

Although Texas sets the limit for mandatory interviews at 12 regarding primary residence, the parties, attorneys, and judge should still consider the maturity of the child. The court may want to start the in-chambers interview with some questions to determine the child's maturity level and ability to tell and understand the truth. Basically, the competency and reliability of the child. Parties know their children and should discuss with their attorneys how the child might come off in the interview with the judge. Similarly, the judge needs to be cautious that a child's maturity may be best ascertained over an extensive period of time and not in brief time that is set aside for the in-chambers interview.

"Another reason for not including children's participation in the decision making about their custodial placement is that children's decisions are . . . how do we say this delicately . . . often unreliable, spur of the

moment, emotion-driven, short sighted, and generally misinformed. That is, children are not often rational or objective in their decision making. Perhaps a fairer way to frame the concern is that on any given day a pre-adolescent child may be rational, objective and consider the long term effects of his or her decision making, and the next day may be impulsive, emotion-drive and short sighted." *Id.* at 310–311.

g) First Impressions

An in-chambers interview is often a child's first interaction with the judicial system. There is likely an impact associated with talking to a judge about life decisions that should be considered before requesting an in-chambers interview. If this experience is a negative one, this may impact how children view judges and lawyers for the rest of their lives. We often hear stories from clients about how their parents' divorce affected them and their future relationships. Attorneys, the parties, and the courts should be cognizant that the children's experience from the moment that they walk into the courthouse, going through security, waiting in the halls of the courthouse, talking to the attorneys, missing school, and talking to the judge may have a significant impact on them for the rest of their lives.

h) Lost in Translation

Co-existent with being cognizant of the maturity of the child is accurately interpreting what the child is really saying—not just listening to the words that come out of the child's mouth. For instance, if the child is saying that he or she "just wants to spend more time with Mom/Dad," but can cite to no specific reason, one should consider whether the child is really saying that he or she is going through issues that are gender specific or is hiding some underlying issue such as mental, physical, or sexual abuse at the other parent's house. It is imperative when there is a question about the child's motives that other resources be marshalled to ascertain what the child is truly saying. For instance, a mental health professional may be recommended and/or ordered to counsel with the child and ascertain any motives or reasons for the child's preferences. Another option may be obtaining a social study or the appointment of an amicus attorney to probe into the child's home life and provide the court with a clearer view of the situation at hand.

In an older article in the Louisiana Law Review entitled *Child Custody: The Judicial Interview of the*

Child by Lisa Carol Rogers, Rogers identifies the more common strategies and possible interpretations of the child's behavior:

"1. Reunion strategy: The child will praise both parents, and the parent 'at fault,' hoping they will respond to the praise by the reuniting. The judge should be alert to descriptions of the parents that sound too good to be true.

"2. Pain reduction strategy: The parents may both claim that the child refuses to leave one to visit the other. The child is probably just trying to reduce the pain he feels each time he leaves one parent by refusing to leave, which does not indicate a preference for one parent over the other.

"3. Tension detonation strategy: The child may seem very hostile toward one or both parents. It is possible that he is trying to get them to direct their anger toward him instead of each other, and to detonate the tension between them by having them strike out at him.

"4. Loyalty proving strategy: The child may pick the parent that seems the most likely to keep him around and sacrifice the other parent to show his loyalty.

"5. Fairness strategy: The child will repress his own needs in order to make sure each parent gets equal treatment. He will probably refuse to state a preference, and will exhaust himself trying to divide his time and affection equally between his parents.

"6. Permissive living strategy: The child will give up trying to reunite his parents and will repress his pain. He may appear to his own best advantage. Older adolescents are more likely to use this strategy consciously. Younger children are more likely to use it innocently, as when they express a natural preference for the parent who buys nicer presents or who has had custody during vacations." Lisa Carol Rogers, *Child Custody: The Judicial Interview of the Child*, 47 La. L. Rev. 559, 580 (1987).

i) Putting the Child in the Middle

The child should never be put in the middle of litigation. If a child is forced to speak with a judge and talk about the child's preferences for possession and access or with whom the child primarily resides, it will likely have an adverse impact on the child, manifested in several ways. First, if a record is made, there is forever a

writing that memorializes what was said to the judge and a parent will be able to read it and have first-hand knowledge of what the child said. This is very likely to impact the relationship of the parent with the child. It may lead to alienation or feelings of being slighted. These feelings will then impact both the child and the parent for a very long time—maybe even a lifetime. If a record is not made, and the judge makes a ruling that takes away rights or possession and access time of one parent, the slighted parent may assume that it is because of what the child told the judge and lead to the same repercussions as if a record was made.

In short, we are all human, and feeling slighted or "un-preferred" by someone we love and would do anything for is going to lead to feelings that are not easily concealed, and these feelings may have a long-term impact on the child.

Practice note: When you are not having a jury determine a specific issue, the child has expressed desires regarding that issue, and you want the judge to interview the child, be sure to file a motion requesting the interview prior to the close of evidence and to include in your request who you want to be present and whether you want to make a record of the interview. For appellate purposes, a record is needed, but you should weigh the psychological effect that the interview will have on the child and whether that effect may be prolonged by having a written record of it. And if the court denies any of it, object to the interview if you do not want it to happen, object to the interview not happening if you want it to happen, and make an offer of proof or bill of exception to preserve the error regarding what the child would have testified.

8. Interview Framework

"Among the most relevant factors to examine when talking with children about their experiences in a divorced family are:

"1. Physical space refers to the practical issues of getting from one place to another. Physical space includes examining concerns that the child has about organizing clothes, toys, and schoolwork. It entails letting children's friends know where they are and letting children voice concerns that they have about remembering where to be at certain times.

"2. Emotional space refers to different emotional climates that exist at each parent's home. Children are

moving not only from one physical home to another but also from one emotional landscape to another. Children may react to changes in emotional climate between mother's and father's home. Children also may feel differently at different homes. Smart found that the geographic distance between parental homes can create an emotional distance between child and parent. Interestingly, Smart noted that even children who are equally happy to be with either parent or equally happy to be in either parent's home experienced transitions between homes as an emotional journey requiring regular emotional adjustment.

"3. Psychological space refers to differences in household structure, organization, and functions. There may be changes between homes in routines, codes of behavior, expectations, standards of living, and other functional differences. Children may find it difficult to adjust to a home that does not fit the psychological narrative in their heads about who they are and where they are supposed to live.

"4. Equal time refers to parents', judges', and attorneys' tendency to think about parenting time in exact amounts of time. Whether children spend one week with one parent and another week with the other parent or whether children are on a '4 day with one parent and 3 day with the other parent' schedule, the inflexibility of time share schedules often affect children's need for elasticity in the scheduling of their transitions between homes. For example, Smart found that if a child was scheduled with her father but needed to spend time with her mother on a particular day, the rigidity of the access schedule became a more important decision-making element than the child's needs. If it was Tuesday, the child had to be at dad's house. Smart reported that children felt frustrated with the rigidness of their access schedules and they were reluctant to talk about these frustrations with their parents. Children were aware of their parent's competing needs for the children's time and, as a result, they did not want to disappoint either parent nor did they want to cause tension because of their discontent. The result was that children did not talk about their feelings and often experienced the unbending nature of the parenting schedule as oppressive.

"5. Time apart refers to children's time away from one parent. Some children did not like time away from a particular parent and, other children did not like feeling that they were forced to spend time with a parent. Still other children liked the time away from the residential parent because it provided them with opportunities to gain

some perspective on the non-residential parent. Smart referred to this time away from the residential parent as a 'sabbatical.'

"Some children worried about one parent when they were with the other parent. Children worried when their parents remained single and had no romantic partner. These children felt that time away from a single parent meant that the parent was lonely. Some children reported that time passed more slowly at one parent's home than at the other's, usually because one parent was less available, less involved, or had a home with fewer creature comforts.

"6. Time to oneself refers to children's lack of private time. Children of divorce felt that their time was always scheduled. They felt that they had less time for themselves and that they had less time to spend with their friends.

"7. Time and hurting refers to an experience of a subgroup of children who had to deal with waiting for the nonresidential parent to come to visit them or wait for the nonresidential parent to take them out. These children often felt powerless and they often viewed time spent waiting for the parent to show up as a measure of how much that parent cared.

"8. Time and sharing refers to those situations where both parents enjoyed plenty of time with their children and where each parent was on good terms with the other parent. Sharing parenting time became a way of continuing family life. Children felt happy with time-sharing arrangements because of the quality of their relationship with each parent. Children felt that the most important issues were sustaining and managing their relationships with parents." Gould & Martindale, *Including Children in Decision Making About Custodial Placement*, 22 J. Am. Acad. Matrim. Law. at 312–13.

VII. FRE Article VII. Opinions and Expert Testimony

A. Lay Witness Opinion

Rule 701 states that any person who is not testifying as an expert may state that person's opinion if the opinion is rationally based on the witness's perception and helps the factfinder understand the witness's testimony or determine a fact in issue. Tex. R. Evid. 701; *cf.* Fed. R. Evid. 701(c) (adding third element that lay opinion

cannot be based on scientific, technical, or other specialized knowledge that would fall under Rule 702). The first requirement is a two-part test: "First, the witness must establish personal knowledge of the events from which his opinion is drawn and, second, the opinion drawn must be rationally based on that knowledge." *Hartwell v. State*, 476 S.W.3d 523, 536 (Tex. App.—Corpus Christi 2016, pet. ref'd) (quoting *Fairow v. State*, 943 S.W.2d 895, 898 (Tex. Crim. App. 1997)); *see also, e.g., Ackles v. Hartford Underwriters Ins. Corp.*, 699 N.E.2d 740, 743 (Ind. App. 1998); *Marks v. State*, 289 S.W.3d 923, 927 (Ark. 2008). Lay opinions are elicited and given in almost every family law case, and as is often the case in family law, facts and opinions are often intertwined and impossible to separate.

Practice Note: Unless the proffered lay opinion testimony is damaging the case, it is probably not worth the objection. The practitioner will find that, many times, such lay opinions present the cross examiner with fodder to neutralize any potential harm.

B. Admission of Expert Testimony

Rule 702 of the Texas Rules of Evidence predicates the admission of expert testimony on three basic factors:

1. The witness must be qualified in the area of expertise for which the evidence is proffered;
2. The expert's testimony must be grounded in the scientific, technical, or other specialized knowledge in that particular area of expertise; and
3. The testimony must assist the trier of fact.

Tex. R. Evid. 702; *cf.* Fed R. Evid. 702 (requiring expert's specialized knowledge be helpful to factfinder, testimony is based on sufficient facts or data, testimony is product of reliable principles and methods, and expert has reliably applied those principles and methods).

Example Predicate:

You were requested to provide expert witness services in this case?

Does the person who has asked you to perform those services affect your professional opinions in this matter?

What was your assignment in this matter?

Did you do work to complete that assignment?

Did you use your training and experience to complete your work in this matter?

Please tell the court what education you have received that you believe qualified you to perform this assignment? (if objected to: Please tell the court your education, including specialized professional college education, after high school.)

Have you attended any professional educational programs within the last five years (to emphasize recent knowledge)?

Please tell the court what those professional educational programs were and when you attended them. (compound; break down if objected to)

Were there other professional education programs you have attended?

Are those other professional educational programs you have attended set forth on your CV?

Have you taught any professional educational programs within the last five years?

Please tell the court the professional educational programs you have taught and when you taught them.

Were there other professional educational programs you have taught?

Are those other professional educational programs you have taught set forth on your CV?

Have you written any professional books, articles, or other similar materials within the last five years?

Please tell the court about those professional books, articles, or other materials.

Were there other professional books, articles, or materials you have written?

Are those other professional books, articles, or materials you have written set forth on your CV?

I am handing you what has been marked as Exhibit 1 for identification purposes; do you recognize that document? What is it? (My CV)

Does it set forth most of your educational information to which you have not specifically testified?

If I asked you about each item set forth on Exhibit 1 for identification, would you testify as set forth on Exhibit 1 for identification?

I offer Exhibit 1 into evidence.

I request the Court to declare/recognize the witness as a qualified expert.

C. Qualification of the Expert is Discretionary

Whether the expert is qualified to testify and render an opinion lies within the discretion of the trial court. *Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996) ; *see also, e.g., Dollar Gen. Corp. v. Elder*, 600 S.W.3d 597, 606 (Ark. 2020); *A.J.C. ex rel. J.D.C. v. K.R.H.*, 602 S.W.3d 857, 865 (Mo. App. 2020). A reviewing court will review the trial court's determination to admit expert testimony for abuse of discretion. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002).

D. Bases of Expert Testimony and Opinions

The proponent of the proffered testimony bears the burden of demonstrating the admissibility of the expert testimony if the other side objects to it. *Id.*

1. Hard Science

To overcome the objection, the proponent must demonstrate that: (1) the expert is qualified, and (2) the expert's testimony is relevant and reliable. *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 348 (Tex. 2015). The non-exclusive factors that can be considered in the reliability of scientific evidence are:

1. The extent to which the theory has been or can be tested;

2. The extent to which the technique relies upon the subjective interpretation of the expert;

3. Whether the theory has been subjected to peer review and/or publication;

4. The technique's potential rate of error;

5. Whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

6. The non-judicial uses which have been made of the theory or technique. *Id.* at 348 n.8.

2. Soft Science

Different jurisdictions treat "soft sciences" differently. *See, e.g.*, Fed. R. Evid. 702 cmt. ("Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication than others. Some types of expert testimony will not rely on anything like a scientific method,

and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded."); *State v. Hungerford*, 697 A.2d 916, 925 (N.H. 1997) (for recovered memories, looking to *Daubert* elements as well as age of witness, length of time between event and recovery, presence of objective evidence, attendant circumstances); *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998) (applying similar standards as comments to Federal Rule 702), *overruled on other grounds*, *State v. Terrazas*, 4 S.W.3d 720 (Tex. Crim. App. 1999).

3. Factors Relied Upon

The general rule is that, once properly qualified, an expert can base his or her opinion on just about anything remotely relevant to the issue about which he or she is called to testify. Rule 703 permits an expert to rely on the following to base his opinion:

1. Personal Knowledge. This would include such observations as statements made by the parties, testing results, etc.

2. Facts/Data Made Known to the Expert at or Before the Hearing. Many mental health professionals rely and may rely on evidence presented by others, deposition testimony, and reports of other experts.

3. Inadmissible Evidence, if Relied on by Others. Some jurisdictions require the probative value in helping the jury substantially outweigh the prejudicial effect for inadmissible evidence to be admitted. *See, e.g.*, Fed. R. Evid. 703 (requiring probative value to outweigh prejudice); *but see In re Amey*, 40 A.3d 902, 913–14 (D.C. App. 2012) (holding opposite).

Even where inadmissible evidence is readily admissible if it is relied on by experts in the field, the reliance on tests, trade journals, other medical reports, etc., has not created much controversy concerning expert opinions. *See Gharda USA*, 464 S.W.3d at 352. A problem may arise, however, when the expert begins to recount a hearsay conversation he has had with another. Rule 703 implies that this type of testimony is permissible, but some

jurisdictions have limits. A trial court may permit the expert to state that his or her opinion was based, in part, on what another had related but should not permit the expert to disclose what was actually said. *People v. Sanchez*, 374 P.3d 320, 334 (Cal. 2016) (the expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception."); *Beavers ex rel. Beavers v. Northrop Worldwide Aircraft Servs., Inc.*, 821 S.W.2d 669, 674 (Tex. App.—Amarillo 1991, writ denied); *but see In re C.K.*, 391 P.3d 735, 739–40 (Mon. 2017) ("Rule 703 thus contemplates that a testifying expert may refer to otherwise inadmissible hearsay upon a foundational showing that the expert relied on the otherwise inadmissible evidence in forming the expert's opinion and the information is of a type reasonably relied upon by experts in the field of expertise. . . . By application of Rule 801(c), Rule 703 circumvents the general prohibition of Rule 802 by repurposing otherwise inadmissible hearsay as definitional non-hearsay. . . . Alternatively, Rule 703 is also amenable to construction as an implicit exception to the hearsay rule. This view recognizes that the otherwise inadmissible hearsay cannot serve its limited Rule 703 purpose of aiding assessment of the credibility and reliability of the expert's opinion unless the finder of fact takes it as true.").

4. Experts and Custody Cases

The testimony of mental health experts is often critical to the outcome of a conservatorship proceeding. Courts have placed limits on expert testimony in jury cases. For example, in *Ochs*, the court held that a psychologist in a child abuse case was not permitted to testify before a jury as to the propensity of the child complainant to tell the truth regarding the alleged abuse. *Ochs v. Martinez*, 789 S.W.2d 949, 957 (Tex. App.—San Antonio 1990, writ denied); *see also, e.g.*, *Hoglund v. State*, 962 N.E.2d 1230, 1234–35 (Ind. 2012) (collecting cases holding one witness cannot testify about credibility of another witness); *cf. Gregg v. State*, 411 S.E.2d 65, 68 (Ga. 1991) (setting forth ten factors to determine reliability of child victim's statement). The court reasoned that such testimony invaded the province of the jury concerning judging the credibility of the witness. *Ochs*, 789 S.W.2d at 957. While social workers assigned to custody cases are almost always permitted to testify, the extent of their testimony should also be closely monitored. If the testimony is admitted over objection, a limiting instruction should be requested at the time the objection is made and in the charge to preserve error and

avoid the invited error trap. *See In re Commitment of Polk*, 187 S.W.3d 550, 554–55 (Tex. App.—Beaumont 2006, no pet.); *see also State v. Hargrove*, 293 P.3d 787, 795 (Kan. App. 2013) ("The invited error rule effectively binds trial counsel to strategic decisions inducing judicial rulings with the purpose of obtaining favorable judgments for their clients—not guilty verdicts or, in some cases, convictions on lesser charges for criminal defendants. The rule also defeats a disreputable strategy aimed at requesting that a judge act in a particular way to salt the record with error as an end in itself, thereby providing potential grounds for reversal of an adverse judgment.") (citations omitted).

Under the Uniform Parentage Act, however, where no presumed, acknowledged, or adjudicated father exists, a report of a genetic testing expert is admissible as evidence of the truth of the facts asserted in the report. Tex. Fam. Code Ann. § 160.621(a); *see also, e.g.*, N.M. Stat. Ann. § 40-11A-621; Okl. Stat. Ann. § 7700-621; Utah Code Ann. § 78B-15-613. Admissibility is only affected if a presumed, acknowledged, or adjudicated father exists, unless the testing was performed with consent of both the mother and presumed/acknowledged/adjudicated father, or by court order. Tex. Fam. Code Ann. § 160.621(c).

Example Predicate:

(This predicate may be used with an expert in almost any field)

Please tell the court what your assignment was in this case.

Were you able to formulate an opinion in regards to that assignment?

In connection with your work in this matter, did you apply/use any tests/procedures in reaching your opinion?

Please tell the court what the tests/procedures are that you used in reaching your opinions and conclusions in this matter.

*As to each test/procedure, one at a time:

Please describe what that test/procedure is.

Why did you use that test/procedure?

As a result of using that test/procedure, did you obtain information that you used in your work in this case?

What information did you obtain that you used in your work in this case?

Why did you think that information was important?

How did you use that information in formulating your opinions or conclusions in this case?

(Then go to the next test/procedure and repeat*)

What opinion or conclusion did you reach as a result of the work you did in this case?

E. Use of Treatises

1. Only through Expert Testimony

As discussed below, under a hearsay exception, treatises may be used only through expert testimony. Tex. R. Evid. 803(18); *see also, e.g.*, Fla. Stat. Ann. § 90.706; Nev. Rev. Stat. Ann. § 51.255; Va. S. Ct. R. 2:706. A proponent cannot have his expert read from the treatise on direct but can have the treatise qualified as a reliable authority. If the witness is asked to read from it on cross, then clarifying excerpts can subsequently be read on redirect. If admitted, the statements may be read into evidence, but the treatise may not be received as an exhibit. Tex. R. Evid. 803(18).

2. Using a Treatise on Cross-Examination

The questioning attorney can have the opposing expert acknowledge that the treatise in question is authoritative and relied upon in that particular field. Even if the witness does not commit to such a position, the attorney has established that the treatise is a published work and that the opposing expert is aware of it. The proponent's expert can then qualify the writing as authoritative at a later time. *King v. Bauer*, 767 S.W.2d 197, 199–200 (Tex. App.—Corpus Christi 1989, writ denied).

Example Predicate:

You have heard of Fishman and Pratt's book: Guide to Business Valuations?

Fishman and Pratt are respected in the business valuation community?

Their book is respected in the business valuation community?

Their book has guidelines on how to perform business valuations?

Were you aware that their book states that a cap rate should be between 11% and 20%?

You set the cap rate for your valuation at 4%?

F. Disclosure of Underlying Facts/Data

Per Rule 705, an expert may disclose all data he has relied on in arriving at his opinion, thus abolishing the need to ask hypothetical questions. Tex. R. Evid. 705; *cf. Jordan v. State*, 928 S.W.2d 550, 556 n.8 (Tex. Crim. App. 1996). But remember that hearsay conversations with third parties may not be admissible as discussed above regarding Rule 703. *See* Tex. R. Evid. 705(d).

G. Opinion of Law and Fact

Rule 704 allows an expert to give an opinion that embraces an ultimate issue. Tex. R. Evid. 704; *but see Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir.) ("That said, an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law.") (quotations omitted). As such, an expert may state an opinion on a mixed question of law and fact, so long as the opinion is confined to the relevant issues and is based on proper legal concepts. *Birchfield*, 747 S.W.2d at 365.

H. Opinion as to Understanding of the Law

Even though an expert may not be permitted to testify as to his or her understanding of the law, the expert is entitled to apply legal terms in his testimony as to the factual issues. *In re Tex. Windstorm Ins. Ass'n*, 417 S.W.3d 119, 149 n.7 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding); *Welder v. Welder*, 794 S.W.2d 420, 423 (Tex. App.—Corpus Christi 1990, no writ); *see, e.g., Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 95 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (holding that former Supreme Court of Texas justice could not testify to his understanding of the law); *see also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases and providing exception for foreign law). For example, in a divorce case involving tracing of separate funds, summaries of checking account records were held to be admissible even though the testifying CPA made characterizations as to the separate and community nature of the money. *Welder*, 794 S.W.2d at 428–29.

I. Opinion Evidence does not Establish Fact

The effect of opinion evidence does not establish material facts as a matter of law. *McGuffin v. Terrell*, 732 S.W.2d 425, 428 (Tex. App.—Fort Worth 1987, no writ); *see also, e.g., Int'l Ass'n of Firefighters Local No.*

2287, Montpelier v. City of Montpelier, 332 A.2d 795, 797 (Vt. 1975).

J. Jury Trials

Courts have also placed limits on expert testimony in jury cases. For example, the *Ochs* case, discussed above, where the expert could not opine on the truthfulness of a witness. *Ochs*, 789 S.W.2d at 957. Also, social studies are generally inadmissible hearsay before a jury, although the expert who put the study together is competent to testify as a witness. *Taylor*, 160 S.W.3d at 649 n.9. A court should not exclude the testimony of a social worker merely because that witness was not court-appointed. *Davis v. Davis*, 801 S.W.2d 22, 23 (Tex. App.—Corpus Christi 1990, no writ).

VIII. FRE Article VIII. Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tex. R. Evid. 801(d); *see* "Non-assertive Statement," below, for a discussion of whether testimony is even a "statement" at all. Hearsay is normally excluded because it is evidence that cannot be tested; thus, it is more susceptible to being unreliable or untrustworthy. *See* 2 McCormick on Evid. §§ 244–45. A "statement" includes any spoken or written words or any nonverbal conduct intended as a substitute for such words. Tex. R. Evid. 801(a); *see also, e.g.*, Fed. R. Evid. 801(a); Ga. Code Ann. § 24-8-801(a); Or. Evid. Code 801(1). The statement offered at trial need not be a direct quote to violate the hearsay rules. *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999); *see also Harris v. Wainwright*, 760 F.2d 1148, 1152 (11th Cir. 1985); *State v. Agundis*, 903 P.2d 752, 761 (Id. App. 1995). While the federal rules, and several other jurisdictions, do not explicitly define "matter asserted" within the rules, Texas has defined it as including any matter explicitly asserted and any matter implied by a statement, if the probative value of the statement as offered flows from the declarant's belief about the matter. Tex. R. Evid. 801(c); *cf.* Fed. R. Evid. 801. Hearsay is inadmissible unless otherwise permitted by the rules or by statute. Tex. R. Evid. 802. Put more simply, any out-of-court statement, except non-hearsay statements, whether by the witness or another person, is inadmissible to support the truth of the statement, unless permitted by another rule or statute. In some jurisdictions, however, otherwise inadmissible hearsay admitted without objection may not be denied probative value merely because it

is hearsay. Tex. R. Evid. 802; *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980); *Commonwealth v. Foreman*, 797 A.2d 1005, 1012 (Pa. Super. 2002); *but see Gehin v. Wis. Grp. Ins. Bd.*, 692 N.W.2d 572, 588 (Wis. 2005) (relying on *Ga.-Pac. Corp. v. McLaurin*, 370 So.2d 1359, 1362 (Miss. 1979)). If it can be shown that a statement is non-hearsay or that it falls within a hearsay exception, the statement is admissible as probative evidence. *See Routier v. State*, 112 S.W.3d 554, 591 (Tex. Crim. App. 2003).

A. Statements that are not Hearsay

Evidence constitutes hearsay only if it is (1) an assertive statement (2) by an out-of-court declarant (3) offered to prove the truth of the assertion. Tex. R. Evid. 801(d); *see also* Fed. R. Evid. 801(c). A non-statement or a statement *not* offered to prove the truth of the matter asserted is not hearsay. Further, certain types of statements are defined as non-hearsay by statute or by the rules of evidence.

1. Non-assertive Statement

A "statement" includes verbal or non-verbal assertions, for example pointing, nodding, or a headshake. Tex. R. Evid. 801(a); *see, e.g., Clabon v. State*, 111 S.W.3d 805, 808 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (holding that hand gesture was hearsay). However, a purely contextual out-of-court statement that is nothing more than a question is not hearsay. *See, e.g., United States v. Safavian*, 435 F.Supp.2d 36,44 (D.D.C. 2006); *McNeil v. State*, 452 S.W.3d 408, 418–19 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *but see United States v. Torres*, 794 F.3d 1053 (9th Cir. 2015) (holding that, because defendant third party asked defendant, on three separate occasions within a week, to use defendant's vehicle, third party's intent was clear: he wanted control of defendant's vehicle on U.S. side of the border; explaining that third party intended the implied assertion rather than the express one and that defendant used the questions for the truth of the matter impliedly asserted.). "Imperative sentences giving orders, exclamatory sentences, and interrogatory sentences posing questions usually fall outside the hearsay definition; if these sentences are relevant at all, it is usually relevant simply that the sentences were uttered." Edward J. Imwinkelried, Evidentiary Foundations 423 (8th ed. 2012). The predicate for offering non-assertive statements as non-hearsay usually includes the following evidence:

1. Where and when the statement was made;

2. Who was present;

3. The tenor of the statement;

4. In an offer of proof outside the presence of the jury, that the tenor of the statement is non-assertive; and

5. In the same offer of proof, that the non-assertive statement is logically relevant to the material facts of consequence in the case. *Id.*

2. Statement not Offered by a Person

In family law cases, this usually comes up in the context of electronic evidence, which is discussed below, but could also come up with animals or other non-humans. For example, a dog trained to detect drugs can indicate whether it has detected drugs. The indication made by the dog, however, is not a "statement" because it was not made by a person and is, therefore, not hearsay.

3. Statement not offered for its Truth

"Even if the statement is assertive, the statement is not hearsay unless the proponent offers the statement to prove the truth of the assertion." *Id.* at 428–29. When arguing that a statement is not being offered for its truth, an attorney is arguing that the fact *of* the statement is relevant and that the truth of the facts *in* the statement is irrelevant. *Id.* at 429. Evidence is hearsay when its probative value depends in whole or in part on the credibility or competency of a person other than the person by whom it is sought to be produced. *Chandler v. Chandler*, 842 S.W.2d 829, 831 (Tex. App.—El Paso 1992, writ denied). For example, a declarant's credibility is an issue with statements offered for their truth, and an opponent needs to cross-examine the out-of-court declarant to test the evidence. Imwinkelried, *Evidentiary Foundations* at 421. In contrast, if a proponent is not offering a statement for its truth, the opponent does not need to have the declarant available for cross-examination. *Id.*

a) State of Mind

Rule 803(3) provides an exception to the hearsay rule for statements regarding one's then-existing state of mind, emotion, sensation, or physical condition. Tex. R. Evid. 803(3). "Normally, statements admitted under this exception are spontaneous remarks about pain or some other sensation, made by the declarant while the sensation, not readily observable by a third party, is being experienced." *Chandler*, 842 S.W.2d at 831. When

this exception does not apply, offering the statement, not for the truth of the statement, but rather, to show the knowledge or belief of the person who communicated or received the statement, will provide an exemption and bring the evidence out of being hearsay altogether. *Id.* (citing *Thrailkill v. Montgomery Ward & Co.*, 670 S.W.2d 382, 386 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)). Moreover, where the question is whether a party has acted prudently, wisely, or in good faith, information on which the party acted is original and material evidence, which is not hearsay. *Id.* For example, when a party testified that a Mexican judge told her that she was divorced, the statement was not offered to prove that she was in fact divorced. *Id.* "Rather, it was offered to show that she believed she was divorced. Moreover, the probative force of the statement does not depend on the competency or credibility of the Mexican judge. Therefore, it is not hearsay." *Id.*

b) Impeachment by Prior Inconsistent Statement

Any witness may be impeached by showing that on a prior occasion he made a material statement inconsistent with his trial testimony. Such a statement can be taken from many sources, including prior testimony, affidavits, discovery responses, or pleadings. The purpose of impeachment evidence is to attack the credibility of a witness, not to show the truth of the matter asserted. Evidence used solely to impeach a witness cannot provide probative value to support a judgment. *Labonte v. State*, 99 S.W.3d 801, 807 (Tex. App.—Beaumont 2003, pet. ref'd). As such, any impeaching evidence warrants a limiting instruction. *Id.* But impeaching evidence may also have probative value independent of the impeachment purpose. *See State v. Van Dyke*, 825 A2d 1163, 1172 (N.J. Super. 2003).

c) Operative Facts

Operative facts are facts leading to the ultimate issue. If the making of an out-of-court statement has legal significance, regardless of its truthfulness, then evidence that the statement was made is not hearsay because it is not offered to prove the truth of the matter asserted. *Jazayeri v. Mao*, 94 Cal. Rptr. 198, 211 (Cal. App. 2009); *Brown v. Daly*, 968 S.W.2d 814, 817–18 (Tenn. App. 1997); *Lozano v. State*, 359 S.W.3d 790, 820 (Tex. App.—Fort Worth 2012, pet. ref'd); *Case Corp. v. Hi-Class Bus. Sys. of Am., Inc.*, 184 S.W.3d 760, 782 (Tex. App.—Dallas 2005, pet. denied). This is most obvious when the statement constitutes a necessary part of the cause of

action or defense, the ultimate issue. *Case Corp.*, 184 S.W.3d at 782. Operative facts are admissible as evidence to prove that an utterance was made and not to establish the truth of the contents of such a statement. *Id.* For example, a statement would be an operative fact if the mere making of the statement were the basis of a fraud claim. Another example is words or writings that constitute offer, acceptance, or terms of a contract. *See, e.g.*, *Bobbie Brooks, Inc. v. Goldstein*, 567 S.W.2d 902, 906 (Tex. App.—Eastland 1978, writ ref'd n.r.e.).

4. Extrajudicial Admissions

Extrajudicial admissions are exceptions to the hearsay rule generally based on the notion of estoppel as it applies to prior and often contradictory statements. The court in *Regal* discussed extrajudicial admissions as follows: A statement in an affidavit may not amount to a judicial admission if it is not deliberate, clear, and unequivocal. *Regal Constr. Co. v. Hansel*, 596 S.W.2d 150, 154 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.). In such cases, the statement may be considered an extra-judicial admission. Such an admission "is not conclusive but is merely evidence to be given such weight as the trier of facts may see fit to accord it." *Id.*; *accord Douglas Oil Tools, Inc. v. Demesnil*, 552 So.2d 77, 80 (La. App. 1989).

5. Prior Statement

Certain prior statements by witnesses are defined by the rules as non-hearsay. In order for a prior statement by the witness to be admissible as probative evidence, the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement. Fed. R. Evid. 801(d)(1). The three types of prior statements defined as non-hearsay are:

a) Prior Inconsistent Statement

A statement that is inconsistent with the declarant's testimony and, in a civil case, was given under penalty of perjury at a trial, hearing, other proceeding, or in a deposition. Fed. R. Evid. 801(d)(1)(A).

b) Prior Consistent Statement to Rebut

A statement that is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. Fed. R. Evid. 801(d)(1)(B). Bolstering a witness's credibility by attempting to introduce prior consistent statements, solely for the purpose of

bolstering and not in connection with Rule 801(d)(1)(B), is not permitted in some jurisdictions. *See* Tex. R. Evid. 613(c). However, while a witness' prior consistent statements would normally be inadmissible hearsay, Rule 801 defines prior consistent statements offered to rebut charges of fabrication or improper influence or motive as non-hearsay. Fed. R. Evid. 801(d)(1)(B). If even an implied charge is made against a witness, then prior consistent statements by the testifying witness are not hearsay and are, therefore, admissible as substantive evidence to rebut the charges. However, a prior consistent statement would only be admissible to rebut a charge of fabrication if the statement was made before the motive to fabricate arose. *Goldtrap v. State*, 115 So.3d 1025, 1028 (Fla. App. 2013); *Hammons v. State*, 239 S.W.3d 798, 804–05 (Tex. Crim. App. 2007).

c) Statement of Identification

A prior statement of identification of a person made after perceiving the person. Fed. R. Evid. 801(d)(1)(C); *see, e.g.*, *Hill v. State*, 392 S.W.3d 850, 858 (Tex. App.—Amarillo 2013, pet. ref'd).

6. Admissions by a Party-Opponent

The statement is offered against the opposing party and is: (A) that party's own statement in either an individual or representative capacity; (B) a statement that the party manifested an adoption or belief in its truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; (D) a statement by the party's agent or employee concerning a matter within the scope of that relationship and while it existed; *or* (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2); Tex. R. Evid. 801(e)(2); *see Saavedra v. State*, 297 S.W.3d 342, 346 (Tex. Crim. App. 2009 (holding interpreter's statements at trial, although interpreted incorrectly, were adopted admissions because interpreter was agent of witness and, thus, not hearsay).

Statements in discovery responses or pleadings from the present or other proceedings may be used to impeach a witness's credibility. If they are admissions by a party, they may also be admissible as substantive evidence. Allegations and statements made by a party's attorney in such responses or pleadings are that party's statements. *Cleveland Reg'l Med. Ctr., L.P. v. Celtic Props., L.C.*, 323 S.W.3d 322, 337 (Tex. App.—Beaumont 2010, pet. denied). Even pleadings of a party in other cases that contain statements that are inconsistent with that

party's present position may be admissible as admissions. *Westchester Fire Ins. Co. v. Lowe*, 888 S.W.2d 243, 252 (Tex. App.—Beaumont 1994, no writ). Superseded pleadings, even if they are not verified or file-marked, are no longer judicial admissions but can be introduced into evidence as other admissions, although they are not conclusive. *Quick v. Plastic Sols. of Tex., Inc.*, 270 S.W.3d 173, 185 (Tex. App.—El Paso 2008, no pet.); *Huff v. Harrell*, 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied).

7. Depositions

A deposition taken in the same proceeding. Tex. R. Evid. 801(e)(3). Unavailability of the deponent is not a requirement for admissibility. *Id.* While some jurisdictions include deposition testimony in the non-hearsay definition, and thus unavailability is not required, other jurisdictions require the witness to be unavailable under Rule 804. *See, e.g.*, Mich. R. Evid. 804(b)(5); *United States v. Salim*, 855 F.2d 944, 952 (2d Cir. 1988).

Practice Note: This rule means only that deposition testimony is *non-hearsay*. The deposition testimony may still be objectionable under other rules of evidence, such as relevance, etc. Remember, during a deposition, a majority of objections and evidentiary issues are deferred to final trial.

8. Judicial Admissions

A judicial admission is an assertion of fact, not pleaded in the alternative, in the live pleadings of a party. *Elliott v. Industrial Comm'n of Ill.*, 707 N.E.2d 228, 230 (Ill. App. 1999); *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 712 (Penn. Super. 2003); *Holy Cross Church of Christ in God v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). "A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact." *Holy Cross Church of Christ in God*, 44 S.W.3d at 568. The most common examples of judicial admissions are factual statements made in live pleadings, confession of judgment, and evidence of a guilty plea in a criminal case. An unanswered request for admission is automatically deemed admitted unless the court, on motion, permits its withdrawal or amendment. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *see also Alexander v. C.I.R.*, 926 F.2d 197, 199 (2d Cir. 1991); *Williams v. Cooper*, 926 So.2d 571, 574–75 (La. App. 2006). In Texas, at least, an admitted admission, deemed or otherwise, is a judicial admission, and that party may not subsequently introduce testimony to controvert it. *Marshall*, 767 S.W.2d at

700. Similarly in Texas, a sworn inventory filed in a divorce case constitutes a judicial admission. *Roosevelt v. Roosevelt*, 699 S.W.2d 372, 374 (Tex. App.—El Paso 1985, writ dism'd); *but see Rivera v. Hernandez*, 441 S.W.3d 413, 420–21 (Tex. App.—El Paso 2014, pet. denied) (considering *Roosevelt* and holding that H's inventory did not constitute admission because (1) that argument was not raised at trial, (2) trial court did not find inventory constituted admission, (3) trial court did not take judicial notice of inventory that was not filed or admitted into evidence, (4) trial court allowed H to amend inventory). A party alleging a material and substantial change in order to support a motion to modify cannot then deny that a material and substantial change has occurred for the purposes of the opposing party's motion to modify because the moving party judicially admitted the change in the original motion. *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex. App.—Fort Worth 2013, no pet.).

Practice Note: While abandoned or superseded pleadings may be admissible as a party admission or declaration against interest, they do not qualify as a judicial admission. *Quick*, 270 S.W.3d at 185.

Practice Note: In light of *Rivera*, trial counsel should seek to notify the trial court of statements that are admissions, have the trial court find the statements are admissions, admit them as admissions, and object to any amendments or withdrawals of the admissions. *See Rivera*, 441 S.W.3d at 420–21.

Practice Note: In Texas, parties must prove a material and substantial change in modification cases to overcome res judicata. Be sure that the judicial admission concerns the same subject matter you are using it for. In a recent case out of Dallas, mother petitioned to modify conservatorship, while father petitioned to modify child support; father argued that mother's pleadings contained judicial admissions that circumstances had changed; the Dallas Court of Appeals held that, even though mother pleaded that a change in circumstances had occurred, mother's petition was to modify conservatorship, so she made no judicial admission as to a change in circumstances concerning child support. *In re J.C.J.*, No. 05-14-01449-CV, 2016 WL 345942 (Tex. App.—Dallas Jan. 28, 2016, no pet.) (mem. op.); *cf. In re R.M.*, No. 02-18-00367-CV, 2019 WL 2635566, at *3 (Tex. App.—Fort Worth June 27, 2019, no pet.) (mem. op.) (holding that mother's counterpetition in suit to modify child support was judicial admission of material and substantial change in finances of parties or child). Another case out of Houston held that the parties judicially admitted the "change in circumstances" element, even though

they were requesting different relief. *Obernhoff v. Nelson*, No. 01-17-00816-CV, 2019 WL 4065017, at *20 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, no pet.) (mem. op.).

B. Exceptions to the Hearsay Rule - Availability of Declarant Immaterial

The hearsay exceptions listed in Federal Rule 803 (which most jurisdictions follow to a large degree) may be roughly categorized into (i) unreflective statements, (ii) reliable documents, and (iii) reputation evidence. *Fischer v. State*, 252 S.W.3d 375, 379 (Tex. Crim. App. 2008). "The rationale for all of the exceptions is that, over time, experience has shown that these types of statements are generally reliable and trustworthy." *Id.* However, all hearsay exceptions require a showing of trustworthiness. *Robinson v. Harkins & Co.*, 711 S.W.2d 619, 621 (Tex. 1986); *see, generally*, Fed. R. Evid. 803; Tex. R. Evid. 803.

1. Present Sense Impression

A statement describing or explaining an event or condition made *while* the declarant was perceiving the event or *immediately* thereafter. Fed. R. Evid. 803(1); *see also Jones v. State*, 780 N.E.2d 373 (Ind. 2002); *State v. Washington*, 818 S.E.2d 459 (S.C. App. 2018). Unlike the excited-utterance exception, the rationale for this exception stems from the statement's contemporaneity, not its spontaneity. *Fischer*, 252 S.W.3d at 380. The present sense impression exception to the hearsay rule is based upon the premise that the contemporaneity of the event and the declaration ensures reliability of the statement. The rationale underlying the present sense impression is that: (1) the statement is safe from any error of the defect of memory of the declarant because of its contemporaneous nature, (2) there is little or no time for a calculated misstatement, and (3) the statement will usually be made to another (the witness who reports it) who would have an equal opportunity to observe and therefore check a misstatement. *Id.* (quoting *Rabbani v. State*, 847 S.W.2d 555, 560 (Tex. Crim. App. 2008)). The court in *Fischer* stated the following: "The rule is predicated on the notion that the utterance is a reflex product of immediate sensual impressions, unaided by retrospective mental processes. It is instinctive, rather than deliberate. If the declarant has had time to reflect upon the event and the conditions he observed, this lack of contemporaneity diminishes the reliability of the statements and renders them inadmissible under the rule.

"Once reflective narratives, calculated statements, deliberate opinions, conclusions, or conscious thinking-

it-through statements enter the picture, the present sense impression exception no longer allows their admission. Thinking about it destroys the unreflective nature required of a present sense impression." *Id.* at 381 (internal quotations and citations omitted).

Example Predicate:

Where is your classroom located?

What time of day was it?

What are the children usually doing in school at the beginning of the day?

Did you see little Susie getting dropped off?

What did you see?

What happened when Susie got out of the car?

Could you see the exchange between her and her mother?

What did you see?

What did you see after that?

How did Susie appear to you?

Did you say anything to her?

What did you say?

In her response, did she describe what happened?

What was her response?

2. Excited Utterance

A statement relating to a startling event or condition made while the declarant was under stress or excitement caused by the event or condition. Fed. R. Evid. 803(2); *see also Funches v. State*, 381 P.3d 613, at *1 (Nev. 2012) (holding that text messages were excited utterance, even though declarant had slept for two hours after seeing crime, because declarant was still under stress of seeing gory activity). The excited-utterance exception is broader than the present-sense-impression exception. *McCarty v. State*, 257 S.W.3d 238, 240 (Tex. Crim. App. 2008). While a present-sense-impression statement must be made while the declarant was perceiving

the event or condition, or immediately thereafter, under the excited-utterance exception, the startling event may trigger a spontaneous statement that relates to a much earlier incident. *Id.* No independent evidence of that earlier incident need exist; the trial court decides whether sufficient evidence exists of the event and may consider the excited utterance itself to make that determination. *Coble v. State*, 330 S.W.3d 253, 294–95 (Tex. Crim. App. 2010).

The court in *Goodman* stated the following: "For the excited-utterance exception to apply, three conditions must be met: (1) the statement must be a product of a startling occurrence that produces a state of nervous excitement in the declarant and renders the utterance spontaneous and unreflecting, (2) the state of excitement must still so dominate the declarant's mind that there is no time or opportunity to contrive or misrepresent, and (3) the statement must relate to the circumstances of the occurrence preceding it. The critical factor in determining when a statement is an excited utterance under Rule 803(2) is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. The time elapsed between the occurrence of the event and the utterance is only one factor considered in determining the admissibility of the hearsay statement. That the declaration was a response to questions is likewise only one factor to be considered and does not alone render the statement inadmissible." *Goodman v. State*, 302 S.W.3d 462, 471–72 (Tex. App.—Texarkana 2009, pet. ref'd) (internal quotations and citations omitted).

Practice Note: "The critical determination is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event or condition at the time of the statement. . . . [But] we are constrained to hold that the long pauses in S.D.'s responses . . . preclude a determination that her statements resulted from impulse rather than reason and reflection." *Tienda v. State*, 479 S.W.3d 863, 877–878 (Tex. App.—Eastland 2015, no pet.) (internal quotations and citations omitted) (quoting *Zuliani v. State*, 97 S.W.3d 589, 596 (Tex. Crim. App. 2003)).

Example Predicate:

What classroom did little Susie come into?

Where is your classroom located?

What time of day was it?

What are the children usually doing in school at the beginning of the day?

Do you ever watch the children get dropped off?

Did you see little Susie getting dropped off?

What did you see?

What happened when Susie got out of the car?

Could you hear the exchange between she and her mother?

Did Susie come running into your room after getting dropped off?

How did Susie appear to you?

Did she appear upset or excited?

Did you ask her what had just happened?

In her response, did she describe what happened?

What was her response?

3. Then-Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, mental feeling, pain, or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Fed. R. Evid. 803(3). Statements that go beyond the declarant's emotional state to describe past acts do not fit within this exception to the hearsay rule. *Camm v. State*, 908 N.E.2d 215, 227 (Ind. 2009); *Menefee v. State*, 211 S.W.3d 893, 905 (Tex. App.—Texarkana 2006, pet. ref'd). The type of statement anticipated by this rule includes a statement that, on its face, expresses or exemplifies the declarant's state of mind—such as fear, hate, love, and pain. *Garcia v. State*, 246 S.W.3d 121, 132 (Tex. App.—San Antonio 2007, pet. ref'd). For example, a person's statement regarding her emotional response to a particular person qualifies as a statement of then-existing state of emotion. *Id.* However, a statement is inadmissible if it is a statement of memory or belief offered to prove the fact remembered or believed. Tex. R. Evid. 803(3). "Case law makes it clear that a witness

may testify to a declarant saying 'I am scared,' but not 'I am scared because the defendant threatened me.' The first statement indicates an actual state of mind or condition, while the second statement expresses belief about why the declarant is frightened. The phrase 'because the defendant threatened me' is expressly outside the state-of-mind exception because the explanation for the fear expresses a belief different from the state of mind of being afraid." *State v. Daise*, 807 S.E.2d 710, 719 (S.C. App. 2017); *Delapaz v. State*, 228 S.W.3d 183, 207 (Tex. App.—Dallas 2007, pet. ref'd) (quoting *United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005), *abrogation on other grounds recognized by United States v. Little*, 829 F.3d 1177, 1181–82 (10th Cir. 2016)).

Practice Note: Drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3). *Mims v. State*, No. 03-13-00266-CR, 2015 WL 7166026, at *6 (Tex. App.—Austin Nov. 10, 2015, pet. ref'd) (mem. op., not designated for publication).

Example Predicate:

What classroom did little Susie come into?

Where is your classroom located?

What time of day was it?

What are the children usually doing in school at the beginning of the day?

Do you ever watch the children get dropped off?

Did you see little Susie getting dropped off?

What did you see?

What happened when Susie got out of the car?

Could you hear the exchange between she and her mother?

Did Susie come running into your room after getting dropped off?

How did Susie appear to you?

Did she seem upset or angry?

Was she crying?

Did she say anything that caused you to believe she had a specific physical condition?

What did she say?

4. Statements Made for Medical Diagnosis or Treatment

Statements made for purposes of medical diagnosis or treatment and describing medical history, past or present symptoms, sensations, or the inception or general cause thereof insofar as reasonably pertinent to diagnosis or treatment. Fed. R. Evid. 803(4). The *Taylor* case provides a thorough discussion of this exception, and key points are as follows:

The rationale behind this exception "focuses upon the patient and relies upon the patient's strong motive to tell the truth because diagnosis or treatment will depend in part upon what the patient says." *Taylor v. State*, 268 S.W.3d 571, 580 (Tex. Crim. App. 2008) (quoting *United States v. Iron Shell*, 633 F.2d 77, 83–84 (8th Cir. 1980)). Further, it is reasonable that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription." *Id.* "A two-part test flows naturally from this dual rationale: first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the witness to rely on the information for purposes of diagnosis or treatment." *Id.*; *accord State v. Velasquez*, 944 N.E.2d 34, 41 (Ind. Ct. App. 2011).

It is not required that the witness be a physician or have medical qualifications. *Taylor*, 268 S.W.3d at 587. Out-of-court statements to psychologists, therapists, licensed professional counselors, social workers, hospital attendants, ambulance drivers, or even members of the family might be included under Rule 803(4). *Id.* "The essential qualification expressed in the rule is that the declarant believe that the information he conveys will ultimately be utilized in diagnosis or treatment of a condition from which the declarant is suffering, so that his selfish motive for truthfulness can be trusted. That the witness may be a medical professional, or somehow associated with a medical professional, is no more than a circumstance tending to demonstrate that the declarant's purpose was in fact to obtain medical help for himself. A declarant's statement made to a non-medical professional under circumstances that show he expects or hopes it will be relayed to a medical professional as pertinent to the declarant's diagnosis or treatment would be admissible under the rule, even though the direct recipient of the statement is not a medical professional." *Id.*

Breaking the two-part test down, the first part involves a second two-part test to determine reliability of the statement. The proponent of the evidence must first show that the declarant was aware that the statements were made for the purpose of a medical diagnosis or treatment. *Id.* at 588–89. Second, the proponent must show that a proper diagnosis or treatment depends upon the truthfulness of the statements. *Id.*; *see State v. Simmons*, 816 S.E.2d 566 (S.C. 2018) (holding that, in assault cases, the identity of the perpetrator is not covered by the exception and would still be excluded). That a diagnosis has been given or treatment has begun does not preclude the declarant's self-interested motive to tell the truth. *Taylor*, 268 S.W.3d at 589. And for purposes of appellate review, especially in cases involving a child-declarant, the proponent of the hearsay must "make the record reflect both 1) that truth-telling was a vital component of the particular course of therapy or treatment involved, and 2) that it is readily apparent that the child-declarant was aware that this was the case." *Id.* at 590. The second part of the original two-part test boils down to whether the particular statements proffered are pertinent to treatment. *Id.* at 591.

Practice Note: The Austin Court of Appeals held in *Mata* that, even though the proponent of the hearsay did not explicitly state that the child-declarant knew she had to be truthful when talking to the doctor, the record was absent of any evidence that would negate such a finding, and the evidence was such that the court could infer the finding. *Mata v. State*, No. 03-15-00220-CR, 2016 WL 859037, at *5 (Tex. App.—Austin Mar. 4, 2016, no pet.) (mem. op., not designated for publication).

Practice Note: Medical doctors and mental-health doctors are treated differently in this context. Courts will look "for any evidence that would *negate*" an awareness that the patient must tell the truth to a medical doctor, but the record must reflect that that awareness is present when the patient seeks mental-health treatment. *Taylor*, 268 S.W.3d at 589.

Practice Note: The declarant does not have to be the patient, so long as it is reasonable for the treating professional to rely on the statements and the statements are pertinent to treatment. *Rangel v. State*, No. 05-15-00609-CR, 2016 WL 3031378 (Tex. App.—Dallas May 19, 2016, pet. ref'd) (mem. op., not designated for publication). Therefore, a parent's statements, or someone else that takes a child to the doctor, are excepted from

the hearsay rule.

Example Predicate:

Did you go with your daughter to the doctor?

What was the date of the visit to the doctor?

Did you go in the room with your daughter to see the doctor?

Did you notice any physical symptoms that would lead you to believe your daughter was not feeling well?

What did you see?

Was your daughter rubbing her forehead?

Did the doctor ask your daughter what was wrong?

What did she say?

5. Recorded Recollection

A memorandum or record concerning a matter about which a witness once had personal knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly, unless the circumstances of preparation cast doubt on the document's trustworthiness. Fed. R. Evid. 803(5). If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. *Id.* For a statement to be admissible under Rule 803(5): (1) the witness must have had firsthand knowledge of the event, (2) the statement must be an original memorandum made at or near the time of the event while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum. *Johnson v. State*, 967 S.W.2d 410, 416 (Tex. Crim. App. 1998); *Priester v. State*, 478 S.W.3d 826, 836 (Tex. App.—El Paso 2015, no pet.); *see also United States v. Patterson*, 678 F.2d 774, 778 (9th Cir. 1982). To meet the fourth element, "the witness may testify that she presently remembers recording the fact correctly or remembers recognizing the writing as accurate when she read it at an earlier time. But if her present memory is less effective, it is sufficient if the witness testifies that she knows the memorandum is correct because of a habit

or practice to record matters accurately or to check them for accuracy. At the extreme, it is even sufficient if the individual testifies to recognizing her signature on the statement and believes the statement is correct because she would not have signed it if she had not believed it true at the time." *Johnson*, 967 S.W.2d at 416.

Example Predicate:

Are you familiar with Susie?

Have you provided her counseling?

Do you recall providing her counseling on March 1, 2014?

I'm going to hand you what has been previously marked as Petitioner's Exhibit 2.

Do you recognize this as your counseling notes?

Did you make these notes yourself?

Do you normally make notes when you interview children?

Have you had a chance to review the notes?

Do these notes accurately reflect your knowledge of what occurred in that counseling session?

6. Records of Regularly Conducted Activity

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902 for these types of records, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Fed. R. Evid. 803(6). "'Business' as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not." Tex. R. Evid. 803(6)(e); *accord* Fed. R. Evid. 803(6)(B). For example, if a spouse keeps financial records as part of a regularly organized activity, the records can be admitted under this exception with the spouse as the sponsoring witness, without a business records affidavit. For example, courts have admitted check registers, medical bills and receipts, and cancelled checks, among other things, in this way. *See, e.g.*,

Sabatino v. Curtiss Nat'l Bank of Miami Springs, 415 F.2d 632, 634 (5th Cir. 1969); *In re M.M.S.*, 256 S.W.3d 470, 477 (Tex. App.—Dallas 2008, no pet.). The predicate for admissibility under the business records exception is satisfied if the party offering the evidence establishes that the records were generated pursuant to a course of regularly conducted business activity and that the records were created by or from information transmitted by a person with knowledge, at or near the time of the event. *Thomas v. State*, 967 P.2d 1111, 1124 (Nev. 1998). Business records that have been created by one entity but have become another entity's primary record of the underlying transaction may be admissible under this rule. *Nat'l Health Res. Corp. v. TBF Fin., LLC*, 429 S.W.3d 125, 130 (Tex. App.—Dallas 2014, no pet.); *Martinez v. Midland Credit Management, Inc.*, 250 S.W.3d 481, 485 (Tex. App.—El Paso 2008, no pet). Although the sponsoring witness need not be the record's creator or have personal knowledge of the content of the record, the witness must have personal knowledge of the manner in which the records were prepared. *Barnhart v. Morales*, 459 S.W.3d 733, 744 (Tex. App.—Houston [14th Dist.] 2015, no pet.). In order for a compilation of records to be admitted, there must be a showing that the authenticating witness or another person compiling the records had personal knowledge of the accuracy of the statements in the documents. *In re E.A.K.*, 192 S.W.3d 133, 143 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). However, documents written in preparation of litigation indicate a lack of trustworthiness and do not qualify as business records under the above rule. *Wi-LAN Inc. v. Sharp Elec. Corp.*, 362 F.Supp.3d 226, 232 (D.Del. 2019); *Campos v. State*, 317 S.W.3d 768, 778 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

Example Predicate - Business:

Mr. Jones, what is your position with the company?

How long have you been employed?

What are your responsibilities?

Do your responsibilities include bookkeeping?

Are you familiar with the bookkeeping practices of the company?

Let me show you what I have marked as Exhibit 1.

What is this?

What information do these documents reflect?

When were these documents prepared?

Who prepared those documents?

Do you have personal knowledge regarding the preparation of these documents?

Was the preparation of these documents a regularly conducted business activity of the business?

Was it the regular practice of the business to make these records in this way?

Example Predicate - Individual:

John, as part of your business do you download your bank account information on a weekly basis?

And does that cause you to deal with banks almost daily?

As part of your business, do you go online and make online financial transactions through your accounts?

And you have a username and password to those accounts?

And as part of your business do your print out those bank account statements for your file?

For the purposes of tracking the money you transfer from account to account each week?

And I have handed you what I have marked as Exhibit 2, are those some of those bank statements?

And is it in the normal course of business for you to print the documents in relation to the financial accounts and the business you transact each week?

And is it in the normal course of business for you to keep the documents in the manner they are presented here today?

And you have personal knowledge of these documents?

Because these are your bank statements?

7. Absence of a Record of a Regularly Conducted Activity

Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of 803(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. Fed. R. Evid.

803(7). For example, testimony about what is not documented in medical records is admissible under Rule 803(7). *Azle Manor, Inc. v. Vaden*, No. 2-08-115-CV, 2008 WL 4831408, at *6–7 (Tex. App.—Fort Worth 2008, no pet.) (mem. op.), *disapproved of on other grounds*, *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013). It is first necessary to show that records were kept in accordance with Rule 803(6) before introducing testimony under 803(7) that records are missing. *Coleman v. United Sav. Ass'n of Tex.*, 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ).

8. Public Records

Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth: (A) the activities of the office or agency; (B) matters observed while under a legal duty to report, excluding in criminal cases matters observed by police officers and other law enforcement personnel; or (C) in civil cases, factual findings resulting from a legally authorized investigation; unless the sources of information or other circumstances indicate lack of trustworthiness. Fed. R. Evid. 803(8). The court in *Cole* stated: "A number of courts have drawn a distinction for purposes of Rule 803(8)(B) between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and evaluating the results of the investigation." *Cole v. State*, 839 S.W.2d 798, 803 (Tex. Crim. App. 1990) (internal citations omitted) (quoting *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985)). "Rule 803(8) is designed to permit the admission into evidence of public records prepared for purposes independent of specific litigation. In the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter, . . . such records are, like other public documents, inherently reliable." *Id.* at 804.

In contrast, adversarial, investigative, or third-party statements do not fall under this exception. Classic examples would be witness statements in police reports or statements by third parties in CPS caseworker

narratives. Such statements, even if contained within a public report, would be hearsay-within-hearsay and only admissible if another hearsay exception was applicable. However, records prepared solely for litigation may be admitted so long as they are the result of an investigation made pursuant to authority granted by law and as long as they are properly authenticated. *See, e.g.*, *F-Star Socorro, L.P. v. City of El Paso*, 281 S.W.3d 103, 106 (Tex. App.—El Paso 2008, no pet.) (holding that delinquent-tax records, made for the sole purpose of litigation, were prepared as a result of a tax assessor-collector's lawful investigation, and were admissible because self-authenticating).

Practice Note: It is the burden of the party opposing the document to point out what statements within it are untrustworthy and, thus, excluded from the exception. *Zeus Enters., Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 241 (4th Cir. 1999); *Corrales v. Dep't of Family & Protective Servs.*, 155 S.W.3d 478, 486–87 (Tex. App.—El Paso 2004, no pet.) (holding that, although police report contained witness statements that did not fall within 803(8) exception, opposing party only objected on grounds that those witnesses were not at trial and did not specifically indicate which statements were untrustworthy, so entire report was admitted).

9. Public Records of Vital Statistics

Records of births, deaths, or marriages, if reported to a public office in accordance with a legal duty. Fed. R. Evid. 803(9); *compare Tex. Workers' Comp. Comm'n v. Wausau Underwriters Ins.*, 127 S.W.3d 50, 61 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (explaining that, while death certificate itself was automatically admissible under 803(9), contents of death certificate constitute hearsay within hearsay and must be examined separately), *with Birkhead v. State*, 57 So.3d 1223, 1231–32 (Miss. 2011) (holding that 803(9) admitted death certificate with no exceptions). The contents of a record of vital statistics are not automatically admissible pursuant to Rule 803(9) if it is alleged that the record contains hearsay statements. *See Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61; *but see Martinez v. State*, No. 05-92-02176-CR, 1996 WL 179370, at *1 (Tex. App.—Dallas Apr. 16, 1996, no writ) (not designated for publication). Except for birth and death records, further allegations of hearsay within a record must be examined separately. *See Tex. Workers' Comp. Comm'n*, 127 S.W.3d at 61; *see, e.g.*, Tex. Health & Safety Code Ann. § 191.052 ("A copy of a birth, death, or fetal death record

registered under this title that is certified by the *state* registrar is prima facie evidence of the facts stated in the record.") (emphasis added).

10. Absence of a Public Record

To prove the absence of a public record or statement or the nonoccurrence or nonexistence of a matter of which a public record or statement was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that a diligent search failed to disclose the public record or statement. Fed. R. Evid. 803(10). The best evidence rule cannot be an objection to testimony about the absence of a record because it does not apply to testimony that written records have been examined and found not to contain a certain matter. *United States v. Valdovinos-Mendez*, 641F.3d 1031, 1035 (9th Cir. 2011); *Mega Child Care, Inc. v. Tex. Dep't of Protective & Regulatory Servs.*, 29 S.W.3d 303, 311–12 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Further, "a nonexistent document or document entry, by definition, cannot be authenticated; it does not exist, and no authentication is required." *Mega Child Care, Inc.*, 29 S.W.3d at 311–12.

11. Records of Religious Organizations Concerning Personal or Family History

Statements of births, legitimacy, ancestry, marriages, divorces, deaths, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization. Fed. R. Evid. 803(11). These types of records do not require the same foundation as business records if they are not offered under that exception. *Jessop v. State*, 368 S.W.3d 653, 683 (Tex. App.—Austin 2012, no pet.). Nor does this rule depend upon the personal views or religious beliefs of the person making the records or the popularity or acceptance of the religious organization in question. *Id.* at 684. There is also literature on how this rule shows bias against oral tradition evidence, especially as it relates to Native American culture in America. *See Pueblo of Jemez v. United States*, 430 F.Supp.3d 943, 1169 n.204 (D.N.M. 2019).

12. Certificates of Marriage, Baptism, or Similar Ceremonies

Statements of fact, contained in a certificate that is made by a person who is authorized by a religious organization or by law to perform the act certified, that attest that the person performed a marriage or similar

ceremony or administered a sacrament and that purports to have been issued at the time of the act or within a reasonable time after it. Fed. R. Evid. 803(12).

13. Family Records

Statements of fact concerning personal or family history contained in a family record, such as Bibles, genealogies, charts, engravings on rings, inscriptions on portraits, or engravings on urns or other burial markers. Fed. R. Evid. 803(13); *see, e.g.*, *In re Egbert's Estate*, 306 N.W.2d 525, 527 (Mich. App. 1981) (admitting family photograph with handwritten note on back); *Cruz-Garcia v. State*, No. AP-77,025, 2015 WL 6528727, at *24 (Tex. Crim. App. Oct. 28, 2015) (not designated for publication) (holding that Bible study certificates did not qualify as family records because they did not concern personal or family history nor were they contained in any of the documents listed in 803(13)).

14. Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property as proof of the content of the originally recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is kept in a public office and an applicable statute authorizes the recording of documents of that kind in that office. Fed. R. Evid. 803(14). This hearsay exception should be construed to relate to recitals or statements made in deeds, leases, mortgages, and other such documents affecting an interest in property and not to affidavits of heirship which more properly fall within the hearsay exception stated under Rule 804(b)(3). *Compton v. WWV Enters.*, 679 S.W.2d 668, 671 (Tex. App.—Eastland 1984, no writ). 803(14) could include:

- a power of attorney, *Champion v. Robinson*, 392 S.W.3d 118, 128 n.17 (Tex. App.—Texarkana 2012, pet. denied);
- translated documents, *Kerlin v. Arias*, 274 S.W.3d 666, 667 (Tex. 2008);
- an assignment of mortgage, *U.S. Bank Nat'l Ass'n v. Huggins*, No. 24963, 2012 WL 3871431, at *4–5 (Ohio App. Sep. 7, 2012);
- previous judgments, *United States v. Boulware*, 384 F.3d 794, 806–07 (9th Cir. 2004);

- but not a letter from a CPA without a public office and not filed in a public office, *In re Bay Vista of Va., Inc.*, 428 B.R. 197, 216–17 (Bank. E.D. Va. 2010).

15. Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Fed. R. Evid 803(15); *Maui Land & Pineapple Co. v. Infiesto*, 879 P.2d 507, 511–12 (Haw. 1994); *McGuire v. Walker*, 423 S.E.2d 617, 618–19 (W.Va. 1992). This rule is similar to 803(14) but relates to statements in unrecorded documents affecting an interest in property. Although attorneys tend to think of real property when applying this exception, it can apply to personal property as well. *See, e.g., United States v. Weinstock*, 863 F.Supp. 1529, 1535 (D.Utah 1994) (holding that affidavit regarding ownership of shares of stock should not be excluded in motion in limine); *Guidry v. State*, 9 S.W.3d 133, 146–47 (Tex. Crim. App. 1999) (holding that wife's inventory from divorce proceeding stating she had an interest in a Jeep, which was to be the appellant's remuneration for killing her, fell under 803(15) exception); *Madden v. State*, 799 S.W.2d 683, 698 (Tex. Crim. App. 1990) (holding that handwritten list of victim's weapons with corresponding serial numbers found among victim's personal papers after death fell under 803(15) exception). Be aware, however, that some courts require the document to have some sort of official or formal nature, even though it is not recorded. *See, e.g., Tri-Steel Structures, Inc. v. Baptist Found. of Tex.*, 166 S.W.3d 443, 451 (Tex. App.—Fort Worth 2005, pet. denied) (noting that Texas Court of Criminal Appeals has been more liberal but holding that unsigned letters do not fall under 803(15) exception).

16. Statements in Ancient Documents

Jurisdictions vary on a time or date limit for how old a document must be to be considered "ancient." *See, e.g.*, Fed. R. Evid. 803(16) (prepared before January 1, 1998); Ind. R. Evid. 803(16) (at least thirty years old); Tex. R. Evid. 803(16) (at least twenty years old). But, generally, statements in a document that qualifies as an ancient document and whose authenticity is established is excepted from the hearsay rule. Fed. R. Evid. 803(16); *Cave Buttes, L.L.C. v. Comm'r of Internal Revenue*, 147 T.C. 338, 360–62 (2016) (holding that images of maps

digitally converted and posted on government website were ancient documents under 803(16) because maps were authenticated ancient documents). Although all hearsay exceptions require a showing of trustworthiness, the justification for this exception is, in part, circumstantial indicia of trustworthiness. *Walton v. Watchtower*, No. 10-05-00190-CV, 2007 WL 64442, at *3 (Tex. App.—Waco Jan. 10, 2007, no pet.) (mem. op.). "Fraud and forgery are unlikely to be perpetrated so patiently, to bear fruit so many years after a document's creation. Fair appearance and proper location, therefore, are sufficient additional circumstances to justify admissibility of an ancient document." *Id.* Grounds for excluding evidence include that the document was: (1) not produced in an admissible form, (2) unreliable, (3) found and produced under suspicious circumstances, or (4) not found where it should have been found. *Aguillera v. John G. & Marie Stella Kennedy Mem. Found.*, 162 S.W.3d 689, 695 (Tex. App.—Corpus Christi 2005, pet. denied); *see also* Fed. R. Evid. 901(b)(8) (authenticating ancient documents).

Example Predicate (to be used for authentication also):

I'm handing you what has been marked as Exhibit 1; what is that?

When was it created?

Is that more than 20 years ago?

Where was it found?

Is that an unusual place to find it?

Is there anything suspicious about its condition for being so old?

What does it say?

17. Market Reports and Similar Commercial Publications

Market quotations, lists, directories, or other compilations generally relied upon by the public or by persons in particular occupations. Fed. R. Evid. 803(17). "Where it is proven that publications of market prices or statistical compilations are generally recognized as reliable and regularly used in a trade or specialized activity by persons so engaged, such publications are admissible for the truth of the matter published." *Patel v. Kuciemba*, 82 S.W.3d 589, 594 (Tex. App.—Corpus Christi 2002, pet. denied); *accord Dugan v. Gotsopoulos*, 22 P.3d 205,

207 (Nev. 2001) (admitting Kelley Blue Book values). This exception also applies to drug labels if there is sufficient reliability that the drugs had not been changed since the date of packaging. *Reemer v. State*, 835 N.E.2d 1005, 1007–09 (Ind. 2005); *Shaffer v. State*, 184 S.W.3d 353, 362 (Tex. App.—Fort Worth 2006, pet. ref'd). For a discussion of the difference between this exception and the learned treatise exception, see immediately below.

18. Statements in Learned Treatises, Periodicals, or Pamphlets

To the extent called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, statements contained in published treatises, periodicals, or pamphlets established as reliable authority by the testimony or admission of the expert or by another expert or by judicial notice. Fed. R. Evid. 803(18); *Jacober v. St. Peter's Med. Ctr.*, 608 A.2d 304, 312 (N.J. Super. 1992) (collecting states that have adopted learned treatise hearsay exception and comparing differences). If admitted, the statements may be read into evidence but may not be received as exhibits. *Id.* The market report exception is different from the learned treatise exception in significant ways, as discussed in the *Kahanek* case: "A market report or commercial publication is received for the truth of the matter asserted, which permits the jury to take the document into the jury room. A learned treatise, on the other hand, is admissible only in conjunction with an expert's testimony and may not be taken into the jury room." *Kahanek v. Rogers*, 12 S.W.3d 501, 504 (Tex. App.—San Antonio 1999, pet. denied). The market report exception is for information that is readily ascertainable and about which there can be no real dispute. *Id.* The exception relates to objective facts furnished under a business duty to transmit. *Id.* Acceptance of these criteria can be seen in several examples in case law—growth charts of turkeys, daily stock price quote sheets, newspaper publications of the market prices of chickens, a baseball guide admitted to show the beginning and ending dates of the baseball season, and a travel guide admitted to show railroad timetables. *Id.* On the other hand, the compilation of drug information embodied by the Physicians' Desk Reference (PDR) goes beyond objective information to items on which learned professionals could disagree in good faith. *Id.* Therefore, the PDR is better classified as a learned treatise rather than a compilation of market material. *Id.* The predicate for cross-examining an expert on a learned treatise is found above in the section on experts. From that predicate, simply read into the record what you want the judge or jury to hear from the treatise.

19. Reputation Concerning Personal or Family History

Reputation among members of a person's family by blood or adoption or marriage, among a person's associates, or in the community, concerning a person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood or adoption or marriage, or other similar facts of personal or family history. Fed. R. Evid. 803(19); *Blackburn v. United Parcel Service, Inc.*, 179 F.3d 81, 98–101 (3d Cir. 1999) (providing in-depth background to rule). Hearsay exceptions 803(19) and (20) arise from necessity and are founded on the general reliability of statements by family members about family affairs when the statements by deceased persons regarding family history were made at a time when no pecuniary interest or other biased reason for the statements were present. *Akers v. Stevenson*, 54 S.W.3d 880, 885 (Tex. App.—Beaumont 2001, pet. denied). For example, "certain witnesses may provide hearsay evidence regarding a person's age. In order to give such evidence, the witness must be a close family associate who is familiar with the family history." *Jones v. State*, 950 S.W.2d 386, 388 (Tex. App.—Fort Worth 1997, pet. ref'd, untimely filed).

20. Reputation Concerning Boundaries or General History

Reputation in a community, arising before the controversy, concerning boundaries of or customs affecting lands in the community or concerning general historical events important to the community, state, or nation in which they are located. Fed. R. Evid. 803(20); *Pueblo of Jemez v. United States*, 366 F.Supp.3d 1234, 1267 (D.N.M. 2018) (allowing oral tradition in if it related to an event and boundaries but not stories, legends, or myth). However, proposed testimony related to an individual's family assertion of an easement without any indication of the community's interest in or knowledge of the family's claim to access the property or any indication of a general reputation within the community of his right of access is not admissible. *Roberts v. Allison*, 836 S.W.2d 185, 191 (Tex. App.—Tyler 1992, writ denied); *see also Roser v. Silvers*, 698 N.E.2d 860, 864 (Ind. 1998) (comparing different jurisdictions' application of rule).

21. Reputation Concerning Character

Reputation of a person's character among that person's associates or in the community. Fed. R. Evid. 803(21). "Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay

rule." *Moore v. State*, 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983, no pet.). A character witness is not required to reside or work in the same "community" as the one about whom the testimony is related. *Siverand v. State*, 89 S.W.3d 216, 221 (Tex. App.—Corpus Christi 2002, no pet.). For example, the testimony of a witness who knew defendant's reputation in Dallas, where the defendant worked, was admissible even though the witness did not know the defendant's reputation in Richardson, where the defendant lived. *Jordan v. State*, 290 S.W.2d 666, 667 (Tex. Crim. App. 1956); *cf. United States v. Oliver*, 492 F.2d 943, 944 (8th Cir. 1974) (allowing reputation within "college community," even though not "general community").

22. Judgment of Previous Conviction

In civil cases, evidence of a final judgment of conviction, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment of conviction, while no appeal of the conviction is pending. Fed. R. Evid. 803(22)(A). See Fed. R. Evid. 803(22)(B) if offering in a criminal case. If the judgment is used for a purpose other than a fact sustaining the judgment, Rule 803(22) does not apply. *Olsen v. Correiro*, 189 F.3d 52, 63 (1st Cir. 1999) (holding that, because judgment was being used to show defendant had been punished in a way related to his claim for incarceration-related damages, Rule 803(22) did not apply).

According to the *McCormick* case, a person may be prevented from explaining the circumstances of his previous conviction: "Where (i) the issue at stake was identical to that in the criminal case, (ii) the issue had been actually litigated, and (iii) determination of the issue was a critical and necessary part of the prior judgment, the judgment is established by offensive collateral estoppel and is within the hearsay exception of [803(22)]. When the requirements are satisfied, a party is estopped from attacking the judgment or any issue necessarily decided by the guilty verdict." *McCormick v. Tex. Commerce Bank Nat'l Ass'n*, 751 S.W.2d 887, 890 (Tex. App.—Houston [14th Dist.] 1988, writ denied). A trial court does not err in refusing to permit a party to explain the circumstances of his criminal conviction under these circumstances. *Id.* To allow a party to present evidence of inadequate representation by counsel, for example, would impugn the validity of the judgment and be impermissible under the doctrine of collateral estoppel. *Id.* It would also allow for an impermissible collateral

attack.

23. Judgments Involving Personal, Family, or General History, or a Boundary

Judgments as proof of matters of personal, family, or general history, or boundaries that were essential to the judgment, if the same could be proved by evidence of reputation. Fed. R. Evid. 803(23); *In re Estate of Mask*, 703 So.2d 852, 858 (Miss. 1997) (holding that judgment regarding conservatorship of ward was not admissible because ward's inability to handle his own affairs did not concern history of which no bias or passion would exist).

24. Residual Exception

Even if a statement does not fall under Rules 803 or 804, it can still overcome the hearsay rule if the statement is supported by sufficient guarantees of trustworthiness and it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts. Fed. R. Evid. 807(a). But, the statement is only admissible if the proponent gives reasonable notice in writing prior to the trial or hearing, or at the trial or hearing if good cause excuses the lack of earlier notice, of its intent to offer the statement so that its opponent has a fair opportunity to meet it. Fed. R. Evid. 807(b). Several states have similar residual rules, which all draw from the same principle discussed initially: hearsay is normally excluded because it cannot be tested and is, therefore, more susceptible to being unreliable or untrustworthy. *See* 2 McCormick on Evid. §§ 244–45. Thus, if that untrustworthiness is overcome, there is no reason to exclude it.

C. Exceptions to the Hearsay Rule - Declarant Unavailable

1. "Unavailable" Defined

A declarant is considered unavailable if the declarant: (1) is exempted, by ruling of the court on the ground of privilege, from testifying concerning the subject matter of the declarant's statement; (2) refuses to testify concerning the subject matter despite a court order to do so; (3) testifies to not remembering the subject matter; (4) is unable to be present or to testify at the hearing because of death or a then-existing infirmity or physical or mental illness; or (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means. Fed. R. Evid. 804(a).

These do not apply if the proponent of the statement wrongfully caused the declarant's unavailability. *Id.* In other words, unavailability of a witness means that the witness is dead, has become insane, is physically unable to testify, is beyond the jurisdiction of the court, is unable to be found after a diligent search, or has been kept away from the trial by the adverse party. *Hall v. White*, 525 S.W.2d 860, 862 (Tex. 1975); *cf. People v. Duncan*, 835 N.W.2d 399, 406 (Mich. 2013) ("The phrase 'then existing' specifically limits the temporal scope within which a witness's availability under MRE 804(a)(4) may be assessed; the only relevant reference point is the point at which the witness takes the stand. As a result, the declarant need not suffer from a permanent illness or infirmity. Thus, the fact that RS was competent and available to testify at two preliminary examinations does not affect the determination whether she was mentally capable or infirm for purposes of MRE 804(a)(4) at the time her testimony was sought at trial. Rather, the only relevant inquiry is her condition at the time she was called to testify."). The party offering a statement under a hearsay exception must prove the unavailability of the declarant. *Hall*, 525 S.W.2d at 862.

The court in *Fuller* discussed situations that do not satisfy the unavailability requirement. *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914 (Tex. App.—Beaumont 1998, pet. dism'd, judgment set aside Sep. 16, 1999). Although the *Fuller* opinion has been set aside, it raises concerns that lawyers must be diligent in procuring an available declarant. The court in *Fuller* stated that, although the declarant, who was 92, uncooperative, too ill to attend the original trial, and lived in California, was unavailable at the date of trial, that did not mean that he was not or would not be available at another point or in another way, such as a deposition in his home state. *Id.* at 921.

2. Former Testimony

Former testimony is not excluded if the declarant is unavailable as a witness if the testimony was given by the declarant as a witness at another hearing of the same or a different proceeding, or in a deposition taken in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Fed. R. Evid. 804(b)(1). Basically, if the opposing party, or one with a similar interest and motive,

had the opportunity to examine the declarant at another point in time about the same testimony, the declarant need not be available for examination by that party at the present hearing. *See United States v. Salerno*, 505 U.S. 317, 321–22 (1992) (holding that similar motive to develop testimony must exist in party against whom former testimony is offered). Different jurisdictions treat depositions differently, as discussed above. Former testimony from a previous hearing or trial, whether or not it is in the same proceeding, must be properly admitted into evidence at the current hearing before the factfinder, or the reviewing court may not consider it. *Bos v. Smith*, 492 S.W.3d 361, 378 (Tex. App.—Corpus Christi 2016), *rev'd in part on other grounds*, 556 S.W.3d 293 (Tex. 2018); *Moreno v. Perez*, 363 S.W.3d 725, 735–36 (Tex. App.—Houston [1st Dist.] 2011, no pet.). While a trial court may take judicial notice of its own file, it may not "take judicial notice of the truth of [the] allegations in its records." *Barnard*, 133 S.W.3d at 789. To properly admit previously admitted testimony, a party must authenticate the evidence and lay the proper predicate as though offering it for the first time. *See Guyton*, 332 S.W.3d at 693. Evidence not properly before the factfinder amounts to no evidence. *Id.*

3. Dying Declaration

A statement made by a declarant, while believing that the declarant's death was imminent, concerning the cause or circumstances of the death. Fed. R. Evid. 804(b)(2). The court in *Gardner* discusses this exception: "Under Texas common law, the proponent of a dying declaration was required to establish that it was made (1) when the declarant was conscious of approaching death and had no hope of recovery, (2) voluntarily, (3) without persuasion or influence from leading questions, and (4) when the declarant was of sound mind. This predicate could be established by either direct or circumstantial evidence, and it was not essential that the declarant actually say that he was conscious of impending death or without hope of recovery. Each case depends upon its particular circumstances, but sometimes the declarant's conduct and the nature of his wounds would suffice. Under the modern-day Rule 804(b)(2), the common-law requirement that there was no hope of recovery was abrogated, and the focus turned more to the severity of the injuries than the declarant's explicit words indicating knowledge of imminent death. All that the rule requires is sufficient evidence, direct or circumstantial, that demonstrates that the declarant must have realized that he was at death's door at the time that he spoke. It is both (1) the solemnity

of the occasion—the speaker peering over the abyss into the eternal—which substitutes for the witness oath, and (2) the necessity principle—since the witness had died, there was a necessity for taking his only available trustworthy statements—that provide the underpinning for the doctrine. As with the admission of all evidence, the trial judge has great discretion in deciding whether a statement qualifies as a dying declaration." *Gardner v. State*, 306 S.W.3d 274, 289–91 (Tex. Crim. App. 2009); *cf. Berry v. State*, 611 So.2d 924, 927 (Miss. 1992) (holding that declarant's consciousness of impending death could be inferred by fact that his body had over twenty shotgun pellets in it, every organ was damaged, major artery was severed, and chest was injured). Suicide notes have been held to not meet the dying declaration elements. *See United States v. Angleton*, 269 F.Supp.2d 878, 886 (S.D.Tex. 2003); *Garza v. Delta Tau Delta Fraternity Nat'l*, 948 So.2d 84, 86 (La. 2006)

4. Statement against Interest

A statement that was, at the time of its making, so contrary to the declarant's pecuniary or proprietary interest, or had so great a tendency to invalidate the declarant's claim against someone else or expose the declarant to civil or criminal liability or make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. Fed. R. Evid. 804(b)(3)(A). In criminal cases, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. Fed. R. Evid. 804(b)(3)(B). However, only those specific statements that were actually against penal interest are admissible, not the entire conversation. *Williamson v. United States*, 512 U.S. 594, 600 (1994). Self-inculpatory statements and "blame-sharing" or neutral collateral statements are admissible, but self-exculpatory statements that shift blame to another must be excluded. *Walter v. State*, 267 S.W.3d 883, 886, 894 (Tex. Crim. App. 2008). And remember that the statement must involve the *declarant's* interest or liability and not the interest or liability of another. *Williamson*, 512 U.S. at 601. Not all jurisdictions require the declarant to be unavailable for this exception to apply. *See, e.g.*, Tex. R. Evid. 803(24).

5. Statement of Personal or Family History

A statement concerning the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce,

relationship by blood or adoption or marriage, or other similar facts of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or a statement concerning the foregoing matters, including death, of another person, if the declarant was related to the person by blood or adoption or marriage, or was so intimately associated with the person's family as to be likely to have accurate information concerning the matter stated. Fed. R. Evid. 804(b)(3). This rule is similar to 803(19), which allows *reputation* testimony regarding personal or family history. *See* Fed. R. Evid. 803(19). This rule rests on the assumption that the type of declarant specified by the rule will not a make a statement, such as a date of a marriage or the existence of a ceremony, unless it is trustworthy. *Henderson v. State*, 77 S.W.3d 321, 326 (Tex. App.—Fort Worth 2002, no pet.). Rule 804(b)(3) does not apply when the matter asserted by the declarant involves non-trustworthy facts, such as state of mind. *Id.*

D. Hearsay within Hearsay

Hearsay within hearsay is admissible only if each offered portion fits a rule or exception. Fed. R. Evid. 805. Trial advocates commonly face this problem regarding statements contained within business and medical records. Like all hearsay, however, if an opponent does not object to hearsay-within-hearsay, the testimony may be probative evidence. *Gen. Motors Corp. v. Harper*, 61 S.W.3d 118, 126 (Tex. App.—Eastland 2001, pet. denied). Similarly, if evidence contains both inadmissible hearsay and other admissible evidence, the objection must be specific enough to point out the inadmissible evidence, or else it may all come in. *State v. Thomas*, 932 N.W.2d 713, 726 (Neb. 2019); *Foster v. S.C. Dep't of Highways and Pub. Transp.*, 413 S.E.2d 31, 34 (S.C. 1992); *Sunl Grp., Inc. v. Zhejiang Top Imp. & Exp. Co., Ltd.*, 394 S.W.3d 812, 816 (Tex. App.—Dallas 2013, no pet.).

Practice Note: A recent case out of California held that, although an expert may rely on hearsay to form an opinion, the expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." *People v. Sanchez*, 374 P.3d 320, 334 (Cal. 2016). The court adopted the following rule: "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being

admitted for their truth." *Id.* This would then extend to an expert's report, like a custody evaluation. If the evaluator relied on collaterals in forming an opinion, and the evaluator's report contains those collaterals' statements, the opponent should object on the grounds of hearsay (for the report) and hearsay within hearsay (for each statement made by a collateral). The proponent of the report should call each of those collaterals to testify so that the collateral can be cross-examined. But note that the Confrontation Clause, generally, does not apply to civil cases, should the court deny your request that each collateral be called to testify before admitting the report. *Am. Automotive Accessories, Inc. v. Fishman*, 175 F.3d 534, 541 (7th Cir. 1999); *In re S.P.*, 168 S.W.3d 197, 206 (Tex. 2005). One possible way around this, however, is that cross-examination is fundamental to due process. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2001) ("We have recognized that our due course of law provision at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. . . . This right [to be heard] also includes an opportunity to cross-examine witnesses, to produce witnesses, and to be heard on questions of law."); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987) ("Due process requires an opportunity to confront and cross-examine adverse witnesses.").

E. Impeaching Hearsay Statements

Rule 806 provides that when a hearsay statement, or a non-hearsay statement defined by Rule 801(d), has been admitted in evidence, the credibility of the out-of-court declarant may be attacked. Fed. R. Evid. 806. Evidence of a statement or conduct by the declarant at any time may be offered to impeach the out-of-court declarant. *Id.* There is no requirement that the declarant be afforded an opportunity to deny or explain. *Id.* If the credibility of the out-of-court declarant is attacked, it may be supported by any evidence that would be admissible if the declarant had testified as a witness. *Id.* If the party against whom a hearsay statement has been admitted subsequently calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if on cross-examination. *Id.*

F. Hearsay Issues with Electronic Evidence

Electronic evidence and non-electronic evidence follow the same underlying rules: they both must (1) be relevant, (2) be authentic, (3) fall within a hearsay exception or not be hearsay, (4) be an original or duplicate, and (5) have probative value that is not outweighed by its unfair prejudice. The predicates may be lengthier or more complicated for electronic evidence to prove each of those things, but do not forget, it is still just evidence. As such, this sub-section will only discuss issues directly related to electronic evidence and hearsay, relying on the discussions above of each individual hearsay rule. Electronic evidence, generally, will be discussed in more depth in the next section on authentication.

1. Unreflective Statements

Evidence obtained from email, text messaging, or social networking sites, such as Facebook, MySpace, or Twitter, is often relevant in family law cases. The evidence may be non-hearsay to the extent that it is an admission by a party-opponent, but there may be times where statements by others are relevant. Of the hearsay exceptions, 803(1)-(3) can be especially useful in admitting these types of statements. Those are the exceptions for present sense impression, excited utterance, and then-existing condition, as discussed above. Electronic communication is particularly prone to candid statements of the declarant's state of mind, feelings, emotions, and motives. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 570 (D.Md. 2007) (mem. op.). Further, such messages are often sent while events are unfolding (e.g., live tweeting), thus providing an additional argument for lack of reflection. The logic of the existing exceptions can be applied to admit even new forms of communication. *See* Fed. R. Evid. 803(1)–(3).

2. Reliable Documents

The second category of hearsay exceptions, reliable documents, can also include a variety of computer- or internet-stored data. Anything from online flight schedules, to personal financial records, to emails could potentially be admitted under these existing hearsay exceptions. *See* Fed. R. Evid. 803(5)–(18).

3. Statements that are not Hearsay

a) Computer-Generated "Statements"

"Cases involving electronic evidence often raise the issue of whether electronic writings constitute

statements under Rule 801(a). Where the writings are non-assertive, or not made by a 'person,' courts have held that they do not constitute hearsay, as they are not 'statements.'" *Lorraine*, 241 F.R.D. at 564. This refers to computer-generated statements made by an internal operation of the computer, such as the date and time that a hotel-room card reader reads a card key or the self-generated print out from an intoxilyzer instrument, rather than data that was entered by a person and subsequently printed out. *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir. 2003) (fax header); *Stevenson v. State*, 920 S.W.2d 342, 343–44 (Tex. App.—Dallas 1996, no pet.) (intoxilyzer); *Murray v. State*, 804 S.W.2d 279, 283–84 (Tex. App.—Fort Worth 1991, pet. ref'd) (hotel-room card reader); *but see Smith v. State*, 168 So.3d 992, 1000–01 (Miss. App. 2013)), aff'd in part, vacated in part, 136 So.3d 424 (Miss. 2014) (holding that automatically generated email that included both notification of Facebook message and contents of Facebook message was computer-generated and not hearsay). Even though these statements may be computer-generated, evidence must still support that the computer process is accurate and reliable. *See U. S. v. Rollins*, No. ACM34515, 2004 WL 26780, at *9 (A.F. Ct. Crim. App. 2003) ("[T]he admissibility of the computer tracing system record should be measured by the reliability of the system itself, relative to its proper functioning and accuracy."), *rev'd on other grounds*, 61 M.J. 338 (C.A.A.F. 2005); *Baker v. State*, 117 A.3d 676, 683–84 (Md. 2015) (phone records were inadmissible because, even though not hearsay, no evidence that they were accurate and reliable); *Miller v. State*, 208 S.W.3d 554, 562–64 (Tex. App.—Austin 2006, pet. ref'd) (holding that because no evidence was admitted that self-generated phone bill or process to create such bill was accurate, trial court erred by admitting phone bill over hearsay objection).

b) Metadata

Metadata is the computer-generated data about a file, including date, time, past saves, edit information, etc. It would likely be considered a non-statement under the above logic, and therefore non-hearsay. It remains important to properly satisfy authentication requirements. A higher authentication standard may apply because it is computer-processed data, rather than merely computer-stored data.

However, because metadata is normally hidden and usually not intended to be reviewed, at least ten states have issued ethics opinions concluding that it is unethical to mine inadvertently-produced metadata. *See, e.g.*,

Miss. Bar Ethics Comm., Op. 259 (2012); N.C. State Bar Ethics Comm., 2009 Formal Ethics Op. 1 (2010); Me. Bd. of Overseers, Op. 196 (2008). At least Seven states, including the American Bar Association, have issued opinions stating that mining metadata is not unethical, some including the caveat "as long as special software is not used." *See, e.g.*, Or. State Bar Legal Ethics Comm., Op. 2011-187 (2015); Co. Bar Ass'n Ethics Comm., Op. 119 (2008); Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Op. 06-442 (2006). Minnesota and Pennsylvania have each issued opinions that state it must be determined on a case-by-case basis. *See* Minn. Lawyers Prof'l Responsibility Board, Op. 22 (2010); Penn. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Op. 2009-100 (2009).

Texas issued an ethics opinion at the end of 2016 about metadata. Prof'l Ethics Comm. for the State Bar of Tex., Op. 665 (2016). While it does not directly address mining for metadata, it does instruct that attorneys have a duty to be competent when dealing with electronic documents and to scrub metadata so that a client's confidential information will not be inadvertently disseminated to opposing counsel. *Id.* It also states that, while lawyers have no duty to tell the sending lawyer that metadata containing confidential information was received, lawyers must continue to follow other ethical rules by not misleading the court. *Id.* Thus, if a lawyer makes a proposition to the court that would not be misleading without the knowledge of the confidential information, but would be misleading with the knowledge of the confidential information, the lawyer cannot make that proposition if the lawyer knew the confidential information, whether the lawyer inadvertently saw it or mined for it. *Id.*

c) Admissions by a Party-Opponent

The exemption for admissions by a party-opponent is extremely useful in overcoming a hearsay objection to texts, emails, Facebook wall posts, etc. Electronic evidence will meet this hearsay exemption if it is properly authenticated to have been written/posted/created/etc. by the party against whom it is used. *See, e.g.*, *United States v. Johnson*, 280 F.Supp.3d 772, 773 (D. Maryland 2017) ("Every day millions of individuals post the statements of others—in video, audio, and written form—to their own social media accounts. One need not look far to find examples where such actions do not constitute an endorsement of the statement, let alone a full-fledged adoption of the statement sufficient to justify its admission at trial against the individual who posted it . . . . Nor

is there any indication from the message allegedly posted by [defendant] that he authored or adopted the video as a whole—including its production, effects, and the statements of others."); *Cook v. State*, 460 S.W.3d 703, 713 (Tex. App.—Eastland 2015, no pet.) (text messages); *Massimo v. State*, 144 S.W.3d 210, 215–17 (Tex. App.—Fort Worth 2004, no pet.) (emails).

Similarly, "liking" something on social media could be an adoption of a statement, making it an admission by a party opponent. In *Bland*, an employee of the incumbent sheriff "liked" the opposing candidate's social media campaign page and was terminated. *Bland v. Roberts*, 730 F.3d 368, 372 (4th Cir. 2013). The 4th Circuit held that "liking a political candidate's campaign page . . . is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech." *Id.* at 386. Although this case did not directly address whether "liking" a social media page or post could be hearsay, holding that it is substantive speech certainly opens the door to that argument. And depending on who "liked" something and who is offering the "like," it could be an admission by a party opponent.

d) Emojis/Emoticons

An "emoticon" is "a combination of typed keyboard characters used . . . to represent a stylized face meant to convey the writer's tone." *Ukwuachu v. State*, No. PD-0366-17, 2018 WL 2711167, at *6 n.12 (Tex. Crim. App. June 6, 2018) (Yeary, J., concurring) (quoting Garner's Modern English Usage 476 (4th ed. 2014)). An "emoji" is "an emoticon or other image in [a standardized] set." *Id.* Emoticons and emojis are now mainstream in society and are becoming more prevalent in the law, and cases are beginning to cite to them more often. *See, e.g.*, *United States v. Schweitzer*, No. ACM 39212, 2018 WL 3326645, at *2, *6 (A.F. Ct. Crim. App. May 18, 2018); *Ukwuachu*, 2018 WL 2711167, at *6. Not many cases have directly held whether emojis or emoticons themselves are statements such that they would fall under the hearsay rules. *See, e.g.*, *Ghanam v. Does*, 845 N.W.2d 128, 144–46 (Mich. App. 2014) (holding in defamation case that tongue-sticking-out emoji ":P" meant sarcasm, so defendant's responses in online forum thread that public official was performing nefarious acts "cannot be taken as asserting fact," so they were not defamatory); *People v. Johnson*, 28 N.Y.S.3d 783, 795 (County Ct. N.Y. 2015) (holding that "likes" by victim of sexually suggestive posts were hearsay). But under the

definition of hearsay, a written verbal expression or nonverbal conduct is a statement. Fed. R. Evid. 801(a). Furthermore, drawings have been held to be admissible under hearsay exceptions. *See Mims*, 2015 WL 7166026, at *6 (drawings by a child of the child frowning or smiling represent the child's then-existing emotion and are admissible under 803(3)).

Therefore, there is no reason why emoticons or emojis, computer images used to convey the writer's tone or the actual thing the emoji depicts, should not fall under the hearsay rules. When seeking to admit or object to evidence that contains emoticons or emojis, make your argument specific and include the emoticons or emojis accordingly.

G. Rule of Optional Completeness

In Texas, Rule 107 allows for the admission of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter opened up by the adverse party. Tex. R. Evid. 107; *Bezerra v. State*, 485 S.W.3d 133, 142–43 (Tex. App.—Amarillo 2016, pet. ref'd) (holding no abuse of discretion in admitting videotaped interviews, over hearsay exception, that more fully and fairly explained the matters about which police officer testified per Rule 107) (citing *Walters*, 247 S.W.3d at 214–18). The omitted portion or other evidence that the proponent attempts to admit must be on the same subject and must be necessary to make it fully understood. *Id.* (quoting *Sauceda v. State*, 129 S.W.3d 116, 123 (Tex. Crim. App. 2004)). No other jurisdiction appears to include Rule 107, and Federal Rule 106, which matches Texas Rule 106 and is similar to Texas Rule 107, is not an exception to the hearsay rule, as discussed above.

IX. FRE Article IX. Authentication and Identification

The requirement of authentication or identification is one of the first conditions precedent to admissibility. This requirement is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Fed. R. Evid. 901(a). If the evidence is not what the proponent claims it is, then it cannot be relevant. *Tienda*, 358 S.W.3d at 638. A party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be. Unless the evidence sought to be admitted is self-authenticating under Rule 902, extrinsic evidence must be adduced prior to its admission. Fed. R. Evid. 902. Rule 901(b) contains a

non-exclusive list of illustrations of authentication that comply with the rule. Fed. R. Evid. 901(b).

The authentication requirements of Rule 901 are designed to set up a threshold preliminary standard to test the reliability of evidence, subject to later review by an opponent's cross-examination. Determining what degree of foundation is appropriate in any given case is in the judgment of the court. The required foundation will vary not only with the particular circumstances but also with the individual judge. Obviously, there is no "one size fits all" approach that can be taken when authenticating electronic evidence, partly because technology changes so rapidly that it is often new to many judges.

Before you step into the courtroom, you should already know what evidence you have that you want the factfinder to consider. You can then find the predicates and law necessary to authenticate and admit that evidence. Whether the evidence is electronic or not, the same rules of evidence apply, and the same unreliability must be overcome. *See In re F.P.*, 878 A.2d 91, 95 (Penn. 2005) (explaining that same rules of evidence apply to new technology and that same problem of unreliability can exist in traditional forms of evidence). While attorneys are right to be skeptical of electronic evidence, attorneys may forget that the same concerns are present with any type of evidence.

A. Non-electronic evidence

Non-electronic, physical evidence still exists, e.g. drawings, letters or writings, public records, tickets (sporting or other events, travel, etc.), deeds, judgments or convictions, bills, tax records, and wills. Except for those items that fall under 902, these items must be authenticated by laying the proper predicate to show that they are what the proponent claims they are.

Physical evidence has two basic methods of identification, which can authenticate the physical evidence and make it admissible: ready identifiability and chain of custody. Imwinkelried, Evidentiary Foundations at 138. Ready identifiability usually consists of distinctive characteristics or other attributes that a witness has experienced with the senses, thereby having personal knowledge, and can then identify again at trial, for example: a letter with an identifiable signature, a photograph, a voice, or an email. *See, e.g., Angleton v. State*, 971 S.W.2d 65, 68 (Tex. Crim. App. 1998) (voice); *Manuel v. State*, 357 S.W.3d 66, 75 (Tex. App.—Tyler 2011, pet. ref'd)

(email); *Garza v. Guerrero*, 993 S.W.2d 137, 142 (Tex. App.—San Antonio 1999, no pet.) (letter); *Kessler v. Fanning*, 953 S.W.2d 515, 522 (Tex. App.—Fort Worth 1997, no pet.) (photograph). The same identifiable characteristics can apply to both physical evidence and electronic evidence.

Example Predicate:

When have you seen/heard/experienced/etc. _____?

What characteristics did you see/hear/experience/etc.?

I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?

What is it? (The same _____ I saw/heard/experienced/etc. before)

How can you identify Exhibit 1? *[distinctive characteristics test]*

Are those the same characteristics you saw/heard/experienced/etc. previously?

Are you basing your identification on your previous experience?

Is Exhibit 1 in the same condition as you previously experienced it?

Chain of custody is necessary when an object has no readily identifiable characteristics, yet the proponent wants to prove that the object is the same object that is connected to the case. Imwinkelried, Evidentiary Foundations at 138. This is most apparent in criminal cases involving substances that are collected at the crime scene, sent for testing, and sent back and presented at the trial. But beware, with the ever-increasing amount of "fake" evidence that can be produced today, some evidence in family law cases may require the chain of custody to be established also. To do so, the proponent must call each link (person who handled the evidence) to the stand and show that link's receipt of the object, ultimate disposition of the object, and safekeeping of the object. *Id.* at 139. Note, however, that the chain-of-custody requirements in civil cases are usually less stringent than in criminal cases. *See, e.g.*, *In re K.C.P.*, 142 S.W.3d at 579–80.

Example Predicate:

When did you receive _____?

Where did you receive _____?

What condition was _____ in when you received it at that time and place?

What did you do with _____ when you received it?

Did you safeguard _____?

How? or What did you do to prevent any tampering?

What did you do when your work with _____ was complete? (retain, destroy, or transfer)

Explain the process of retain/destroy/transfer.

If not destroyed:

I am handing you what has been marked as Exhibit 1 for identification purposes; can you identify Exhibit 1?

What is it?

Aside from anything you did to _____, is Exhibit 1 in the same condition as _____ when you initially received it?

Do you believe _____ and Exhibit 1 are the same object?

B. Electronically Stored Information (ESI)

Remember, evidence is evidence. Whether electronic or not, the proponent must adduce sufficient evidence to show that it is what its proponent claims.

1. What is ESI?

Family law cases typically involve four different categories of electronic data: (1) voice transmissions such as audio recordings, cell phone transmissions, and voice mail; (2) computer-generated data such as spreadsheets, computer simulations, information downloaded from a GPS device, emails, and website information (such as social networking sites); (3) information from personal data devices and cell phones including calendars, text messages (SMS/MMS), notes, digital photos, and address books; and (4) video transmissions.

Each of those four categories can be stored as data in different ways. The court, in the landmark case of *Zubulake*, listed five different types of storage:

1. Active/Online Data. This includes data files that are currently-in-use and works-in-progress such as word processing documents, spreadsheets, electronic calendars, address books, and all of the items contained on the computer's hard drive. This is considered the most accessible data;

2. Near-line Data. This includes the data contained on robotic storage devices. Although retrieval time can range between a few milliseconds to several minutes, this data is still considered very accessible;

3. Archival or Offline Data. This includes the information copied to removable media and stored in a location other than on the computer. The accessibility time of this data can range from minutes to days, depending on where the data is stored;

4. Backup Tapes. This is the imaging of the computer's system to a tape drive for archival reasons. Restoration of backup tapes is more time-consuming and usually very costly. The court in *Zubulake* considered this type of data inaccessible;

5. Erased or Damaged Data. This includes deleted files and fragments of files that are randomly placed throughout the disk. This is the least accessible form of ESI, and the court in *Zubulake* considered this type of data inaccessible. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 318–19 (S.D.N.Y. 2003).

Each of these types of storage can be found in a variety of forms, such as desktop and laptop computers, hard drives, removable media drives (i.e. floppy disks, tapes, CDs, DVDs), handheld devices and cell phones, optical disks, network hard disks, remote internet storage or the "cloud," and iPods/iPads and other MP3 players. Many newer forms of media/apps, such as Snapchat, purportedly send a message that is erased after a set amount of time. But some of these apps actually store those messages on the phone, which can be retrieved.

2. Stored versus Processed Data

"Given the widespread use of computers, there is an almost limitless variety of records that are stored in or generated by computers." *Lorraine*, 241 F.R.D. at 556. The least complex admissibility issues are associated with electronically stored records. "In general, electronic documents or records that are merely *stored* in a computer raise no computer-specific authentication issues. If a computer *processes* data rather than merely storing it, authentication issues may arise. The need for authentication and an explanation of the computer's processing will depend on the complexity and novelty of the computer processing. There are many stages in the development of computer data where error can be introduced, which can adversely affect the accuracy and reliability of the output. Inaccurate results occur most often because of bad or incomplete data inputting, but can

also happen when defective software programs are used or stored-data media become corrupted or damaged." *Lorraine*, 241 F.R.D. at 543 (quoting Weinstein's Federal Evidence § 900.06[3]); *see, e.g.*, *Burleson v. State*, 802 S.W.2d 429, 440 (Tex. App.—Fort Worth 1991, pet. ref'd) (holding that computer-generated display, and system that produced display, was properly authenticated).

That said, although computer records are the easiest to authenticate, there is growing recognition that more care is required to authenticate these electronic records than traditional "hard copy" records. Two cases illustrate the contrast between the more lenient approach to admissibility of computer records and the more demanding one:

In *United States v. Meienberg*, the defendant challenged on appeal the admission into evidence of printouts of computerized records of the Colorado Bureau of Investigation, arguing that they had not been authenticated because the government had failed to introduce any evidence to demonstrate the accuracy of the records. 263 F.3d 1177, 1180–81 (10th Cir. 2001). The Tenth Circuit disagreed, stating, "Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility." *Id.* at 1181 (quoting *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988)).

In contrast, in the case of *In re Vee Vinhnee*, the bankruptcy appellate panel upheld the trial ruling of a bankruptcy judge excluding electronic business records of the credit card issuer of a Chapter 7 debtor for failing to authenticate them. 336 B.R. 437, 445 (9th Cir. BAP 2005). The court noted, "it is becoming recognized that early versions of computer foundations were too cursory, even though the basic elements covered the ground." *Id.* The court also observed, "The primary authenticity issue in the context of business records is on what has, or may have, happened to the record in the interval between when it was placed in the files and the time of trial. In other words, the record being proffered must be shown to continue to be an accurate representation of the record that originally was created. . . . Hence, the focus is not on the circumstances of the creation of the record, but rather on the circumstances of the preservation of the record during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created." *Id.* at 444. That is similar to

chain of custody. The court reasoned that, for paperless electronic records, "The logical questions extend beyond the identification of the particular computer equipment and programs used. The entity's policies and procedures for the use of the equipment, database, and programs are important. How access to the pertinent database is controlled and, separately, how access to the specific program is controlled are important questions. How changes in the database are logged or recorded, as well as the structure and implementation of backup systems and audit procedures for assuring the continuing integrity of the database, are pertinent to the question of whether records have been changed since their creation." *Id.* at 445. In order to meet the heightened demands for authenticating electronic business records, the court adopted, with some modification, an eleven-step foundation proposed by Professor Edward Imwinkelried, viewing electronic records as a form of scientific evidence:

1. The business uses a computer.

2. The computer is reliable.

3. The business has developed a procedure for inserting data into the computer.

4. The procedure has built-in safeguards to ensure accuracy and identify errors.

5. The business keeps the computer in a good state of repair.

6. The witness had the computer readout certain data.

7. The witness used the proper procedures to obtain the readout.

8. The computer was in working order at the time the witness obtained the readout.

9. The witness recognizes the exhibit as the readout.

10. The witness explains how he or she recognizes the readout.

11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact. *Id.* at 446; *cf. State v. Dunn*, 7 S.W.3d 427, 432 (Mo. Ct. App. 2000) (admissibility of computer-generated records "should be determined on the basis of the reliability and accuracy of the process involved"); *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998) ("[T]he admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy.").

As the foregoing cases illustrate, there is a wide disparity between the most lenient positions courts have

taken in accepting electronic records as authentic and the most demanding requirements that have been imposed. Further, it would not be surprising to find that, to date, more courts have tended towards the lenient rather than the demanding approach. However, it also is plain that commentators and courts increasingly recognize the special characteristics of electronically stored records, and there appears to be a growing awareness, as expressed in the Manual for Complex Litigation, that courts should "consider the accuracy and reliability of computerized evidence" in ruling on its admissibility. Manual for Complex Litigation, Fourth, § 11.447. Lawyers can expect to encounter judges in both camps, and in the absence of controlling precedent in the court where an action is pending setting forth the foundational requirements for computer records, there is uncertainty about which approach will be required. Further, although "it may be better to be lucky than good," as the saying goes, counsel would be wise not to test their luck unnecessarily. If it is critical to the success of your case to admit into evidence computer-stored records, it would be prudent to plan to authenticate the record by the most rigorous standard that may be applied. If less is required, then luck was with you.

Practice Note: The Texas Court of Criminal Appeals stated, in 2007, "in this modern era of computer-stored data, electronic files, and paperless court records, the day may come in which written judgments are largely obsolete. For this reason, Rule 902 of the Texas Rules of Evidence explicitly allows for the self-authentication of certified copies of public records, including data compilations in any form certified as correct by their custodian. A computer-generated compilation of information setting out the specifics of a criminal conviction that is certified as correct by the county or district clerk of the court in which the conviction was obtained is admissible under Rule 902." *Flowers v. State*, 220 S.W.3d 919, 922–23 (Tex. Crim. App. 2007) (internal quotations and citations omitted).

3. *Tienda v. State*

The Texas Court of Criminal Appeals released a 2012 opinion that dealt extensively with authenticating social media evidence. *See Tienda*, 358 S.W.3d at 633. While this case is not the first case to address internet evidence, it is the first from a court of last resort in Texas and goes into great depth on the subject, drawing from jurisdictions nationwide. *Id.*

The court in *Tienda* explained that there is no specific procedure for authenticating each piece of electronic evidence; rather the means of authentication will depend on the facts of the case. *Tienda*, 358 S.W.3d at 638–39. The court reviewed the case law from other jurisdictions to list some methods by which electronic evidence had been authenticated. *Id.* at 639 n.23. The court also acknowledged that some courts have held electronic evidence to a higher standard of authentication than other forms of evidence. *Id.* at 641–42. The court acknowledged the possibility that someone could have forged the pages to frame the defendant but held that that issue was one for the factfinder, not for the court as an authentication prerequisite. *Id.* at 645–46.

Practice Note: While case law on authenticating and admitting electronic evidence is still developing, practitioners may need to rely on cases from other jurisdictions. However, a practitioner should always attempt to admit the evidence, even if case law from other jurisdictions appears to be against it. Jurisdictions from around the country have sometimes followed, but sometimes distinguished, federal law and the law of other states, so there is nothing to lose by at least attempting to authenticate the evidence using as much circumstantial evidence as possible. Remember, the same rules of evidence apply to all evidence.

4. Reply-Letter Doctrine

"It is an accepted rule of evidence that a letter received in due course through the mails in response to a letter sent by the receiver is presumed to be the letter of the person whose name is signed to it and is thus self-authenticating." *United States v. Wolfson*, 322 F.Supp. 798, 812 (D. Del. 1971) (citing *Scofield v. Parlin & Orendorff Co.*, 61 F. 804, 806 (7th Cir. 1894)); *accord Black v. Callahan*, 876 F.Supp. 131, 132 (W.D. Tex. 1995) (citing *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985)). But the original letter must still be authenticated under traditional rules. *Wolfson*, 322 F.Supp. at 812.

Some jurisdictions have applied this same rule to electronic communications, including emails and text messages, although some courts have held that it is a rule of admissibility under 901, rather than a self-authenticating rule. *People v. Pierre*, 838 N.Y.S.2d 546, 548–49 (N.Y. App. Div. 2007) (text messages); *Butler v. State*, 459 S.W.3d 595, 602 n.6 (Tex. Crim. App. 2015) (text messages, letters, emails, instant messages, "and other similar written forms of communications"); *Varkonyi v. State*, 276 S.W.3d 27, 35 (Tex. App.—El Paso

2008, pet. ref'd) (emails).

5. Voice Transmissions

Rule 901(b)(5) provides that a voice recording may be identified by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. Fed. R. Evid. 901(b)(5). Voice transmissions may be authenticated by a witness with knowledge, opinion based upon hearing a voice under circumstances that connect it with the alleged speaker, or self-identification coupled with the context, content, and timing of the call. *See McCallister v. State*, 91 N.E.3d 554, 565 (Ind. 2018); *Emil v. State*, 784 P.2d 956, 958–59 (Nev. 1989); *State v. Thompson*, 803 S.E.2d 44, 50–51 (S.C. App. 2017); *Thornton v. State*, 994 S.W.2d 845, 855 (Tex. App.—Fort Worth 1999, pet. ref'd). One Texas court has held that a voicemail was not properly authenticated, even though a witness testified that she recognized the voice as the defendant's, because no evidence before the jury identified the recording or explained the circumstances in which it was made. *Miller*, 208 S.W.3d at 566. However, a recording can be properly authenticated even when the witness cannot identify every voice in the recording, so long as those unknown voices are not pertinent to the case. *See, e.g.*, *Escalona v. State*, No. 05-12-01418-CR, 2014 WL 1022330, at *10 (Tex. App.—Dallas Feb. 20, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that "[i]t was not necessary to identify both voices on the phone call recordings in order for the State to prove that the recordings were what the State claimed them to be.") (citing *Banargent v. State*, 228 S.W.3d 393, 401 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd), and *Jones v. State*, 80 S.W.3d 686 (Tex. App.—Houston [1st Dist.] 2002, no pet.)).

Practice Note: A video is typically authenticated by a witness who can testify either that the scene is accurately depicted or that the recording was made by a reliable method. However, if your witness merely recognizes the people in the video but cannot testify about the scene or how the video was made, you may try admitting solely the audio portion. Your witness can testify that she recognizes some or all of the voices, and the other requirements for authenticating a video would not apply.

6. Computer-generated Data

a) Email

There are many ways in which email evidence may be authenticated. The distinctive characteristics of email include the sender's email address, its contents, substance, and internal patterns. *Lorraine*, 241 F.R.D. at 554 (quoting Weinstein's Federal Evidence § 900.07[3][c]). "Because of the potential for unauthorized transmission of e-mail messages, authentication requires testimony from a person with personal knowledge of the transmission or receipt to ensure its trustworthiness." *Id.*; *cf. United States v. Siddiqui*, 235 F.3d 1318, 1322–23 (11th Cir. 2000) (holding that email can be authenticated by circumstantial evidence, including distinctive characteristics); *Safavian*, 435 F.Supp.2d at 40 (holding that emails can be authenticated by distinctive characteristics or by comparison of exemplars with other emails that have already been authenticated under 901(b)(3)); *Rambus, Inc. v. Infineon Techs. AG*, 348 F.Supp. 2d 698, 707 (E.D. Va. 2004) (emails that qualify as business records may be self-authenticating); *State v. Robinson*, 363 P.3d 875, 1024–26 (Kan. 2015) (although unredacted copies presented at trial, unredacted copies were produced in discovery, and the witness testified that the redacted copies were true and accurate copies of the original emails; holding emails were properly authenticated), *disapproved on other grounds*, *State v. Cheever*, 402 P.3d 1126 (Kan. 2017); *Johnson v. State*, 137 A.3d 253, 271–74 (Md. Ct. Spec. App. 2016) (holding emails properly authenticated because defendant admitted the email addresses belonged to him, distinctive characteristics within the emails, and the IP address from where the emails were sent was linked to defendant's mother's home). The reply-letter doctrine applies to emails as discussed above.

Practice Note: An email can be authenticated by testimony that the witness was familiar with the sender's email address and that the witness had received the emails in question from the sender. *Sennett v. State*, 406 S.W.3d 661, 669 (Tex. App.—Eastland 2013, no pet.). Other courts have enumerated several characteristics to consider when determining whether an e-mail has been properly authenticated, including:

1. Consistency with the email address on another email sent by the defendant;

2. The author's awareness through the email of the details of defendant's conduct;

3. The email's inclusion of similar requests that the defendant had made by phone during the time period; and

4. The email's reference to the author by the defendant's nickname. *See Manuel*, 357 S.W.3d at 75; *Shea v. State*,

167 S.W.3d 98, 105 (Tex. App.—Waco 2005, pet. ref'd); *Massimo*, 144 S.W.3d at 215.

Example Predicate:

Is this a print-out of an email?

Do you recognize the email address following the word "To"?

Whose email address is that?

Do you recognize the email address following the word "From"?

Are you familiar with that email address?

Do you receive emails from that email address often?

Do you communicate with _____ on a normal basis using that email address?

How long have you been communicating with _____ using that email address?

To your knowledge, has anyone else ever sent you an email from _____'s email address?

Do you have any reason to believe this particular message is from someone other than _____?

Why do you say that? *[FRE 901(b)(4) distinctive characteristics]*

Is the print-out of the email a fair and accurate depiction of the conversation that took place that day?

Have you changed or deleted any portions of the conversation?

*If emojis are included:

Is there anything in the messages aside from letters, numbers, and punctuation?

What emojis/emoticons/symbols appear?

Did your spouse use those emojis before?

In what context would your spouse use them?

What do those emojis mean to you when your spouse uses them?

b) Websites, Including Social Media

When determining the admissibility of exhibits containing representations of the contents of website postings of a party, the issues that have concerned courts include the possibility that third persons other than the sponsor of the website were responsible for the content of the postings, leading many to require proof by the

proponent that the organization hosting the website actually posted the statements or authorized their posting. *Lorraine*, 241 F.R.D. at 555–56.

"One commentator has observed in applying the authentication standard to website evidence, there are three questions that must be answered explicitly or implicitly. (1) What was actually on the website? (2) Does the exhibit or testimony accurately reflect it? (3) If so, is it attributable to the owner of the site? The same author suggests that the following factors will influence courts in ruling whether to admit evidence of internet postings:

"The length of time the data was posted on the site; whether others report having seen it; whether it remains on the website for the court to verify; whether the data is of a type ordinarily posted on that website or websites of similar entities (e.g. financial information from corporations); whether the owner of the site has elsewhere published the same data, in whole or in part; whether others have published the same data, in whole or in part; whether the data has been republished by others who identify the source of the data as the website in question?

"Counsel attempting to authenticate exhibits containing information from internet websites need to address these concerns in deciding what method of authentication to use, and the facts to include in the foundation." *Id.* at 555–56 (quoting Gregory P. Joseph, *Internet and Email Evidence*, 13 Prac. Litigator (Mar. 2002), *reprinted in* 5 Stephen A. Saltzburg et el., Federal Rules of Evidence Manual, Part 4 at 22 (9th ed. 2006)); *see also United States v. Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) (excluding website postings because proponent failed to show that sponsoring witness actually posted the statements, rather than third party); *State v. Eleck*, 23 A.3d 818, 824 (Conn. App. Ct. Aug. 9, 2011) (holding insufficient fact that messages came from certain Facebook account without further "foundational proof"); *Parker v. State*, 151 N.E.3d 1269 (Ind. App. 2020) (holding that Facebook messages were properly authenticated because defendant's picture was on messages, address on Facebook and defendant's address were on the same street, actions in messages matched defendant's actions, and defendant's phone rang after being arrested when officer called from staged Facebook profile with missed-call notice from the officer's profile); *Commonwealth v. Purdy*, 945 N.E.2d 372, 380–82 (Mass. 2011) (holding that email sent from Facebook account bearing defendant's name not sufficiently authenticated without additional "confirming circumstances"); *In re Adoption of Nash*, 50 N.E.2d 2019, at *3 (Mass. App. 2016)

(holding that Facebook messages not authenticated because, after mother and adoptive parents were no longer friends on Facebook, messages' metadata showed that they came from an unknown source); *State v. Green*, 830 S.E.2d 711, 714–16 (S.C. App. 2019) (holding Facebook messages properly authenticated because contained co-defendant's screen name, reference to co-defendant's sister, co-defendant's invitation to co-defendant's address, co-defendant's real name, timing of messages, and fact that victim disappeared after invitation to co-defendant's home, where victim's blood was found); *State v. Burns*, No. M2014-00357-CCA-R3-CD, 2015 WL 2105543, at *10–12 (Tenn. Crim. App. May 5, 2015) (holding Facebook messages authenticated because victim's computer and defendant's computer had same messages, emails also existed between defendant and victim, defendant's email was linked to Facebook account, same email was linked to defendant's cell phone and resume, and same pictures were found on both defendant's computer and cell phone); *Campbell v. State*, 382 S.W.3d 545, 551–52 (Tex. App.—Austin 2012, no pet.) (holding that Facebook messages authenticated because only two parties who had access to the account were victim and defendant, defendant admitted he had a Facebook account, and victim admitted to receiving messages from the defendant's Facebook account).

7. Information from Personal Data Devices

a) Text Messages

Text messages can be authenticated by applying the same factors as emails. *Manuel*, 357 S.W.3d at 76–77; *see also State v. Damper*, 225 P.3d 1148, 1152–53 (Ariz. App. 2010) (authenticated because witness and victim regularly texted, victim's phone number saved in witness's phone, text on morning of shooting came from victim's phone, victim's phone found next to her body after shooting, defendant failed to provide evidence that anyone other than victim could have had used victim's phone that morning); *State v. Koch*, 334 P.3d 280, 288 (Idaho 2014) ("[E]stablishing the identity of the author of a text message or email through the use of corroborating evidence is critical to satisfy the authentication requirement for admissibility."); *Boyd v. State*, 175 So.3d 1, 6 (Miss. 2015) (authenticated because defendant was arrested at the time and place of the meeting set up through the messages, he was alone when arrested with a cell phone that contained victim's phone number, and victim's phone had sent messages to that cell phone); *Rodriguez v. State*, 273 P.3d 845, 848 (Nev. 2012) (texts not

authenticated because state did not demonstrate that defendant was author of texts); *State v. Thompson*, 777 N.W.2d 617, 626 (N.D. 2010) (holding texts authenticated because defendant demanded money via text and in person from victim, victim explained circumstances and testified of defendant's phone number and signature on text); *Butler*, 459 S.W.3d at 605 (holding that Rule 901 does not require court to determine credibility of sponsoring witness, who had been impeached); *Joseph v. State*, No. 14-11-00776, 2013 WL 2149779 (Tex. App.—Houston [14th Dist.] May 16, 2013, no pet.) (memo. op.) (appellant's verbal messages to witness were so similar to purported texts that they could be properly authenticated as coming from appellant); *State v. Otkovic*, 322 P.3d 746, 752 (Utah 2014) (authenticated because sufficient evidence showed that texts came from defendant's cell phone and that defendant was in possession of same cell phone at time texts were sent).

Example Predicate:

Is this a print-out of a text message?

Do you recognize it?

How do you recognize it?

Do you recognize the name at the top of the print-out?

Regarding the printout, what cell phone number is that name attached to in your cell phone contacts?

How did you obtain _____'s cell phone number?

Have you received text messages from _____ before?

Is text messaging a normal way that you communicate with _____?

How long have you been text messaging with _____?

To your knowledge, has anyone else ever sent you a text message from _____'s cell phone?

Do you have any reason to believe this particular text message is from someone other than _____?

Why do you say that? *[FRE 901(b)(4) distinctive characteristics]*

Did you and _____ discuss the events that occurred earlier in the day? *[FRE 901(b)(4) distinctive characteristics]*

Is the print-out of the text message a fair and accurate depiction of the conversation that took place?

Have you changed or deleted any portions of the conversation?

b) Chat Room Content

"Many of the same foundational issues encountered when authenticating website evidence apply with equal force to internet chat room content; however, the fact that chat room messages are posted by third parties, often using 'screen names' means that it cannot be assumed that the content found in chat rooms was posted with the knowledge or authority of the website host." *Lorraine*, 241 F.R.D. at 556; *but see United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (holding testimony of witness who had participated in chats was sufficient to authenticate chat log). "One commentator has suggested that the following foundational requirements must be met to authenticate chat room evidence:

"(1) evidence that the individual used the screen name in question when participating in chat room conversations (either generally or at the site in question);

"(2) evidence that, when a meeting with the person using the screen name was arranged, the individual showed up;

"(3) evidence that the person using the screen name identified himself as the person in the chat room conversation;

"[(4)] evidence that the individual had in his possession information given to the person using the screen name; or

"(5) evidence from the hard drive of the individual's computer showing use of the same screen name." *Lorraine*, 241 F.R.D. at 556 (quoting 1 Saltzburg, Federal Rules of Evidence Manual, § 901.02[12]).

Courts also have recognized that exhibits of chat room conversations may be authenticated circumstantially. *See United States v. Tank*, 200 F.3d 627, 629–31 (9th Cir. 2000) (despite certain portions of messages being deleted, circumstantial evidence connecting defendant to chat room, including use of defendant's screen name in messages, authenticated messages); *United States v. Simpson*, 152 F.3d 1241, 1249 (10th Cir. 1998) (use of email name of defendant, presence of the defendant's correct address in messages, and notes seized at defendant's home containing address, email address, and telephone number given by undercover officer, all authenticated messages); *In re F.P.*, 878 A.2d at 93–94 (holding that circumstantial evidence, such as use of

defendant's screen name in text message, use of the defendant's first name, and subject matter of the messages all could authenticate the transcripts).

c) Digital Photographs

"Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering [expert] testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be enhanced. Digital image enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change." *Lorraine*, 241 F.R.D. at 561 (quoting Edward J. Imwinkelried, *Can this Photo be Trusted?*, Trial, Oct. 2005, at 48).

"Some examples graphically illustrate the authentication issues associated with digital enhancement of photographs: Suppose that in a civil case, a shadow on a 35 mm photograph obscures the name of the manufacturer of an offending product. The plaintiff might offer an enhanced image, magically stripping the shadow to reveal the defendant's name. Or suppose that a critical issue is the visibility of a highway hazard. A civil defendant might offer an enhanced image of the stretch of highway to persuade the jury that the plaintiff should have perceived the danger ahead before reaching it. In many criminal trials, the prosecutor offers an improved, digitally enhanced image of fingerprints discovered at the crime scene. The digital image reveals incriminating points of similarity that the jury otherwise . . . never would have seen." *Id.* (quoting Imwinkelried, *Can this Photo be Trusted?* at 49).

Three distinct types of digital photographs should be considered with respect to authentication analysis: original digital images, digitally converted images, and digitally enhanced images. *Id.*

(1) Original Digital Photograph

"An original digital photograph may be authenticated the same way as a film photo, by a witness with personal knowledge of the scene depicted who can testify that the photo fairly and accurately depicts it. If a question is raised about the reliability of digital photography in general, the court likely could take judicial notice of it under Rule 201." *Id.*

Further, even if no witness can testify from personal knowledge that the photo accurately depicts the scene, the "silent witness" analysis allows a photo to be authenticated by showing a process or system that produces an accurate result. Fed. R. Evid. 901(b)(9); *United States v. Greska*, 65 M.J. 835, 844 (A.F. Ct. Crim. App. 2007); *Reavis v. State*, 84 S.W.3d 716, 719 (Tex. App.—Fort Worth 2002, no pet.) (citing *United States v. Harris*, 55 M.J. 433, 438 (C.A.A.F. 2001)). Testimony that shows how the storage device was put in the camera, how the camera was activated, the removal of the storage device immediately after the offense, the chain of custody, and how the film was developed/photograph was printed, is sufficient to support a trial court's decision to admit evidence. *See Reavis*, 84 S.W.3d at 719 (citing *United States v. Taylor*, 530 F.2d 639, 641–42 (5th Cir. 1976)). The D.C. Circuit has held that photos taken by an ATM were properly authenticated on even less evidence—mere testimony of a bank employee familiar with the operation of the camera and the fact that the time and date were indicated on the evidence were sufficient to authenticate the photos. *Id.* at 719–20 (citing *United States v. Fadayini*, 28 F.3d 1236, 1241 (D.C. Cir. 1994)).

(2) Digitally Converted Images

"For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)—the latter rule implicating expert testimony under Rule 702. Alternatively, if there is a witness familiar with the scene depicted who can testify to the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion." *Lorraine*, 241 F.R.D. at 561. If further testimony is required to explain the process, then the

predicate laid out above in the expert witness section would be used to show the procedures used to convert the film image to a digital format, along with the witness's personal knowledge that the process produces an accurate and reliable digital version of the photograph.

(3) Digitally Enhanced Images

"For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable and accurate results, which delves into the realm of scientific or technical evidence under Rule 702. Recently, one state court has given particular scrutiny to how this should be done. In *State v. Swinton*, the defendant was convicted of murder in part based on evidence of computer enhanced images prepared using the Adobe Photoshop software. The images showed a superimposition of the [defendant's] teeth over digital photographs of bite marks taken from the victim's body. At trial, the state called the forensic odontologist (bite mark expert) to testify that the defendant was the source of the bite marks on the victim. However, the defendant testified that he was not familiar with how the Adobe Photoshop made the overlay photographs, which involved a multi-step process in which a wax mold of the defendant's teeth was digitally photographed and scanned into the computer to then be superimposed on the photo of the victim. The trial court admitted the exhibits over objection, but the state appellate court reversed, finding that the defendant had not been afforded a chance to challenge the scientific or technical process by which the exhibits had been prepared. The court stated that to authenticate the exhibits would require a sponsoring witness who could testify, adequately and truthfully, as to exactly what the jury was looking at, and the defendant had a right to cross-examine the witness concerning the evidence. Because the witness called by the state to authenticate the exhibits lacked the computer expertise to do so, the defendant was deprived of the right to cross examine him.

"Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9): (1) The witness is an expert in digital photography; (2) the witness testifies as to image

enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them; (3) the witness testifies that the processes used are valid; (4) the witness testifies that there has been adequate research into the specific application of image enhancement technology involved in the case; (5) the witness testifies that the software used was developed from the research; (6) the witness received a film photograph; (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer; (8) the witness can identify the trial exhibit as the product of the enhancement process he or she performed. The author recognized that this is an extensive foundation, and whether it will be adopted by courts in the future remains to be seen. However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results." *Id.* at 561–62.

The eight steps above can lay the predicate for digitally enhanced images. But because Photoshop is so widely used today, and image enhancements are easy to come by, the same predicate laid out in the section on expert witnesses concerning the tests and procedures they use could be used here. The witness must first be proved up as an expert on digital photo enhancements, though.

Example Predicate:

Do you use Instagram?

Do you have an Instagram account?

Did you create your own Instagram page?

When did you create it?

Did you create the username and password?

Does anyone else have access to that username and password that you created?

Has anyone else ever had access to that username and password that you created?

Do you have friends/followers on Instagram?

Do you either accept friends/followers or request friends/followers on Instagram?

Have you ever de-friended/un-followed anyone on your Instagram page?

When was that/Who was that [as relevant]?

Did you create your Instagram profile page?

Have you posted photos to your Instagram page?

When you posted those photos, did you utilize any of the photography filters available on Instagram?

What filters did you utilize (if applicable)?

Other than providing a filter on the photograph, did you make any other edits or changes to the photograph?

When did you last modify your profile on Instagram?

Have you ever noticed anything about your Instagram page that would lead you to believe that someone else has had access to your Instagram account?

What is your username?

What is your password?

Is this a fair and accurate depiction of your page?

Does it appear that anything has been deleted or changed?

8. Video Transmissions

Videos can be authenticated the same way as photographs, and the same "silent witness" principle applies as well. *See State v. Luke*, 464 P.3d 914, 928–29 (Haw. App. 2020); *People v. Tetter*, 144 N.E.3d 664, 668 (Ill. App. 2019); *Reavis*, 84 S.W.3d at 719; *see, e.g.*, *Thierry v. State*, 288 S.W.3d 80, 88–89 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (holding that, even though sponsoring witness was not present when the video was made, sponsoring witness knew the intricacies of the recording and computer systems and detailed how he was able to link the encoding on the receipts to the time and date in question, to the transaction in question, to the cashier, to the terminal, and finally to the video camera that recorded the transaction; he also testified that he personally copied the relevant recording to the videotape, viewed it on the recording system and the videotape the same day he made the tape, and viewed it on the day prior to his testimony, and that it fairly and accurately represented what it purported to show and that no alterations or deletions had been made; thus, videotape was properly authenticated); *see also Fowler v. State*, 544 S.W.3d 844, 848–49 (Tex. Crim. App. 2018) (holding that

"yes, it is possible" for the proponent of a video to sufficiently prove its authenticity without testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device; using distinctive characteristics test to determine that the trial court was within the zone of reasonable disagreement when admitting the video).

Example Predicate:

Were you present when Husband struck Wife that day?

Were you able to see him when he struck her?

What were you doing when he struck her?

I am handing you what has been marked as Exhibit 1 for identification purposes; do you recognize that?

What is it?

Since making that video, have you watched it?

Does the video recording, marked as Exhibit 1, fairly and accurately show what you saw that day when Husband struck Wife?

Is the recording complete?

Has it been edited in any way?

C. Self-Authenticating Evidence

Rule 902 sets forth fourteen different types of evidence that are self-authenticating, meaning that no extrinsic evidence of authenticity is required before they are admissible. Fed. R. Evid. 902. Each subsection of Rule 902 lays out the predicate necessary to self-authenticate each type of evidence.

1. Domestic Public Documents that are Sealed and Signed

Any document that bears a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; along with a signature purporting to be an execution or attestation. Fed. R. Evid. 902(1); *see, e.g.*, *United States v. Alvirez*, 831 F.3d 1115, 1123 (9th Cir. 2016) (holding that only entities listed in

rule can issue self-authenticating documents); *Waworsky v. Fast Grp. Hous. Inc.*, No. 01-13-00466-CV, 2015 WL 730819, at *4 (Tex. App.—Houston [1st Dist.] Feb. 17, 2015, no pet.) (mem. op.) (holding that, because Texas Workforce Commission's "Appeal Tribunal Decision" contained seal of TWC and signature of hearing officer, decision was properly self-authenticated).

2. Domestic Public Documents that are not Sealed but are Signed and Certified

Any document that bears no seal but bears the signature of an officer or employee of an entity named in 902(1) and another public officer, who has a seal and official duties within that same entity, certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine. Fed. R. Evid. 902(2). These documents can often be authenticated under Rule 902(4) as well. *See, e.g.*, *United States v. Weiland*, 420 F.3d 1062, 1072 (9th Cir. 2005); *Williams v. State*, No. 03-07-00398-CR, 2008 WL 820919, at *3 (Tex. App.—Austin Mar. 28, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that pen packets had more ways to be authenticated than just 902(1) and 902(2)); *Hooker v. Tex. Dep't of Public Safety*, No. 09-07-125 CV, 2007 WL 4722931, at *1 (Tex. App.—Beaumont Jan. 17, 2008, pet. denied) (mem. op.) (holding that sworn reports of police officer were properly authenticated under 902(4), so appellant's issue of proper authentication under 902(2) was irrelevant).

3. Foreign Public Documents

Any document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. Fed. R. Evid. 902(3); *see United States v. Deverso*, 518 F.3d 1250, 1255–56 (11th Cir. 2008). The document must also have a final certification as to the genuineness of the signature and the official position of the signer, and this must be signed by a secretary of the United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. *Id.* If all of the parties have had a reasonable opportunity to investigate the authenticity of the document, the court may order that the document be treated as presumptively authentic without a final certification or allow it to be evidenced by an attested summary with or without a final certification. *Id.*

The Texas Court of Criminal Appeals has recently examined this rule in depth. *Bruton v. State*, 428 S.W.3d 865, 873–81 (Tex. Crim. App. 2014). The appellant had been convicted in the district court of aggravated sexual assault of a child and indecency with a child by contact. *Id.* at 869 n.8. During the punishment phase, the State attempted to introduce exhibits containing several certificates of conviction from the United Kingdom. *Id.* at 868. The court looked first at the difference between obtaining originals or copies. *Id.* at 874–76. Rule 902(3) applies to originals, and originals that purport to be originals executed by someone with authority to execute them satisfy the execution/attestation requirement of Rule 902(3). *Id.* at 874–76. It then turned to the final certification that must accompany such documents, including who must make the certification. *Id.* at 877–79. A final certification must directly or indirectly vouch for the genuineness of the signature and official position of the signer. *Id.* at 877. Only those positions listed in 902(3) may sign such certification. *Id.* at 877–78. And finally, it looked at the good cause determination when no final certification is available. *Id.* 879–81. Good cause is measured partly by whether the document is authentic despite the absence of a final certification. *Id.* at 880. But the weight goes toward whether good cause exists as to why the party did not obtain a final certification. *Id.* at 880–81.

4. Certified Copies of Public Records

Any copy of an official record if the copy is certified as correct by the custodian or another person authorized to make the certification or a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed under statutory authority. Fed. R. Evid. 902(4); *see, e.g.*, *Nolan v. Billings Clinic*, 467 P.3d 545, 548 (Mon. 2020) (holding that weather report was self-authenticating because it was certified by its custodian); *In re Marriage of Dalton*, 348 S.W.3d 290, 295 (Tex. App.—Tyler 2011, no pet.) (holding that certified copy of Oklahoma order was properly filed in Texas and properly authenticated foreign judgment).

5. Official Publications

Any book, pamphlet, or other publication purporting to be issued by a public authority. Fed. R. Evid. 902(5); *see Williams v. Long*, 585 F.Supp.2d 679, 686 (D.Md. 2008) (including same list of entities in 902(1) as "public authority"). Because such documents are self-authenticating, it is proper to take judicial notice of

documents on government websites. *Shook v. Pirkin Cty. Bd. of Cty. Comm'rs*, 411 P.3d 158, 161 n.4 (Col. App. 2015) (taking judicial notice of self-authenticating government webpage from a particular date); *In re Poirier*, 346 B.R. 585, 588–89 (Bankr.D.Mass. 2006) (taking judicial notice of fact that Department of Education maintains a website, but noting that website is not fixed, so not taking judicial notice of facts on website); *Williams Farms Produce Sales, Inc. v. R.&G Produce, Co.*, 443 S.W.3d 250, 259 (Tex. App.—Corpus Christi 2014, no pet.) (holding in turnover suit that court could rely on docket sheet printed from federal court website to show that separate entity owned cause of action to be turned over).

6. Newspapers and Periodicals

Any printed materials purporting to be a newspaper or periodical. Fed. R. Evid. 902(6); *see, e.g.*, *United States Ec. & Exch. Comm'n v. Berrettini*, No. 10-cv-1614, 2015 WL 5159746, at *6 (N.D.Ill. Sep. 1, 2015) (mem. op. & order) (holding document not self-authenticating as article from Wall Street Journal's website because document contained no URL or other information indicating article was obtained from WSJ website or where or when it was obtained); *Crofton v. Amoco Chemical Co.*, No. 14-98-01412-CV, 1999 WL 1122999, at *3 (Tex. App.—Houston [14th Dist.] Dec. 9, 1999, pet. denied) (not designated for publication) (holding that newspaper articles were self-authenticating).

7. Trade Inscriptions

Any inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control. Fed. R. Evid. 902(7); *see, e.g.*, *United States v. Burdulis*, 753 F.3d 255, 263 (1st Cir. 2014) (holding that thumb drive with "Made in China" stamped on it was self-authenticating evidence that showed that thumb drive had travelled in interstate commerce).

8. Acknowledged Documents

Any document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments. Fed. R. Evid. 902(8). Although affidavits may be authenticated under this Rule, they may still be inadmissible as hearsay. *See Ortega v. Cach, LLC*, 396 S.W.3d 622, 630 (Tex. App.—Houston [14th Dist.] 2013, no pet.). But if the acknowledged document is the

statement of an opposing party, it would be self-authenticating and not be hearsay. *See* Fed. R. Evid. 801(d)(2), 902(8).

9. Commercial Paper

Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law. Fed. R. Evid. 902(9); *United States v. Varner*, 13 F.3d 1503, 1510 (11th Cir. 1994) ("The language of Fed.R.Evid. 902(9) encompasses a broader range of self-authenticating documents than does Article 3 of the UCC."); *Ethridge v. State*, No. 12-09-00190-CR, 2012 WL 1379648, at *19 (Tex. App.—Tyler April 18, 2012, no pet.) (mem. op., not designated for publication) (holding that photocopy of checks in forgery case were self-authenticating).

10. Presumptions Under a Federal Statute

A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic. Fed. R. Evid. 902(10); *Jangula v. N.D. Dep't of Transp.*, 881 N.W.2d 639, 645 (N.D. 2016) (under similar state rule, blood analysis report was prima facie genuine under state statute and, thus, self-authenticating).

11. Certified Domestic Records of a Regularly Conducted Activity

The original or a copy of a domestic record that was made at or near the time of the act by a person with knowledge and was kept in the regular course of business, which is a regular practice of that business, if the record is accompanied by a certification of the custodian or other qualified person. Fed. R. Evid. 902(11). Reasonable notice must be given of the intent to offer the record prior to trial. *Id.* The affidavit should include such information as: the affiant is the custodian of the record, the affiant is familiar with the manner in which the records are maintained, how many pages of records are attached, the records are originals or exact duplicates, the records were made at or near the time of the act or that it is regular practice to make them at or near the time of the act, the records were made by a person with knowledge of the matters set forth or that it is the regular practice for this type of record to be made by a person with knowledge, and it is the regular practice of the business to make that type of record. *See United States v. Kassimu*, 188 Fed. Appx. 264, at *1 (5th Cir. 2006) (holding that

only witness qualified to explain record keeping system of organization to confirm that requirements of 803(6) had been met was required to authenticate computer records; inability of witness to verify accuracy of information entered into computer did not preclude admissibility).

Business records that originate with one entity but subsequently become another entity's primary record of information about an underlying transaction are admissible as business records of that subsequent entity. *Riddle v. Unifund CCR Partners*, 298 S.W.3d 780, 782 (Tex. App.—El Paso 2009, no pet.). Furthermore, one business' documents may comprise the records of a second business if that second business determines the accuracy of the information generated by the first business. *Id.*

12. Certified Foreign Records of a Regularly Conducted Activity

The original or a copy of a foreign record that meets the criteria of 902(11), but the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. Fed. R. Evid. 902(12). The same notice as 902(11) is required. *Id.*

13. Certified Records Generated by an Electronic Process or System

A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11) or (12). Fed. R. Evid. 902(13). This rule was added to reduce the expense and inconvenience of producing a witness to authenticate electronic evidence. *Id.* cmt. to 2017 amendment. *See United States v. Bondars*, No. 1:16-cr-228, 2018 WL 9755074, at *2 (E.D.Va. Aug. 20, 2018) (slip copy) (holding that internet screenshots accompanied with certificate of custodian were self-authenticating).

14. Certified Data Copied from an Electronic Device, Storage Medium, or File

Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification and notice requirements of Rule 902(11) or (12). Fed. R. Evid. 902(14). "Today, data copied from electronic devices, storage media, and electronic files are ordinarily authenticated by "hash value." A hash value is a number that is often represented as a sequence of characters and is produced by an algorithm based upon the digital contents of

a drive, medium, or file. If the hash values for the original and copy are different, then the copy is not identical to the original. If the hash values for the original and copy are the same, it is highly improbable that the original and copy are not identical. Thus, identical hash values for the original and copy reliably attest to the fact that they are exact duplicates. This amendment allows self-authentication by a certification of a qualified person that she checked the hash value of the proffered item and that it was identical to the original. The rule is flexible enough to allow certifications through processes other than comparison of hash value, including by other reliable means of identification provided by future technology." *Id.* cmt. to 2017 amendment.

15. Genetic Testing Results

Under the Uniform Parentage Act, a report of the results of genetic testing is self-authenticating if it is: (1) in a record and signed under penalty of perjury; and (2) accompanied by documentation from the testing laboratory that includes (a) the name and photograph of each individual whose specimens have been taken; (b) the name of each individual who collected the specimens; (c) the places in which the specimens were collected and the date of each collection; (d) the name of each individual who received the specimens in the testing laboratory; and (e) the dates the specimens were received. *See, e.g.*, N.M. Stat. Ann. § 40-11A-621; Okl. Stat. Ann. § 7700-504; Tex. Fam. Code Ann. § 160.504; Utah Code Ann. § 78B-15-504. Per the UPA, these requirements provide a sufficiently reliable chain of custody.

X. FRE Article X. Contents of Writings, Recordings, and Photographs

Writings and recordings consist of letters, words, numbers, or their equivalent, set down in any form or recorded in any manner. Fed. R. Evid. 1001(a), (b). Originals of writings and recordings are the writings or recordings themselves or any counterpart intended to have the same effect by the person who executed or issued them. Fed. R. Evid. 1001(d). Photographs are photographic images or their equivalent stored in any form. Fed. R. Evid. 1001(c). Originals of photographs include their negatives or prints therefrom. Fed. R. Evid. 1001(d).

Originals of electronically stored information include any printout or other output readable by sight if the printout or output accurately reflects the information. *Id.* Duplicates are counterparts that are produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately

reproduces the original. Fed. R. Evid. 1001(e).

Rule 1002 is commonly known as the best evidence rule. The best evidence rule states that, to prove the content of a writing, recording, or photograph, the *original* writing, recording, or photograph is required except as otherwise provided. Fed. R. Evid. 1002. "The purpose of the best evidence rule is to produce the best obtainable evidence, and if a document cannot as a practical matter be produced because of its loss or destruction, then the production of the original is excused." *Jurek v. Couch-Jurek*, 296 S.W.3d 864, 871 (Tex. App.—El Paso 2009, no pet.). In the predicate for introducing a computer printout, asking whether the exhibit reflects the data accurately may help to overcome an objection under the best evidence rule. The rule generally precludes admission of parol evidence to prove the contents of a document. *Id.*

A. When is Original Not Required?

The rule does not normally require the use of the singular, originally created source document. The only time a copy would not be admissible to the same extent as the original is if the party opposing the evidence raises a question as to the authenticity of the original or shows that it would be unfair to admit the duplicate in lieu of the original. Fed. R. Evid. 1003. The rules also list several potentially far-reaching exceptions to the rule. *See* Fed. R. Evid. 1004–1005. If any of the following exceptions apply, then other evidence, such as witness testimony, can be used to prove the contents of the document.

1. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

2. No original can be obtained by any available judicial process;

3. The party against whom the original would be offered had control of the original, was on notice at that time that the original would be a subject of proof at the trial, and failed to produce the original at the trial;

4. The writing, recording, or photograph is not closely related to a controlling issue; or

5. The proponent wants to prove the content of an official record or document that was recorded or filed in a public office as authorized by law, but no such copy can be obtained by reasonable diligence. Fed. R. Evid. 1004 (exceptions 1–4), 1005 (exception 5).

B. Summaries

The contents of voluminous writings, recordings, or photographs can be presented in a summary, chart, or calculation if it is not convenient to examine the records in court. Fed. R. Evid. 1006. The rule requires that the originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place and that the court may order the proponent to produce them in court. *Id.* A proper predicate for introducing summaries includes demonstrating that the underlying records are voluminous, were made available to the opposing party for inspection and use in cross-examination, and are admissible. *Aquamarine Assocs.*, 659 S.W.2d at 821. In *Aquamarine*, the Supreme Court of Texas held a summary to be inadmissible hearsay because the underlying business records upon which it was based were never shown to be admissible. *Id.* at 822 (holding that records were hearsay, which under former rules of evidence, would not support a judgment, even though unobjected to).

C. Testimony or Statement of a Party to Prove Content

The proponent of the evidence may prove the content of the writing, recording, or photograph through testimony, deposition, or written statement of the party against whom the evidence is offered. Fed. R. Evid. 1007. The basic concept is similar to the admissions by a party opponent exemption to the hearsay rule, though it accepts all opposing party statements in the form of testimony, deposition, or written statement. *Lorrain*, 241 F.R.D. at 581–82; *see, e.g.*, *Commonwealth v. Haywood*, 95 N.E.3d 300, at *2 (Mass. App. 2017) (holding that copy of letter written by defendant was admissible as exception to hearsay rule and, because letter was written by defendant, no accounting of original was required).

D. Functions of the Court and Jury

The court normally determines whether a party has fulfilled the factual conditions to admit other evidence of the content of a writing, recording, or photograph under Rules 1004 or 1005. Fed. R. Evid. 1008. However, if a jury is acting as the factfinder, then the jury, pursuant to Rule 104(b), will decide issues concerning whether an asserted writing, recording, or photograph ever existed; another one produced at the trial is the original; or other evidence of content accurately reflects the content. *Id.*

XI. Ethical Concerns

A. ESI and Discovery

1. The New Federal Rules of Civil Procedure

The Supreme Court of the United States amended the Federal Rules of Civil Procedure in 2006 to address the discovery of electronically stored information. *See* Carl G. Roberts, *The 2006 Discovery Amendments to the Federal Rules of Civil Procedure*, August 2006, accessible at http://ccbjournal.com/articles/7217/2006-discovery-amendments-federal-rules-civil-procedure (last visited, Aug. 22, 2020). The changes specifically amended Rules 16, 26, 33, 34, 37, and 45. *Id.*, *see* Fed. R. Civ. P. 16; 26; 33; 34; 37; 45. In 2015, the Supreme Court again amended the rules, including amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 37, 55, and 84. *See* Joseph F. Marinelli, *New Amendments to the Federal Rules of Civil Procedure: What's the Big Idea?*, February 2016, accessible at https://www.americanbar.org/groups/business_law/publications/blt/2016/02/07_marinelli/ (last visited Aug. 22, 2020). While there are many changes in the 2015 amendments, the most relevant to this paper are in Rule 37 about preservation of ESI, spoliation, and sanctions. *See* Fed. R. Civ. P. 37; *Thomas v. Butkiewicus*, No. 3:13-CV-747 (JCH), 2016 WL 1718368, at *7 (D. Conn. Apr. 29, 2016) (discussing the change in rules). The rules now guide the court in determining when the court can take action for lost ESI and what actions the court may take. These are important for state jurisprudence because, while discovery issues concerning ESI occur in each state, state case law is usually guided by federal case law.

2. Federal Case Law

Judge Scheindlin, of the Southern District of New York, announced in a series of opinions, culminating in what is commonly referred to as *Zubulake I*, *III*, *IV*, and *V*, what have become significant protocols in the world of electronic discovery. *Zubulake I*, 217 F.R.D. at 312. The holdings of the *Zubulake* opinions addressing electronic discovery are significant, even though many states had released opinions prior to *Zubulake*.

a) *Zubulake I and III*

In *Zubulake I*, released in 2003, Laura Zubulake, plaintiff, requested all documents regarding communications between herself and the defendant, UBS. *Id.* UBS produced emails and live data, but it failed

to search its backup tapes, archives, or servers for documents responsive to the request. *Id.* at 313. Laura requested UBS do so, to which UBS objected, arguing that the cost of searching and retrieving the data was unreasonably high, approximately $175,000, and that Laura's request of the electronic data should be denied. *Id.* Judge Scheindlin, after considering the arguments of both parties, held that electronic documents are as equally subject to discovery as paper documents. *Id.* at 317.

The court analyzed the cost of discovery based on the accessibility of the data to be retrieved and held that fragmented, erased, and damaged data, as well as data held on backup tapes, was inaccessible, and thus a cost-shifting analysis must be considered to determine which party would pay for the production of the inaccessible data. *Id.* Judge Scheindlin created a then-new seven-factor balancing test:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information. *Id.* at 322.

Judge Scheindlin ordered UBS to produce all of the electronic information on its servers and backup tapes that Laura requested and to pay one-hundred percent of the costs associated with the production. *Id.* The court, upon review and application of the seven-factor balancing test, determined that Laura would be responsible for 25% of the remaining production costs, while UBS would pay for the other 75%. *Id.*

b) *Zubulake IV and V*

Judge Scheindlin handed down *Zubulake IV* in 2003, and both parties learned that relevant ESI, created after litigation had commenced, had been destroyed and were only available on UBS' backup tapes. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). The court held that UBS violated its duty to preserve the evidence because it should have known the evidence would be relevant to future litigation. *Id.* at 219. In *Zubulake*

V, the court subsequently addressed the responsibility of counsel regarding electronic discovery and evidence and provided steps that counsel should take to create a "litigation hold" on ESI. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004). This litigation hold to prevent the spoliation of evidence is discussed in more detail below.

3. Other Considerations

a) Model Orders

Several courts are now adopting model orders to promote the just and speedy production of ESI because it has become such a major player in discovery issues and is constantly the topic of pretrial discussions. For example, the Eastern District of Texas has adopted its own model order regarding e-discovery in patent law cases. *See* model order at http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf (last visited Aug. 22, 2020). Notable highlights of the model order include:

1. "A party's meaningful compliance" with the model order and "efforts to promote efficiency and reduce costs will be considered in cost-shifting determinations";

2. ESI Production requests shall not include metadata without a showing of good cause or compliance with a mandatory disclosure order;

3. "Each electronic document shall be produced in . . . 'TIFF' . . . format";

4. "Absent a showing of good cause, no party need restore any form of media upon which backup data is maintained in a party's normal or allowed processes, including but not limited to backup tapes, disks, SAN, and other forms of media";

5. "Absent a showing of good cause, voice-mails, PDAs and mobile phones are deemed not reasonably accessible and need not be collected and preserved"; and

6. General ESI requests "shall not include e-mail," as a specific request must be made for email. http://pdfserver.amlaw.com/legaltechnology/Model_E-Discovery_Patent_Order_w_Commentary.pdf.

b) The Sedona Guidelines

Shortly before *Zubulake I* came down, the Sedona Conference, a working group of lawyers, consultants, academics, and jurists, began a public comment draft on the best practices regarding electronic evidence. *See* The Sedona Conference Publications page, https://thesedonaconference.org/publications (last visited Aug. 22, 2020). The Sedona Conference has since published several articles regarding the management, best practice, discovery, and production of ESI. *See id.* Mainly intended for organizations, the Sedona Conference has published the following guidelines for managing electronic information and records:

1. An organization should have reasonable policies and procedures for managing its ESI;

2. An organization's ESI management policies and procedures should be realistic, practical, and tailored to the circumstances of the organization;

3. An organization does not need to retain all ESI ever generated or received;

4. An organization adopting an ESI management policy should also develop procedures that address the creation, identification, retention, retrieval, and ultimate disposition or destruction of ESI;

5. An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation, or audit. The Sedona Guidelines: Best Practice Guidelines and Commentary for Managing Information and Records in the Electronic Age, iv-v (Charles R. Ragan et al. eds., The Sedona Conference 2005).

The Sedona Conference has also created the following guidelines to help determine whether litigation should be reasonably anticipated and whether a duty to take affirmative steps to preserve relevant information exists:

1. "A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation." The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger and The Process*, 11 Sedona Conference J. 265, 269 (2010) [hereinafter *Commentary on Legal Holds*].

2. "Adopting and consistently following a policy or practice governing an organization's preservation obligations

are factors that may demonstrate reasonableness and good faith." *Id.*

3. "Adopting a process for reporting information relating to a probable threat of litigation to a responsible decision maker may assist in demonstrating reasonableness and good faith." *Id.*

4. "Determining whether litigation is or should be reasonably anticipated should be based on a good faith and reasonable evaluation of relevant facts and circumstances." *Id.* at 270.

5. "Evaluating an organization's preservation decisions should be based on the good faith and reasonableness of the decisions undertaken (including whether a legal hold is necessary and how it should be executed) at the time they are made." *Id.*

4. The Social Network

When lawyers have been unable to obtain the ESI regarding a website or social networking site directly from the party, many have resorted to sending civil subpoenas directly to the websites or companies themselves in search of the information. Unfortunately, however, federal laws and regulations seem to protect websites such as Facebook, Google, and Myspace from having to release such information.

a) Stored Communications Act

The Stored Communications Act ("SCA") essentially protects privacy interests in personal information that is stored on the internet. 18 U.S.C. §§ 2701—2712. Its essential purpose is to limit the government's ability to compel disclosure of an internet user's information contained on the internet and held by a third party.

More case law is coming out every year discussing whether internet sites such as Google, Facebook, and Myspace are protected under the SCA. *See, e.g.*, *Lucas v. Jolin*, No. 1:15-cv-108, 2016 WL 2853576, at *5 (S.D. Ohio May 16, 2016) (order granting motion to quash civil subpoena except as modified), and cases cited therein. The court in *Lucas* explained that, under Section 2702 of the SCA, the contents of communications only includes the information concerning the substance, purport, or meaning of those communications, and as such, the court modified the motion to quash and ordered Google to produce the "to/from fields and time/date fields" for any communications between two separate defendants. *Id.* at *9. In *In re Facebook, Inc.*, the Northern District of California quashed a subpoena for Facebook information, citing several cases dealing with subpoena's for email

and other online services. 923 F.Supp.2d 1204, 1206 (N.D. Cal. 2012).

In contrast to *Lucas* and *In re Facebook*, in *Romano v. Steelcase, Inc.*, a New York court compelled a party to sign an authorization form to allow access to "Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information . . . in all respects." 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010). The defendant argued that the plaintiff's social media sites contained information inconsistent with her claims in her personal injury action against the defendant. *Id.* at 651.

b) Sending out the Subpoenas

Notwithstanding the SCA, you may still be able to obtain vital information by attempting to subpoena information from a social media site. Each website and social media site, such as Facebook, Myspace, AOL, Yahoo, Ebay, Twitter, and Craigslist, to name a few, have their own policies and procedures for requesting personal information regarding their users. In fact, some sites, such as Facebook, simply have electronic request forms rather than subpoenas that a party may use. Electronic Frontier Foundation (EFF.com) has produced a "Social Network Law Enforcement Guides" that sets forth the policies and procedures for sending out a subpoena or request for information to multiple websites. EFF Social Network Law Enforcement Guides, https://www.eff.org/document/eff-social-network-law-enforcement-guides-spreadsheet-pdf (last visited, Aug. 22, 2020). In addition, many of these sites allow users to download their own information into "archives." This is especially important to remember when drafting your requests for production to the other side.

c) Obtaining Information from the Social Network

Considering the availability of social media via a subpoena as described above, below are some of the practical ways to obtain discovery of social media without the use of a subpoena. As these websites continually update, the information below may not be exactly how the webpages are set up, but the process is usually very similar:

1. Facebook: On a desktop or laptop computer, click on the down arrow in the top right corner, at the far-right end of the blue bar at the top. Click on "Settings." Click on "Download a copy of your Facebook data." Facebook

then begins the process of gathering your information and saving your Facebook archive. You will receive an email that a request has been made, and once the archive is complete, you will receive an email indicating that your Facebook download is complete, along with a link to allow you to download your Facebook data in .zip format. The link will remain active for only a few days.

2. Twitter: Like Facebook, a user can easily download his or her Twitter archive with the click of a button. On a desktop or laptop computer, click on the "Profile and settings" button at the top right, which is the square button of your profile picture. Click on "Settings." Towards the bottom of the page, under "Content," will be "Your Twitter archive" along with a button to "Request your archive." Click on "Request your archive." Again, like Facebook, Twitter will send you an email to download your Twitter archive in .zip format. The archive will include a list of all tweets, along with a date and time stamp for each message. In addition, if the Twitter feed is public, you can access a Twitter user's tweets without requesting to download the user's archive. Consider using a website such as AllMyTweets.net to assist you in searching for available public tweets.

3. Google: Your Google account is linked to all of Google's products, forty-six total. Once logged in to any Google connected product, click on the settings link at the top right, which should be your profile picture (and where you click to logout). Click on "Manage your Google Account" On that page, click on "Data & personalization" on the left side of the page. Scroll down to the "Download, delete, or make a plan for your data" section. Click on "Download your data." You can select which Google Product you want to download archived information for. They are each automatically selected and show a "check." Click on any you do not want to download. Click on "Next step" at the bottom of the list. You can select what format to download your data in, although .zip is the most widely available, already being on most computers. You can also select whether to receive a download link through email, or add it to your Google Drive, Dropbox, or OneDrive account. Files larger than 2 GB will be split into multiple .zip files. Any content from Google Play Music is not included and must be downloaded through Google Play Music Manager. Additionally, past searches are not included but may be generated under the "Web & App Activity" page, which link is available on the archive download page, or can be accessed under the "Activity controls" section above the "Control your content" section on the "Personal info

& privacy" page.

B. Spoliation and the Duty to Preserve

1. *Zubulake* Guidelines

As stated above, *Zubulake V* regards an attorney's responsibility concerning electronic discovery and evidence. *Zubulake V*, 229 F.R.D. at 422. One of the main duties the *Zubulake* opinions address is the duty to preserve ESI when a party reasonably anticipates litigation. *See id.*; *Commentary on Legal Holds*, *supra*, at 268. *Zubulake V* offers three steps attorneys should take to maintain compliance with a party's preservation obligation:

1. Counsel must issue a "litigation hold" at the beginning of litigation or whenever litigation is reasonably anticipated. The hold should be re-issued periodically so that new employees are aware of it and all employees are reminded of their duties.

2. Counsel should communicate directly with "key players" in the litigation (i.e. people identified in a party's initial disclosure and any supplemental disclosure).

3. Counsel should instruct all employees to produce electronic copies of their relevant active files and make sure that all backup media which the party has a duty to retain is identified and stored in a safe place. *Zubulake V*, 229 F.R.D. at 422.

A litigation hold notice should describe the matter at issue, provide specific examples of the types of information at issue, identify potential sources of information, and inform recipients of their legal obligations. Case law has made it clear that no duty exists to preserve information if that information is not relevant. *Zubulake IV*, 220 F.R.D. at 217.

2. *Pension Committee*

In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC*, another opinion that Judge Scheindlin released, Judge Scheindlin revisited the *Zubulake* issues and clarified many of them concerning discovery abuse. 685 F.Supp.2d 456 (S.D.N.Y. 2010), *abrogated by Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012). Following are some of the key points from the opinion:

1. Negligence, gross negligence, and willfulness involved in discovery issues are all addressed on a case-by-case

basis. However, Judge Scheindlin set forth a list of what constitutes negligence, gross negligence, and willful conduct, although the list is not exhaustive:

a. Gross Negligence: The failure to issue a written litigation hold, to identify all of the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

b. Willful Actions: The failure to collect records from key players identified during the process, and the intentional destruction of relevant paper or electronic email or records, including backup tapes.

c. Negligent Actions: The failure to collect information and data from employees, even if they are not key players as identified in the process, and the failure to assess the accuracy and validity of selected search terms.

2. The duty to preserve evidence arises when a party reasonably anticipates litigation. Thereafter, a party must put a "litigation hold" in place to preserve the relevant documents. Many times, the plaintiff's duty to preserve is triggered before the defendant's.

3. The party claiming spoliation must prove 1) the spoliating party had control over the evidence and an obligation to preserve at the time of the destruction or loss; 2) acted with a culpable state of mind upon destroying or losing the evidence; and 3) that the missing evidence is relevant to the innocent party's claim or defense. Relevance and prejudice may be presumed when the spoliating party acts in bad faith or a grossly negligent manner. *Id.* at 466, 471.

C. The Duty to Advise Clients

Lawyers must advise their clients about evidentiary issues. In state court, an attorney is held to the reasonably prudent attorney standard of care concerning spoliation, which means that a reasonably prudent attorney, familiar with spoliation laws, who has been retained by a client who has been sued in state court, would have: (1) determined that a duty exists to preserve evidence that is material and relevant to the dispute, (2) advised the client of the duty immediately and that the client must take reasonable measures to safeguard that evidence,

and (3) inform the client that the deliberate destruction of that evidence can lead to sanctions. *See Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 722 (Tex. 2003); *Trevino*, 969 S.W.2d at 957. The federal standard of care, however, is based on federal law, rather than state law, at least in diversity suits. *Condrey v. Sun Trust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005).

Lawyers must also advise their clients about how to obtain evidence, even from their spouses. In *Miller v. Talley Dunn Gallery LLC*, husband took photographs of text messages on wife's cell phone between her and another individual. No. 05-15-00444-CV, 2016 WL 836775, at *1 (Tex. App.—Dallas Mar. 3, 2016, no pet.) (mem. op.). Husband also placed a recording device in wife's car and at home and recorded conversations she had in the car and also between him and her at their home. *Id.* About a year later, wife filed for divorce. *Id.* Just before wife filed for divorce, the art gallery that she owned sued husband for using confidential information that he accessed on wife's cell phone, claiming that he was using it to interfere with the business. *Id.* at 2. Husband claimed that photographs were not accessing the phone and, further, that wife's cell phone was community property that he had consent to use. *Id.* at 11. The court of appeals held that the photographs themselves did not violate the Harmful Access by Computer Act (HACA) but that retrieving the text messages did. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 143.001(a); Tex. Penal Code Ann. § 33.01(1)). The court reasoned that, because the cell phone belonged to wife, she used it on a daily basis, it was the only way to reach her, she had the right to password protect it, and restricted access to it by password protection, husband had no rightful access to the phone, and HACA makes no distinction between community and separate property. *Id.* Furthermore, the recordings in the car, which husband was not a party to, violated the Interception of Communication Act (ICA) because wife did not consent to those recordings. *Id.* at *9 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 123.001–123.002). The court of appeals also held that the other recordings husband made between him and wife at their home invaded wife's privacy under that common-law cause of action, even though the recordings did not violate the ICA. *Id.* at 10–11.

Accordingly, lawyers must inform their clients to not seek out information by accessing their spouses' cell phones or other electronic devices that could reasonably be considered a computer. Also, recording

conversations that one is not a party to not only imposes civil liabilities, it also violates state and federal wiretapping laws. And further, one spouse can violate the privacy of another spouse, even while they are together.

Practice Note: Facebook and other social media accounts can be deleted, which would violate the spoliation rules. Inform your clients that, rather than delete those accounts, simply deactivate them. This is usually done under the settings or security page of the particular website.

D. The Lawyer's Responsibility to Learn

ESI is commonplace in litigation today. Some states are taking steps to ensure that lawyers stay up to date in knowing rules concerning ESI, discovery, and spoliation. Several states have also adopted Comment 8 to the Model Rules of Professional Conduct, which states, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." Model Rules of Prof'l Conduct R. 1.1 cmt. 8 (Am. Bar Ass'n 2016). California issued an ethics opinion in 2015 that states that attorneys who are not familiar with the benefits and risks associated with the technology relevant to their case, and cannot acquire sufficient learning and skill before performance is required, must decline representation or associate with or consult competent counsel or technical experts familiar with that technology. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193 (2015); *see also* Erin Corken, Director of Legal Technology, U.S. Legal Support, *Ethical Issues that Arise in Preservation and Collection* (April 29, 2016). The opinion laid out nine skills that attorneys should be able to do: (1) initially assess e-discovery needs and issues, if any; (2) implement or cause to implement appropriate ESI preservation procedures; (3) analyze and understand a client's ESI systems and storage; (4) advise the client on available options for collection and preservation of ESI; (5) identify custodians of potentially relevant ESI; (6) meet and confer with opposing counsel concerning an e-discovery plan; (7) perform data searches; (8) collect responsive ESI in a manner that preserves the integrity of that ESI; and (9) produce responsive non-privileged ESI in a recognized and appropriate manner. Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Op. 2015-193; Corken, *supra*. While this specific standard has not been adopted by all states, it is

worthwhile for attorneys to be up-to-date on their knowledge of and ability to perform such skills, as mentioned in the comments to the Model Rules, because sanctions can be steep, both against the attorney and the client.

Section Five

18th Annual Family Law Institute

October 23, 2020

By:
James A. Reed
Dentons Bingham Greenebaum LLP

With Written Materials By:
Michael R. Kohlhaas
Dentons Bingham Greenebaum LLP

Anyone interested in subscribing to the free, E-mail based Indiana Family Law Update that provides the enclosed case law digests in real time can subscribe by sending an email to familylawcases.us.dbg@dentons.com with "subscribe" in the subject line. Thank you!

Section Five

"Graying Divorce" and Representation of Clients with Diminished Capacity……...James A. Reed
Michael R. Kohlhaas

General Considerations of Gray Divorce.....2

Issues of Client with Diminished Capacity in a Gray Divorce 4

Tillman v. Tillman

General Considerations of Gray Divorce

- The divorce rate for older Americans (over 50 years old) is increasing substantially.
- The percentage of older Americans divorcing has doubled since 1990.
- While “gray divorces” often eliminate some issues associated with younger divorces (e.g., child custody), gray divorces often create their own novel challenges.
- One of the biggest challenges of gray divorce is that the parties usually have little or no remaining years of income earning potential. When a 30-something gets divorced, the financial repercussions of divorce are offset by the ability to "earn a way out" in future decades. In a gray divorce, the existing assets to be divided often constitute all that the parties will ever have, or nearly so.
- It is usually good advice to tell a gray divorce client who is contemplating retirement to wait until the divorce is over and a better understanding of the post-divorce financial situation can be evaluated. The longer that the client can defer spending down savings, the better.
- In addition, the couple may have spent decades coming up with a financial plan that allows them to retire and maintain a similar standard of living after their retirement. Such a plan is almost always deeply jeopardized – for both parties – by a gray divorce.
- A gray divorce will typically involve a disproportionately high amount of retirement assets. It is imperative to understand the related tax consequences when evaluating any division of the marital estate so that the intrinsic "discount" associated with tax-deferred retirement accounts can be factored.
- There may also be defined benefit retirement plans, which were more common decades ago and seen less frequently now in younger divorces. Further, since defined benefit pensions tend to reach their greatest present value in the years just before retirement, these assets can have substantial value and usually require professional, actuarial valuation.
- Dividing the marital estate in a gray divorce often takes away the option of having one party make extended property settlement payments over time, due to questionable future income and the heightened risk of disability or mortality before the property payment stream is completed (a factor made even more complicated by the added difficulty of securing that obligation with life insurance.)
- More so than with a younger couple, it is often disadvantageous to seek possession of a marital residence, since downsizing and reducing expenses is often a consideration.
- While gray divorces usually do not involve the children's issues normally associated with divorce, they often involve adult children who have an interest in the outcome of the

divorce. Sometimes the adult children are estranged from one parent, and advocating for the other, adding a layer of emotional complexity to the proceedings in the process (especially if the adult child is in a business or other financial relationship with the divorcing parent).

- While child support may not, strictly speaking, be at issue in a gray divorce, often the adult children have future expenses that were anticipated the divorcing parents would help pay (e.g., grad school, wedding, down payment on first home, etc.). While a divorce court may not order such obligations, a settlement agreement can include provisions on these subjects, including ordering a division of such expenses, setting aside a fund from the marital estate to pay for them, etc.

- In younger divorces, property division disputes can usually be handled in one of two ways: either one spouse receives the property, or the other spouse receives the property. Gray divorces can present an opportunity to resolve such matters with the disputed property not going to either spouse, but instead either outright or in trust for the benefit of the parties' children. For example, in settlement discussions, Husband may not like the idea of transferring a $300,000 brokerage account to Wife as part of the divorce; however, it may be much more palatable for Husband to transfer the brokerage account into a trust that provides Wife income for life, with the remainder at Wife's death to the parties' children.

- Strictly speaking, Social Security retirement benefits are not marital property subject to a division in a divorce. However, the opportunity to claim benefits (including based upon the employment of a former spouse) involve complicated rules and should be understood as applied to a given case, so that the client can better understand his/her financial future. It is often most important to advise the spouse to evaluate whether a future remarriage will diminish retirement benefits.

- In a gray divorce, the parties might have forgone long-term care insurance, assuming that the other spouse would be available to help provide that care. A gray divorce provides an opportunity to re-evaluate whether long-term care insurance is an option that should be reconsidered.

- Healthcare issues can also be more complicated in a gray divorce. Because of age, a gray divorce spouse is more likely to have health issues. Further, a non-employed spouse who relied on the other spouse's employer-provider insurance may be too young for Medicare eligibility. Here, it is important to ascertain COBRA and/or private insurance options and costs.

- Even though remarriage is often the last thing on a gray divorce client's mind, I always leave them with the parting wisdom to consider a premarital agreement in the event of remarriage. (Or a cohabitation agreement in the event of cohabitation.) Few clients are aware of elective share and other restrictions that remarriage can impose upon their desire to leave most or all of their estate to children from a previous marriage.

Issues of Client with Diminished Capacity in a Gray Divorce

- It is estimated that approximately 1 in 5 adults in the United States suffers from some form of mental health condition or disorder. Thus, it is a foregone conclusion that throughout a legal career, one will represent many clients with varying types and degrees of mental illness.

- Indiana Rule of Professional Conduct 1.14 governs dealing with clients with diminished capacity. It advises:

    - "[T]he lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Ind. Professional Conduct Rule 1.14(a).

    - If the client's capacity is questioned, "the lawyer <u>may</u> take reasonably necessary protective action, including consulting with the individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." Prof. Cond. R. 1.14(b) (emphasis supplied).

        - It is worth noting that taking protective actions on behalf of a diminished client is presented as a *discretionary* option for the lawyer; it is not mandated by the Rules.

        - Note: some ethics opinions suggest that the nature of the obligation to seek a protector changes if the lawyer is planning to withdraw, thereby leaving the client indefinitely *pro se* and without anyone looking after his or her interests.

    - The commentary to the rule suggests that the appointment of a third party protector can involve a balancing test of the cost of doing so relative to the value of the financial interests at stake. For example, proceedings to appoint a GAL may be justified in a $200,000 marital estate, but not for a marital estate with little or no value. Prof. Cond. R. 1.14, at Comment 7.

- Particularly relevant to divorce cases, the commentary to Rule 1.14 advises as follows:

    - "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege." Prof. Cond. R. 1.14, at Comment 3.

- Lawyers representing a client with questionable mental capacity also need to be aware of and consider the potential prejudice to the client of his or her diminished capacity being revealed. Specifically, lawyers are admonished not to reveal a client's diminished capacity to any person who could use that information against the client's interests. Prof. Cond. R. 1.14, at Comment 8.

- What is the obligation of the divorce lawyer to assess a client for diminished capacity? Most lawyers have little or no formal training making such an assessment. Lawyers

should, in the normal course of speaking with a client, be able to determine from a lay perspective that there may be an issue of the client's diminished capacity (e.g., forgetfulness, asking the same questions repeatedly, difficulty articulating thoughts and ideas, etc.)

- Decision making capacity requires:
    - Possession of a set of values and goals;
    - The ability to communicate and to understand information; and
    - The ability to reason and to deliberate about one's choices.
- Many state opinions agree that a full-blown guardianship should be a decision of last resort, and should be sought only if the client is incapable of acting in his or her own interest.
- If a question of client capacity lingers, an expert assessment is an option. If the lawyer remains uncertain about a client's mental state after a preliminary assessment, then the attorney may need to consult the help of a mental health professional.
- Protective Actions. What actions should be taken?
    - ABA Formal Opinions suggest that the best protection action is the *least restrictive alternative action under the circumstances*.
    - While it might be tempting to leap immediately to a guardianship, other intermediary options should be considered, such as:
        - Involving family members to assist;
        - If the capacity issue is temporary, or it "comes and goes," then consider delaying key decisions (including filing for appropriate continuances);
        - Request the appointment of a GAL for the client in the divorce case.
        - Finally, consideration of a guardianship.
- Professional risks of cases involving clients with diminished capacity:
    - Potential malpractice action from the client (or client's family) for failing to address the diminished capacity and take steps to protect.
    - There are even risks of the opposing spouse's diminished capacity going unaddressed. Suppose the parties reach a final settlement agreement that is favorable to your client. The decree is issued and settlement agreement is approved. What happens if the other spouse's family later attempts to set aside the

settlement agreement on the grounds it was executed by the other spouse without requisite capacity?

- *Tillman* Case. The most relevant Indiana case on this subject is *Tillman v. Tillman*, 70 N.E.3d 349 (Ind. Ct. App. 2013).
    - Husband and Wife married in 1998. Prior to doing so, the parties entered into a premarital agreement whereby Husband agreed to provide "reasonable support, care, and maintenance" to Wife during the marriage.
    - In 2008, Husband suffered a stroke and was subsequently found by the Vanderburgh Superior Court to be incapacitated. Husband's daughter from a prior marriage was appointed to be guardian over Husband's estate and person. Husband was placed into a nursing home which, apparently, was expensive relative to Husband's financial resources, leaving insufficient funds to provide adequately for both Husband and Wife.
    - In 2012, the guardian for Wife – who had separately been determined to be incapacitated – filed a petition seeking enforcement of the support, care, and maintenance provision of the parties' premarital agreement. In response, Husband's guardian filed a petition for dissolution of marriage on Husband's behalf. Wife moved to dismiss the petition for dissolution. After a hearing, the trial court dismissed the petition for dissolution of marriage that Husband's guardian had filed on Husband's behalf. Husband's guardian, on Husband's behalf, appealed.
    - The Indiana Court of Appeals reviewed the 1951 *State ex rel. Quear v. Madison Circuit Court* decision. There, in a factually similar case, the Indiana Supreme Court held that "[a]n insane person cannot bring an action for divorce because he cannot consent to the filing of the complaint. . . . [n]or do the statutes on divorce or guardianship authorize the institution of a suit for divorce by the guardian on behalf of his ward."
    - The Court of Appeals noted that, though *Quear* is over 60 years old, nothing in the guardianship or divorce statutes has change materially so as to allow, today, for a guardian to file for divorce on behalf of the ward. Thus, *Quear* remains controlling law, and the trial court was correct to dismiss the petition for dissolution that Husband's guardian had filed on Husband's behalf.
- Questions left unresolved since *Tillman*:
    - *Tillman* narrowly addressed two issues:
        - An incapacitated party cannot bring an action for dissolution of marriage; and
        - A guardian of an incapacitated party cannot initiate an action for dissolution of marriage on the incapacitated party's behalf.

- What if the spouse who initiates the divorce has no capacity issues, but initiates the divorce against an incapacitated spouse?
    - Presumably, this situation presents no impediment, since, perhaps ironically, “incurable insanity” is an express grounds for divorce. Ind. Code § 31-15-2-3.
- What happens if a spouse has capacity at the time of filing for divorce, but then loses it while the divorce is pending?

Positive
As of: October 15, 2020 6:48 PM Z

Tillman v. Tillman

Court of Appeals of Indiana

July 3, 2013, Decided; July 3, 2013, Filed

No. 87A05-1212-DR-619

Reporter
70 N.E.3d 349 *; 2013 Ind. App. LEXIS 326 **; 2013 WL 3376920

IN RE THE MARRIAGE OF ***HARRY*** L. ***TILLMAN***, Appellant, vs. R. ***VIRGINIA*** ***TILLMAN***, Appellee.

Subsequent History: As Amended July 8, 2013.

Transfer denied by ***Tillman*** *v.* ***Tillman****, 995 N.E.2d 620, 2013 Ind. LEXIS 794 (Ind., Oct. 10, 2013)*

Prior History: [1]** APPEAL FROM THE WARRICK SUPERIOR COURT. The Honorable Keith A. Meier, Judge. Cause No. 87D01-1206-DR-812.

Wagner v. Finney, 989 N.E.2d 842, 2013 Ind. App. Unpub. LEXIS 723 (Ind. Ct. App., 2013)

Core Terms

dissolution, marriage, incapacitated, ***divorce***, guardianship

Case Summary

Overview
HOLDINGS: [1]-Both husband and wife were incapacitated and were not competent to consent to the filing of a dissolution petition, and since Indiana statute did not provide guardians of incapacitated persons the authority to petition for dissolution of marriage on the incapacitated person's behalf, the trial court's dismissal of the petition for dissolution of marriage filed by the guardian on the husband's behalf was proper.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Standards of Review, De Novo Review**

Ind. R. Trial P. 12(B)(6) tests the legal sufficiency of a claim, rather than the facts supporting it. Appellate courts review a trial court's grant or denial of a *Ind. R. Trial P. 12(B)(6)* motion to dismiss de novo, viewing the complaint in the light most favorable to the non-moving party and drawing every reasonable inference in favor of that party. Appellate courts must stand in the trial court's shoes, looking only at the complaint itself, and determine whether the trial court erred when it applied the law. Where it is clear that the facts alleged in the complaint are insufficient to support relief under any set of circumstances, the trial court's grant of the motion to dismiss is proper.

Family Law > Marital Termination & Spousal Support > Dissolution & ***Divorce*** > Procedures

HN2[] **Dissolution & Divorce, Procedures**

An insane person cannot bring an action for ***divorce*** because he cannot consent to the filing of the complaint. Nor do the statutes on ***divorce*** or guardianship authorize the institution of a suit for ***divorce*** by the guardian on behalf of his ward. The right to ***divorce*** is not a common law right, but depends upon legislative enactments, and Indiana law provides no statutory authority which would allow a guardian to bring an action for dissolution on behalf of an incapacitated person.

Family Law > Marital Termination & Spousal Support > Dissolution & ***Divorce*** > Procedures

HN3[] **Dissolution & Divorce, Procedures**

A party who seeks to initiate a dissolution of marriage proceeding must file a verified petition for dissolution setting forth, among other things, the residence of each party, the dates of marriage and separation, the grounds for dissolution, and the relief sought. *Ind. Code § 31-15-2-5*.

Family Law > Guardians > Duties & Rights

Family Law > Marital Termination & Spousal Support > Dissolution & ***Divorce*** > Procedures

HN4[] **Guardians, Duties & Rights**

Pursuant to *Ind. Code § 29-3-8-4*, the guardian of an incapacitated person has the power take action and make decisions for the benefit of the incapacitated person. For example, the guardian may invest and reinvest the property of the protected person, may exercise control over the incapacitated person's business or income, and, if reasonable, may delegate to the protected person certain responsibilities for decisions affecting the protected person's business affairs and well-being.

Family Law > Guardians > Duties & Rights

Family Law > Marital Termination & Spousal Support > Dissolution & ***Divorce*** > Procedures

HN5[] **Guardians, Duties & Rights**

Neither the current Indiana statutes governing dissolution of marriage nor governing the guardianship of incapacitated persons provide a means for the guardian of an incapacitated person to file a petition for dissolution of marriage on behalf of the incapacitated person.

Counsel: ATTORNEYS FOR APPELLANT: F. STEPHEN SHEETS, STEVEN T. CHARLES, F. Stephen Sheets & Associates, Evansville, Indiana.

ATTORNEY FOR APPELLEE: CRYSTAL SPIVEY WILDEMAN, Kahn, Dees, Donovan & Kahn, LLP, Evansville, Indiana.

Judges: MATHIAS, Judge. BAKER, J., and MAY, J., concur.

Opinion by: MATHIAS

Opinion

[*350] OPINION — FOR PUBLICATION

MATHIAS, Judge

Harry Tillman ("Husband"), by guardian Deborah Wagner ("Wagner"), appeals the Warrick Superior Court's dismissal of his petition for dissolution of marriage from his wife, ***Virginia Tillman*** ("Wife"). Through his guardian Wagner, Husband argues that both the trial court's ruling and the currently controlling law in Indiana are inconsistent with Indiana's no-fault approach to dissolution of marriage.

We affirm.

Facts and Procedural History

Husband and Wife married on June 3, 1998. Both parties had been previously married. A few days prior to their marriage, Husband and Wife entered into a prenuptial agreement where Husband agreed to provide for Wife, during their marriage, "reasonable support, care, and maintenance." Appellant's App. p. 15.

Approximately ten years later, on April 14, **[**2]** 2008, Husband suffered a stroke. Thereafter, on July 2, 2008, the Vanderburgh Superior Court found Husband to be incapacitated and appointed Wagner, his daughter, guardian over Husband's person and estate. Later that month, Wagner placed Husband in a nursing home in Warrick County, Indiana.

On May 3, 2012, Jeffrey Finney ("Finney"), guardian of incapacitated Wife,[1] filed on her behalf a petition to enforce provisions of the prenuptial agreement in Vanderburgh Superior Court. On June 14, 2012, Wagner filed a petition for dissolution of marriage on Husband's behalf in Warrick Superior Court. Finney objected to the petition and filed a motion to dismiss pursuant to *Indiana Trial Rules 12(B)(1)* and *12(B)(6)*.

Wagner twice amended the petition for dissolution, asserting the insanity of both Husband and Wife. On October 3, 2012, a hearing was held, during which the parties stipulated that Husband is insane under Ballentine's Law Dictionary's definition of insanity.[2] Husband's counsel also reported that expenses for Husband's care totaled around seven thousand dollars per month and that Husband's assets would be depleted in less **[**3]** than two years. Husband's counsel further stated that the nursing home in which Husband resided at the time did not accept Medicaid and that, when Husband exhausted his funds, he would be forced into an institution that accepts Medicaid. Husband's counsel asserted, **[*351]** "it is vital that [Husband] remain in the present place and that he have assets sufficient for as long a time as possible to remain where he is and get the care that he's getting now." Tr. p. 21.

On November 26, 2012, the trial court granted Wife's motion to dismiss, citing a 1951 Indiana Supreme Court case, *Quear v. Madison Circuit Court, 229 Ind. 503, 99 N.E.2d 254 (Ind. 1951)*. Wagner, on Husband's behalf, now appeals.

Discussion and Decision

Although the trial court's order dismissing this case does not specify whether it was granted under *Indiana Trial Rule 12(B)(1)* or *(6)*, the trial court clearly had, and we on appeal have, subject matter jurisdiction over the parties' claims. We therefore review the trial court's order under *Indiana Trial Rule 12(B)(6)*.

HN1[] *Indiana Trial Rule 12(B)(6)* **[**4]** tests the legal sufficiency of a claim, rather than the facts supporting it. *City of South Bend v. Century Indem. Co., 821 N.E.2d 5, 9 (Ind. Ct. App. 2005)*, trans. denied. We review a trial court's grant or denial of a *Trial Rule 12(B)(6)* motion to dismiss *de novo*, viewing the complaint in the light most favorable to the non-moving party and drawing every reasonable inference in favor of that party. *Town of Plainfield v. Town of Avon, 757 N.E.2d 705, 710 (Ind. Ct. App. 2001)*, trans. denied. We must stand in the trial court's shoes, looking only at the complaint itself, and determine whether the trial court erred when it applied the law. *City of South Bend, 821 N.E.2d at 9*; *D.L. v. Huck, 978 N.E.2d 429, 432-33 (Ind. Ct. App. 2012)* aff'd on reh'g, *984 N.E.2d 223 (Ind. Ct. App. 2013)*. Where it is clear that the facts alleged in the complaint are insufficient to support relief under any set of circumstances, the trial court's grant of the motion to dismiss is proper. *D.L., 978 N.E.2d at 432*.

Here, Husband argues that the trial court's decision to grant Wife's motion to dismiss was improper because controlling Indiana case law, which prohibits a guardian from filing for dissolution of marriage **[**5]** on behalf of the incapacitated person, is "no longer consistent with the current Indiana policy on ***divorce*** as reflected in the 'no fault' Indiana law of Dissolution of Marriage and Separation." Appellant's Br. at 5. He further claims that the guardianship powers enumerated in Indiana's probate statute are to be viewed as "examples of a guardian's power" rather than a circumscription of that power. Appellant's Br. at 8.

In its 1951 decision, State ex rel. Quear v. Madison Circuit Court, the Indiana Supreme Court declared, ***HN2***[] "[a]n insane person cannot bring an action for ***divorce*** because he cannot consent to the filing of the complaint." *229 Ind. 503, 99 N.E.2d 254, 256 (Ind. 1951)*. The court further held, "[n]or do the statutes on ***divorce*** or guardianship authorize the institution of a

[1] Wife is "incapacitated under guardianship in Illinois." Tr. p. 7.

[2] Ballentine's Law Dictionary defines "insanity" as "such a degree of mental incapacity as renders one unable to understand and deal with the common affairs of life." Tr. p. 16.

suit for ***divorce*** by the guardian on behalf of his ward." Id.

The court emphasized that "[t]he right to ***divorce*** is not a common law right, but depends upon legislative enactments," and noted that Indiana law provided no statutory authority which would allow a guardian to bring an action for dissolution on behalf of an incapacitated person. Id. Our supreme court concluded, "[s]ince neither the statutes defining the powers **[**6]** of guardians nor the statutes on ***divorce*** authorize a guardian to prosecute an action for ***divorce***, whether absolute or limited, the trial court had no jurisdiction to entertain the action in this case." *Id. at 257*.

Today's actions to dissolve a marriage are governed by Indiana Code Title 31, Article 15. ***HN3***[] A party who seeks to initiate a dissolution of marriage proceeding must file a verified petition for dissolution setting **[*352]** forth, among other things, the residence of each party, the dates of marriage and separation, the grounds for dissolution, and the relief sought. *Ind. Code § 31-15-2-5*.

HN4[] Pursuant to *Indiana Code section 29-3-8-4*, the guardian of an incapacitated person has the power take action and make decisions for the benefit of the incapacitated person. For example, the guardian may "invest and reinvest the property of the protected person," may exercise control over the incapacitated person's business or income, and, if reasonable, may "delegate to the protected person certain responsibilities for decisions affecting the protected person's business affairs and well-being."

HN5[] Neither the current Indiana statutes governing dissolution of marriage nor those governing the guardianship of incapacitated **[**7]** persons provide a means for the guardian of an incapacitated person to file a petition for dissolution of marriage on behalf of the incapacitated person. The facts of the present case are parallel to the facts of *Quear* in this regard. In this case, both Husband and Wife are incapacitated and neither are competent to consent to the filing of a dissolution petition. Since Indiana statute does not provide guardians of incapacitated persons the authority to petition for dissolution of marriage on the incapacitated person's behalf, the trial court's dismissal of the motion Wagner filed on Husband's behalf was proper.

Husband argues that the Quear decision is "no longer consistent" with Indiana's no fault ***divorce*** policy. He further asserts that certain provisions of the guardianship statute[3] can be read to allow a guardian to file for dissolution of marriage on behalf of his ward. While Husband would have us read these statutes broadly, we decline the invitation to contravene our supreme court's holding in *Quear*.

We acknowledge **[**8]** that Quear was decided more than sixty years ago, in 1951. Some might argue that the intervening decades of higher and higher ***divorce*** rates and the creation of federal and state programs to assist the elderly have radically changed civil society's notions concerning what the vows of "for better and for worse" mean. Therefore, for some, this might seem an appropriate time to revisit Quear. But Quear relied on the public policy pronouncements of the General Assembly within Indiana's ***divorce*** and guardianship statutes, and those statutes have not changed appreciably regarding the issue before us since Quear. For example, the General Assembly has yet to provide to a guardian the statutory authority to file for dissolution of marriage on behalf of the incapacitated person. And Quear has not been modified, let alone overruled, by any subsequent supreme court decision. Therefore, *Quear* remains controlling law in Indiana and controls the result in this case.

Conclusion

For these reasons, we conclude that the trial court acted within its discretion when it granted Wife's motion to dismiss.

Affirmed.

BAKER, J., and MAY, J., concur.

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[3] Husband points to, among others, a provision that sets forth a guardian's duty to "protect and preserve the property of the protected person." *Ind. Code § 29-3-8-3*. 6

Section Six

Effective Divorce Depositions

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Section Six

Effective Divorce Depositions…….…. Brian K. Zoeller
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PowerPoint Presentation

Effective Divorce Depositions

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ATTORNEYS

How to avoid having your deposition look something like this:

https://www.youtube.com/watch?v=emsLrZg160s

COHEN & MALAD, LLP
ATTORNEYS

https://www.youtube.com/watch?v=n_kbtKL3Z94

Advantages of Depositions

- Opportunity to establish the key facts for your trial strategy
- Ability to explore deponent's responses - interrogatory responses are limited and edited
- Assess credibility of the deponent and see what issues might be triggers for them
- Less predictable responses than standard interrogatory responses
- Can be used to educate opposing counsel on weaknesses of his/her case to aid settlement

Set the Stage

- Prepare thoroughly
- Spend as much if not more time in deposition preparation as in trial preparation
- Set objectives for the deposition
- Be persistent and do not give up if it is an important point

Determine the Goal

- Important tip: People going through divorce lie and sometimes it is our job to catch them.
- If the purpose of the deposition is to set up the other side, your goal is to get them to commit to certain positions or make statements that will be damaging to their case when you reveal additional information at trial.
- If the deposition is to facilitate settlement at mediation, then you will likely be laying all of your cards on the table to allow the other side to be leery of going to court. This also provides the mediator with helpful ammunition to get your case settled.

Tips for Effective Depositions

- Bluffing to your opponent while not coloring outside the lines of professional rules of conduct: Telling a deponent that you have information that you do not have is unethical, but selective placement of truthful statements can bluff a lying deponent into revealing the truth.
- Taking a bad answer is sometimes a win.
- Buddy up to the deponent if you can and avoid the difficult questions until later.
- Never miss an opportunity to grab a nugget of useful information.
- Never underestimate the importance of having a videographer – video can convey so much more to the judge, opposing counsel less likely to act a fool, unexpected evidence can be captured more effectively, telltale signs when a deponent is lying can show up on video, can somewhat isolate opposing counsel from their client.
- Prioritize sequencing of deponent witnesses to prevent, as much as possible, the comparing of notes.
- Depose multiple people when you suspect events or circumstances are being fabricated.
- Fully explore all conversations that third-party deponents had with opposing counsel.
- Get the Judge involved, but only if you must.

Strategy: Formulating Effective Questions

- Set objectives
- Structure your questions in such a way to elicit the answer you want
- Repeat questions to an evasive deponent
- Ask court reporter to repeat the question when deponent fails to respond
- Listen to deponent's responses to explore topics beyond your deposition outline – do not be a slave to your outline – biggest mistake by attorneys who have not taken a lot of depositions

Instruct the Deponent

- Provide instructions to deponent before the deposition begins
  - Pending question must be responded to before deponent may request to take a break
  - If deponent does not hear or understand the question, ask for it to be repeated
  - Answer presumes clear understanding of the question
  - Do not allow them to answer “uh-huh” or “nu-huh” or some variation – must be yes or no because it is too easy for them to correct a “uh-huh” to a “nu-huh” on the errata sheet and perhaps you’ve now lost a key response

Speaking Objections

- Indiana Trial Rule 30(C):

"All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. When there is an objection to a question, the objection and reason therefor shall be noted, and the question shall be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer, in which case either party may have the question certified by the Reporter, and the question with the objection thereto when so certified shall be delivered to the party requesting the certification who may then proceed under Rule 37(A). In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim."

Speaking Objections

All objections, **except those that would be waived** if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections **need not and shall not be made** during the course of depositions.

Speaking Objections/Refusal to Answer

- When there is an objection to a question, the objection and reason therefor shall be noted, and the question shall be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer. Ind. R. Trial P. 30(C)
- If a deponent fails to answer a question propounded or submitted under Rule 30 the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. Ind. R. Trial P. 37.
- An evasive or incomplete answer is to be treated as a failure to answer.
- Be certain to certify any question the deponent refuses to answer or is instructed not to answer

Speaking Objections

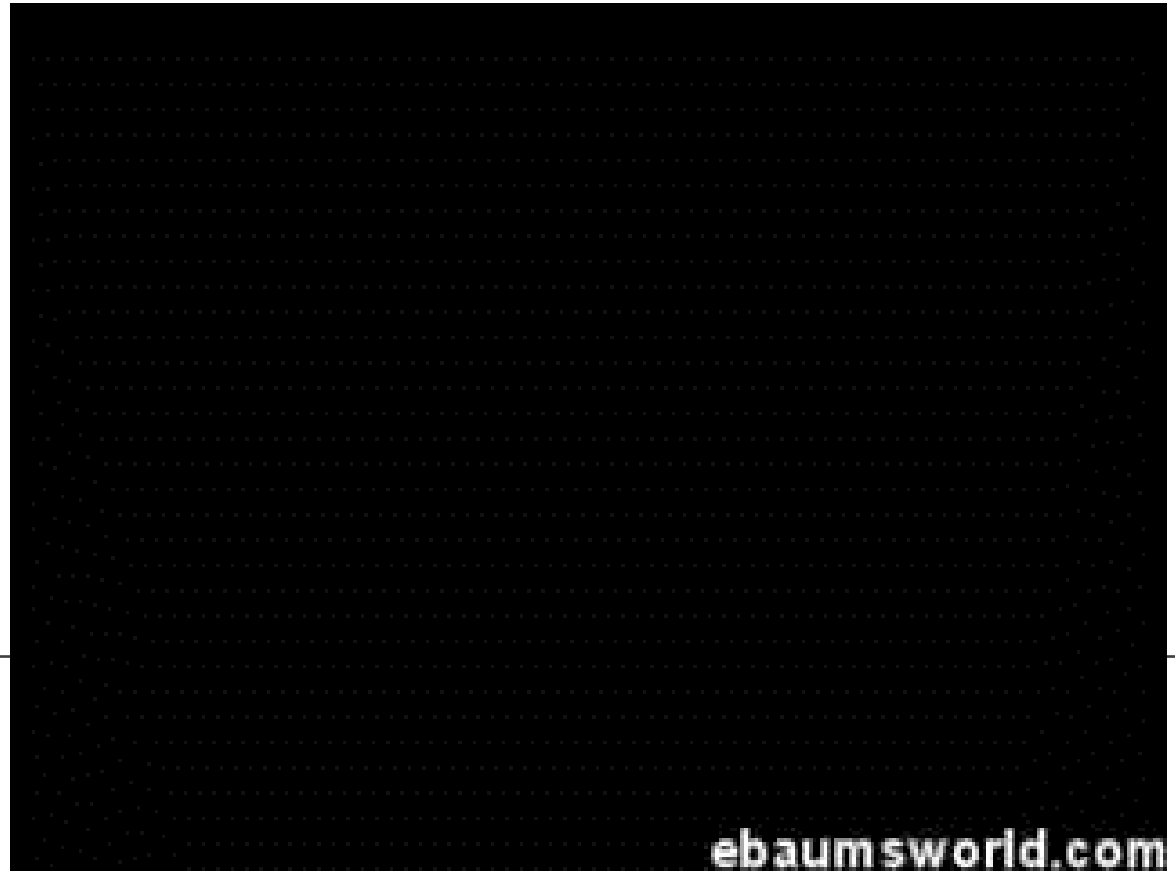
- Instruct opposing counsel to refrain from speaking objections (can be on the record, in your introductory remarks to deponent, or preferably before you begin with opposing counsel privately)
- Permissible objections are to the form of the question or to instruct a client not to answer
- Potential for sanctions: https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2019/speaking-objections-risk-sanctions/

Zoom Depositions

An entire separate CLE could be devoted to Zoom depositions but here are a few points to consider:

- Be prepared that a Zoom deposition will not be as effective as in-person
- Ensure a secure and reliable internet connection
- Determine who will be in the room with the deponent
- Organize exhibits in a folder on your desktop
- Be familiar with the “share screen” and “share file” options
- Instruct court reporter not to share exhibits with deponent or counsel prior to your instruction

Texas Style Deposition:



https://www.youtube.com/watch?v=ZIxmrvbMeKc

Section Seven

Mediation in a Zoom Environment

Kathryn Hillebrands Burroughs
Cross | Glazier | Burroughs, PC
Carmel, Indiana

Andrew C. Mallor
Mallor Grodner LLP
Bloomington, Indiana

Timothy M. Sledd
Mallor Grodner LLP
Bloomington, Indiana

Section Seven

Mediation in a Zoom Environment…….Kathryn Hillebrands Burroughs
Andrew C. Mallor
Timothy M. Sledd

Zoom Etiquette

Virtual Mediation

Memorandum of Mediation Agreement

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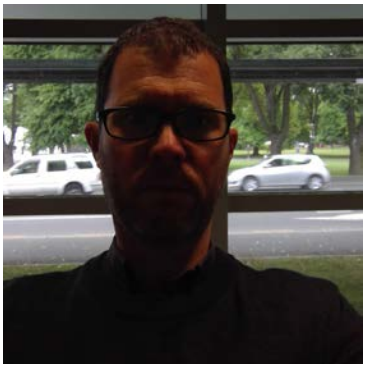
Attorneys

Zoom Etiquette

Think of a Zoom (or WebEx) Meeting, Mediation, or Hearing as a face-to-face meeting and conduct yourself as you would if all were present in the same room. In addition, there are some additional useful tips below to observe to help ensure the Zoom experience goes smoothly for all involved:

- If you are new to Zoom, download Zoom the application well prior to the day of the to familiarize yourself with the features you will need to use on the day (mute/unmute microphone, stop/start video, screenshare). Conduct a trial run with your attorney/client to ensure you both can navigate the platform together.
- **Join early** – up to 5 minutes before the meeting start time
- Have your video on unless you are experiencing connection issues
- Find a quiet space without interruptions / background noise, and preferably seated at a desk or table
- Have a plain background – avoid backlight from bright windows
- Have good lighting on your face so you can be seen clearly
- Adjust your camera to be at around eye level if possible – especially take note of the angle of your laptop screen if using the built-in camera.

Good lighting, good angle, plain background



Poor lighting, backlit by window, busy background

- Mute your microphone when not talking
- **Try to avoid talking over / at the same time as other participants. Especially important for attending hearings, if you are not being asked questions, please be quiet and do not talk.**
- Be aware you are on camera and try to avoid doing other tasks, eating, drinking, smoking, checking emails, looking at your phone, talking to other people, etc.
- Wear appropriate and conservative dress, as if you were attending the event in person.
- **Do not IM or send messages through the Zoom feature. If you need to communicate to your attorney, please email or text using an alternate device.**

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Virtual Mediation

You have been sent a link to join our virtual mediation. Please let us know if you did not receive the invitation. We conduct all of our mediations confitentially and we will do our best to make this process as comfortable as possible.

Each attorney and his or her client will be in separate, designated, private "breakout rooms." At the beginning of the mediation, you will be invited in, separately, and directed to the breakout room without seeing the other parties. Do not be alarmed if you are not admitted for a few minutes after the mediation start time. If for any reason you have not "joined" the meeting within 10 minutes, then there is a problem. Disconnect and contact the Mediator at 812-332-5000. Once everyone is admitted to the mediation, we will then begin in the usual way which means one room may be waiting a bit to get started.

You and your clients do NOT need a paid version of the App/Program. I would recommend using as large a screen as you can. It simply adds quality. You will find if your internet speed isn't good or if your processor is slow, this may hinder the quality.

You should download the Zoom app/program prior to the mediation. This makes your initial connection go much more smoothly and quickly.

To "join" the meeting, simply connect by clicking on the link which you will be sent at the designated time.

Mediations will be "scheduled" which means you will get the link prior to the scheduled starting time.

A few housekeeping matters:

1. I will need the attorney's and client's email addresses.

2. I would like to receive a copy of any substantive Court Orders which have been issued in your case prior to mediation beginning. This will just make mediation move more quickly as Ialmost always need to review past Orders.

3. I will need my executed contracts back prior to the mediation beginning. They can be emailed to _____. These can be sent to your client online in a fillable format to allow them to complete online and send right back.

4. You must have an ability to pay for mediation at the immediate conclusion of the mediation. We can take debit or credit cards and get

you and immediate receipt. We won't be able to accept cash or checks. If you need to pay by cash or check, please make arrangements with your own counsel to have these funds paid into his or her trust account.

I have now done a number of Zoom mediations and they have been very successful. There are a few pitfalls, but there are also some benefits available during a Zoom mediation not available during an in-person mediation. Overall, I would say that the Zoom mediation success rate is as good as, if not better than in person mediation. I find that they seem to take a little less time (i.e. less expensive) as well. Finally, I believe people are actually more comfortable and there is less hostility during Zoom mediation. I believe this is because people feel more comfortable and safer in their own environments.

If you do not believe a Zoom mediation is right for you or your case, please simply notify the office and I am sure we can plan an in-person mediation with safety precautions.

STATE OF INDIANA
IN THE BROOKLYN CIRCUIT COURT
CAUSE NO. 93C01-2001-DC-147

IN RE THE MARRIAGE OF:

JOHN DOE,
Petitioner,

and

JANE DOE,
Respondent.

MEMORANDUM OF MEDIATION AGREEMENT

The parties have reached agreement through mediation. The terms of the agreement are summarized as follows:

Division of Property

The parties' marital estate shall be divided according to the attached Exhibit "A."

Children's Issues

The parties shall have joint legal custody of Julie and Jack with Mother having primary physical custody.

Parenting time for John shall be according to the Indiana Parenting Time Guidelines.

Child support, health insurance, and responsibility for uninsured health care expenses shall be according to the attached Exhibit "B."

Mutually agreeable extra-curricular activity expenses shall be paid according to the percentages of income on Exhibit "B."

Life insurance shall secure child support. Father's death benefit will be at least $100,000.00 and Mother's death benefit will be at least $100,000.00. Beneficiary may be a trust f/b/o the children.

Child tax benefits may be claimed as follows: Father shall claim Julie and Mother shall claim Jack.

College education expenses shall be paid as follows: In percentage to the parents' incomes.

Standard pre-requisites to parents' obligation to contribute to college – minimum G.P.A., limitation to costs of state-supported institution for 4years.

Fees

Mediator's fees to be divided equally.

John to pay $2,500 towards Jane's attorney fees within 30 days.

Additional Documents

John's attorney to draft a settlement agreement containing these provisions, and standard boilerplate including full disclosure language as well as a Waiver and Decree.

Jane's attorney to draft these documents: QDRO, deeds and sales disclosure forms.

These documents will be done within 14 business days and if not this Memorandum of Agreement shall be submitted to the Court as the parties' Settlement Agreement. The parties acknowledge this Memorandum of Agreement is binding and enforceable as a mediated agreement.

Verification

I affirm under the penalties for perjury that the representations contained in the foregoing *Memorandum of Agreement* are true, all to the best of my knowledge and belief.

_____	_____
John Doe	Jane Doe
Date: _____	Date: _____

Approved as to form:

_____	_____
Attorney for John Doe	Attorney for Jane Doe

Cause No.: 93C01-2001-DC-147
Date of Marriage: 06/10/2003
Date of Filing: 01/01/2020

Exhibit A to Memorandum of Agreement			
Assetts and Debts	**To Wife**	**To Husband**	**Notes**
Real Estate			
Marital Residence	X		Refinance w/in 90 days or place for sale
Lake Home		X	Refinance w/in 90 days or place for sale
Personal Property			
Contents of Marital Residence	X		
Contents of Lake Home		X	
Cash and Accounts			
Chase Checking	X		H's name to be removed from account.
ONB Checking		X	
Vehicles			
2017 Toyota	X		
2019 Ford		X	
Investment/Retirement Accounts/Pensions			
Wife's 401K	X		
Husband's IRA	Half	Half	W to receive via QDRO, 1/2 as of DOF plus gains/losses from DOF to transfer
Business Interests			
Doe LLC		X	H to have business, all assets & pay all debts.
Life Insurance			
All American Policy 2345		X	H is owner.
Washington Policy 5678	X		*W is owner.*
Liabilities			Neither to make any charges on card for which the other is responsible. Each to return/destory all cards for which the other is responsible.
Mastercard		X	
Student Loan	X		
Mortgage on Marital Residence	X		
Mortgage on Lake House		X	
Total Marital Estate			

IN RE: The Marriage of John Doe and Jane Doe	CASE NO.: 93C01-2001-DC-147 FATHER: John Doe MOTHER: Jane Doe

CHILD SUPPORT OBLIGATION WORKSHEET (CSOW)

Children	DOB	Children	DOB
Julie	02/17/07	Jack	08/04/10

	FATHER	MOTHER	
1. WEEKLY GROSS INCOME	$2,884.62	$1,442.31	
A. Subsequent Children Credit, .065, .097, ...	0 $0.00	0 $0.00	
B. Child Support Order for prior born	$0.00	$0.00	
C. Child Support Duty for prior born	$0.00	$0.00	
D. Maintenance Paid	$0.00	$0.00	
E. WEEKLY ADJUSTED INCOME (WAI)	$2,884.62	$1,442.31	
2. PERCENTAGE SHARE OF TOTAL WAI	66.6667%	33.3333%	
3. COMBINED WEEKLY ADJUSTED INCOME			$4,326.93
4. BASIC CHILD SUPPORT OBLIGATION	$350.00	$175.00	$525.00
A. Work-related Child Care Expense	$0.00	$0.00	$0.00
B. Weekly Health Insurance Premium (children part)			$21.00
5. TOTAL CHILD SUPPORT OBLIGATION			$546.00
6. PARENT'S CHILD SUPPORT OBLIGATION	$364.00	$182.00	
7. Adjustment from PSEW Line J.	$0.00	$0.00	
Credit for child care payment from 4A	$0.00	$0.00	
Credit for health insurance premium (children part)	$21.00	$0.00	
Credit for parenting time for 098 overnights	$76.65	$0.00	
8. RECOMMENDED SUPPORT OBLIGATION	$266.35		

I affirm under the penalties for perjury the foregoing representations are true.

Preparer: Attorney for Jane Doe Father:_____

Dated: 10/20/2020 Mother:_____

Mother should pay the first $1,638.00 annual uninsured health care. (CSOW 4. + PSEW I. x 52 x .06)
Balance of Annual Expenses to be paid: 66.6667% by Father; 33.3333% by Mother;
Calculated for 2 at home and 0 at college using year 2020 guidelines and 098 overnights.

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