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Family Law

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FAMILY LAW

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I. INTRODUCTION

During the Survey period, the Fifth Circuit grappled with constitutional questions arising from the Indian Child Welfare Act. The Texas Supreme Court settled a split of authority on compliance with Texas Family Code Section 105.006 and the Fourth San Antonio Court of Appeals addressed a non-biological parent's standing to establish conservatorship after a same-sex relationship ended. This article reviews Texas family law cases

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from federal and Texas courts during the Survey period from December 1, 2018 through November 30, 2019. The article excludes cases involving the Texas Department of Family and Protective Services, the Texas Office of the Attorney General, and county Domestic Relations Offices. More than 281,000 new family law cases were filed in 2018.[1] The number of cases reported annually exceeds the authors' ability to report. Accordingly, the authors have limited review to a few highlight cases and an examination of trends of the past year.

II. INDIAN CHILD WELFARE ACT

A. *BRACKEEN ET AL. V. BERNHARDT*[2]

The 2019 version of this article[3] discussed a decision from the United States District Court for the Northern District of Texas which declared much of the Indian Child Welfare Act (ICWA) unconstitutional.[4] On August 9, 2019, a three judge panel for the U.S. Court of Appeals for the Fifth Circuit reversed most of the district court's decisions and found ICWA to be constitutional.[5]

Brackeen et al. v. Bernhardt was filed by the State of Texas and foster parents seeking to adopt a Native American child. Additional foster parents and the states of Louisiana and Indiana were later added as plaintiffs. Defendants were the United States, several federal agencies and their directors, along with five intervening Indian tribes.[6] The district court had ruled that ICWA and its clarifying administrative rules (known as the Final Rule) violated equal protection, the Tenth Amendment, the nondelegation doctrine, and the Administrative Procedures Act.[7]

On appeal, the Fifth Circuit first analyzed the equal protection ruling. At issue was whether the definition of an "Indian Child" was a race-based classification requiring a strict scrutiny level of review or a political classification requiring only a rational basis review. ICWA defined an "Indian Child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[8]

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1. OFFICE OF THE COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 9 (2018), http://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf. The number of family law cases filed annually continues to increase and currently makes up nearly half of the docket of Texas district courts. David Slayton, *Preface to Office of Court Administration*, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY (2018).

2. The name of the first appellee changed from Ryan Zinke to David Bernhardt when Mr. Bernhardt replaced Mr. Zinke as the Secretary of the U.S. Department of the Interior.

3. Anna K. Teller & Donald E. Teller, Jr., *Family Law*, 5 SMU ANN. TEX. SURV. 131, 135–36 (2019) [hereinafter *2019 Survey*].

4. Brackeen et al. v. Zinke, 338 F. Supp. 3d 514, 536, 538 (N.D. Tex. 2018).

5. Brackeen et al. v. Bernhardt, 937 F.3d 406, 441 (5th Cir. 2019).

6. *Id.* at 416.

7. *Id.*

8. 25 U.S.C. § 1903(4) (2018).

The district court found that the "Indian Child" definition was a race-based classification, applied a strict scrutiny analysis to determine if ICWA was sufficiently "narrowly tailored" to further a compelling government interest, and found that ICWA was not.[9] Conversely, the Fifth Circuit determined that the classification of an "Indian Child" was a political classification rather than a race-based classification.[10] A child not racially Indian could meet ICWA's eligibility standard because of a biological parent being a member of a tribe, and some persons, though racially Indian, may not meet ICWA's eligibility standard and thus not be eligible for tribe membership. Because membership was not a proxy for race, the Fifth Circuit found the classification was political rather than race-based, and the rational basis standard of review was appropriate.[11] Applying rational basis review, the Fifth Circuit found that "the special treatment ICWA affords Indian children is rationally tied to Congress's fulfillment of its unique obligation toward Indian nations and its stated purpose of 'protect[ing] the best interests of Indian children and promot[ing] the stability and security of Indian tribes.'"[12] Therefore, ICWA did not violate equal protection.[13]

The majority of the three judge panel also found that ICWA did not violate the Tenth Amendment.[14] The district court found that ICWA violated the Tenth Amendment's anticommandeering doctrine[15] and that federal preemption[16] did not apply.[17] The Fifth Circuit found that ICWA imposed notice and active efforts requirements on the "party" seeking termination of parental rights or adoption of an Indian Child, but this party could be a state agency or a private party and was thus even-handed.[18] ICWA's requirement for states to take administrative action to comply with federal standards was also not the same as administering a federal program.[19] Therefore, ICWA did not violate the anticommandeering doctrine.[20]

Chief Judge Priscilla Owen dissented in part, concluding that portions of ICWA violate the Tenth Amendment "because they direct state officers or agents to administer federal law."[21] For example, § 1915(e) requires a state to keep records of efforts to comply with the statutory

9. *Berhnardt*, 937 F.3d at 428–29.
10. *Id.* at 429.
11. *Id.* at 428–29.
12. *Id.* at 430.
13. *Id.* at 441.
14. *Id.*
15. *See id.* at 430 (The anticommandeering doctrine "prohibits federal laws commanding the executive or legislative branch of a state government to act or refrain from acting.").
16. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.
17. Brackeen et al. v. Zinke, 338 F. Supp. 514, 541 (2018).
18. *Bernhardt*, 937 F.3d at 432–33.
19. *Id.* at 433.
20. *Id.* at 441.
21. *Id.* at 442 (Owen, C.J., concurring in part and dissenting in part).

order of preference for placement of Indian children and to have those records available for review upon request of the child's tribe.[22] The authors concur with Chief Judge Owen.

The Fifth Circuit further disagreed with the district court regarding federal preemption. The district court had ruled that federal preemption did not apply because ICWA regulated states rather than private citizens. The Fifth Circuit said private individuals, namely Native American children and families, were regulated and that the regulation conferred upon them rights they would not have otherwise.[23] Therefore, ICWA met the minimum federal standards threshold and federal preemption did apply.[24]

The Fifth Circuit then reviewed the district court's ruling regarding the nondelegation doctrine. The nondelegation challenge questioned whether ICWA delegated legislative power mandated to Congress to Indian tribes. For example, sections of ICWA allowed tribes to employ tribal resolutions to change the preferred placement order for Indian children from the placement order listed in ICWA.[25] The Fifth Circuit found this did not violate the nondelegation doctrine because tribes have the inherent right to exercise authority over their members.[26] Therefore, the ICWA statute was an incorporation of that authority, not a delegation of congressional authority to the tribes.[27]

The Fifth Circuit then reviewed the Final Rule, the clarifying rules, and regulations needed to implement ICWA. When originally promulgated in 1979, the Final Rule contained merely non-binding guidelines. However, in 2016, the Final Rule was revised by the Bureau of Indian Affairs (BIA) and set as binding minimum standards to promote uniformity in how ICWA was to be construed.[28] The district court had found that the revisions violated the Administrative Procedure Act (APA), but the Fifth Circuit disagreed.[29] The Fifth Circuit held that the revisions to the Final Rule were reasonable and within the scope of the authority BIA received from Congress.[30]

Three months after this opinion's release, a request for en banc consideration was granted. This matter will be reheard in 2020 by the full Fifth Circuit.[31] Multiple opinions should be expected.

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22. 25 U.S.C. § 1915(e) (2018); 25 C.F.R. § 23.141 (2017). Specifically, the regulations require states to have their records available for review within fourteen days of a request by the Secretary of Indian Affairs or the child's tribe. *Id.*

23. *Bernhardt*, 937 F.3d at 434–35.

24. *Id.*

25. 25 U.S.C. § 1915(c) (1978); 25 C.F.R. § 23.101, *et seq.* (2017).

26. *Bernhardt*, 937 F.3d at 437.

27. *See id.*

28. *Id.*

29. *Id.* at 441.

30. *Id.*

31. Brackeen et al. v. Bernhardt, 942 F.3d 287, 289 (5th Cir. 2019).

III. MEDIATED SETTLEMENT AGREEMENTS

A. *HIGHSMITH V. HIGHSMITH*

The 2018 Survey discussed *Highsmith v. Highsmith* out of the Seventh Amarillo Court of Appeals.[32] This case found that a mediated settlement agreement (MSA) signed before the filing of a petition did not meet the requirements of Texas Family Code Section 6.602(a) because Section 6.602(a) specifically stated that "the court may refer a *suit* for dissolution of a marriage to mediation."[33] We advised practitioners in an abundance of caution to file a petition prior to mediation to ensure the MSA would be binding.

Thankfully, the Texas Supreme Court rectified this ruling in 2019. In *Highsmith v. Highsmith*, the supreme court arrived at the opposite conclusion, stating that the requirements for a binding MSA are contained in Section 6.602(b) and do not contain a requirement of a pending suit.[34] So long as the MSA complies with the binding requirements of Section 6.602(b), the referral authority provided in Section 6.602(a) will not restrict divorcing parties from engaging in binding mediation.[35] A party is entitled to judgment on an MSA that meets Section 6.602(b)'s requirements whether suit was filed before or after the MSA was signed.[36]

While the authors agree with this opinion, it does give rise to potential problems. If the parties reach a binding mediated settlement but do not file for divorce until years after the agreement, to what extent does it remain binding? Children could be in another home, property awarded to a party may no longer exist, or parties may no longer reside in Texas. Future cases or statutory amendments will hopefully address these concerns.

B. *JONJAK V. GRIFFITH*

When dividing brokerage or retirement accounts in MSAs, parties may state the percentage or dollar amount that each spouse is awarded and not add a phrase indicating that the award will fluctuate with the stock market. The parties and attorneys may assume inclusion of gains or losses language will be incorporated into the divorce decree and qualified domestic relations order (QDRO). *Jonjak v. Griffith*[37] exposes the risks of

32. Anna K. Teller & Donald E. Teller, Jr., *Family Law*, 4 SMU ANN. TEX. SURV. 161, 168 (2018) [hereinafter *2018 Survey*].

33. Highsmith v. Highsmith, 594 S.W.3d 349, 353 (Tex. App.—Amarillo 2017) (mem. op.) (emphasis added), *rev'd per curiam*, 587 S.W.3d 771, 776 (Tex. 2019).

34. "A mediated settlement agreement is binding on the parties if the agreement: (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed." TEX. FAM. CODE ANN. § 6.602(b); *see* Highsmith v. Highsmith, 587 S.W.3d 771, 776 (Tex. 2019) (per curiam).

35. *Highsmith*, 587 S.W.3d at 776.

36. *Id.* at 777; *see also* TEX. FAM. CODE ANN. § 6.602(c).

37. *See generally* Jonjak v. Griffith, No. 03-18-00118-CV, 2019 WL 1576157 (Tex. App.—Austin Apr. 12, 2019, no pet.) (mem. op.).

that assumption.

The parties' MSA stated the wife, Griffith, "will receive $962,000 from the Bog Farm Profit 401K, which is 53% of the value of the account as represented by [Jonjak] on the date of the mediation via QDRO prepared by [Jonjak]."[38] The MSA did not address gains or losses occurring after the date of mediation. Both parties prepared decrees and QDROs dividing the 401K and a hearing on the competing decrees occurred approximately six months later. Jonjak's proposed decree awarded Griffith a flat $962,000.00 via QDRO. Griffith's proposed decree awarded Griffith 53% of the account as of June 1, 2017, the date of the mediation, "together with any interest, dividends, gains, or losses on that amount arising since that date" to be "more particularly defined" in a QDRO.[39]

Griffith argued that the addition of the gains and losses language was merely a clarification but the Third Austin Court of Appeals rejected that argument, stating that "[w]e may not rewrite or add to their agreement to apply the account's gains or losses to Griffith's award."[40] The court of appeals rendered ruling, modifying the decree and QDRO to award Griffith $962,000.00 as of June 1, 2017, with no adjustment for gains and losses.[41]

Assuming the 401K account increased in value during the six months prior to the hearing and continued to fluctuate until the account was segregated, Griffith lost a significant sum due to not including language in the MSA indicating that the award was subject to fluctuation. Conversely, if the 401K account value had fallen during the intervening months, Jonjak would have been the party injured by the non-inclusion of fluctuation language.[42]

Unanswered by this opinion is how the award to Jonjak was specified in the MSA. If the MSA awarded Jonjak the remaining account balance after the amount awarded to Griffith was segregated from the account, Jonjak retained 100% of the increases to the account post-mediation, even though that likely was not the parties' intent. If the MSA awarded Jonjak a specific dollar amount or percentage as of the mediation date not subject to gains and losses, then any additions to the account would be an undivided asset subject to future litigation to divide the asset. To be safe, family law practitioners must include language in their MSAs indicating that the brokerage or retirement award is subject to post-mediation fluctuations.

38. *Id.* at *1.
39. *Id.*
40. *Id.* at *3.
41. *Id.* at *4.
42. Would the parties have argued opposite interpretations of the MSA if the stock market had declined in the intervening months?

IV. JURISDICTIONAL ISSUES

A. *In re R.R.K.*

In December, the Texas Supreme Court abrogated *In re B.D.*, a decision questioned in the 2018 Survey.[43] In *In re B.D.*, the Fifth Dallas Court of Appeals ruled that a trial court's memorandum ruling was a final Suit Affecting Parent-Child Relationship (SAPCR) judgment although the ruling failed to meet the requirements of Section 105.006.[44] Consequently, the mother's appeal was dismissed for lack of jurisdiction.[45]

In re R.R.K. presented the Texas Supreme Court a case with similar facts.[46] The *In re R.R.K.* trial court issued a one-page memorandum modification order and more than three months later signed a final order.[47] Mother appealed after the final order was entered. Although the memorandum did not meet Section 105.006 requirements, the court of appeals found that the appellate deadlines ran from the entry of the memorandum and dismissed Mother's appeal as untimely.[48] In the supreme court opinion, Justice Jane Bland acknowledged the courts of appeals' split authority on whether compliance with Section 105.006 should be considered as a determining factor of the finality of an order.[49] She explained that an order must dispose of all claims in "clear and unequivocal language" to be deemed a final order.[50] An order that complies with the requirements of Section 105.006 would clearly dispose of all claims; so compliance with Section 105.006 is a relevant inquiry to finality. Justice Bland conceded that omission of some requirements of Section 105.006 may not be fatal to an order but compliance with the statute is evidence of the finality and should play a role in determination of finality.[51] The supreme court held that "an order lacking the unmistakable language of finality—that is resolves all claims between and among the parties is final and appealable—is ambiguous . . . when the order does not comport with the statue governing final orders," and an appellate court should examine the record to determine the trial court's intent.[52] In *In re R.R.K.*, the record revealed that the memorandum was not intended to be a final order, so Mother's appeal was deemed timely and the case was remanded for consideration of the appeal.[53]

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43. *In re* B.D., No. 05-17-00674-CV, 2017 WL 3765848 (Tex. App.—Dallas Aug. 31, 2017, pet. denied) (mem. op.), *abrogated by In re* R.R.K., 590 S.W.3d 535 (Tex. 2019); *see 2018 Survey*, *supra* note 32, at 182 (for a full discussion of the history of *In re B.D.*).

44. Tex. Fam. Code Ann. § 105.006. The statute lists the personal information and boldfaced typed notices to be included in final orders.

45. *In re B.D.*, 2017 WL 3765848, at *2.

46. *In re* R.R.K., 590 S.W.3d 535, 538–39 (Tex. 2019).

47. *Id.* at 539.

48. *Id.* at 538.

49. *Id.* at 542.

50. *Id.* at 540.

51. *Id.* at 542–43.

52. *Id.* at 544.

53. *Id.*

B. *In re Swart*

The Fifth Dallas Court of Appeals conditionally granted writ and directed a Dallas district court to vacate its order and dismiss a divorce action filed by a wife who was in Texas on a tourist visa.[54] Nora Morales is a Bolivian citizen and a resident of Costa Rica. She traveled to Dallas on a B1/B2 temporary tourist visa. The B1/B2 visa application required Morales to overcome the presumption that she was immigrating to the United States by demonstrating that her stay in Texas was temporary. The visa was granted with the constraint that she must return to Bolivia or Costa Rica every six months.[55] Six months after arriving in Dallas, Morales filed for divorce in Dallas district court. In her petition, she claimed to have been domiciled in Texas for the preceding six months and a resident of Dallas for the preceding ninety days. Her spouse, a Dutch citizen and also a resident of Costa Rica, filed a special appearance which the trial court denied. On mandamus, the court of appeals found Morales's domicile claim was barred as a matter of law because she relied on the Immigration and Nationality Act (INA) as the basis for her presence in Texas, and the regulations for the INA provided only for temporary stays.[56] Therefore, Morales was a visitor who was not eligible to file for divorce in Texas, and the trial court abused its discretion by finding Morales met the statutory residence requirement.[57]

C. *In re Venkatraman*

In 2018, we reported on *In re Reardon*.[58] This case detailed a split in authority amongst the courts of appeals regarding the ability to file a subsequent child custody modification while the previous child custody determination was on appeal.[59] *In re Venkatraman* reiterates the Fifth Dallas Court of Appeals precedent allowing for a new modification matter while the previous final order's appeal was pending.[60] Appellant's petition for writ of mandamus filing, which argued that the trial court was without jurisdiction to rule on a child support modification request while the prior final order was on appeal, was denied.[61]

D. *In re S.R.*

The Second Fort Worth Court of Appeals case *In re S.R.* illustrates how misunderstandings can occur when multiple filings and appeals are piled

54. *In re* Swart, 581 S.W.3d 844, 850–51 (Tex. App.—Dallas 2019, no pet.).
55. *Id.* at 846.
56. 8 U.S.C. § 1101(a)(15)(B) (2014); 22 C.F.R. § 41.31 (2020).
57. *In re Swart*, 581 S.W.3d at 850–51.
58. *See 2018 Survey*, *supra* note 32, at 175–77.
59. *In re* E.W.N., 482 S.W.3d 150, 157 (Tex. App.—El Paso 2015, no pet.); *see also In re* G.E.D., No. 05-17-00169-CV, 2018 WL 258982, at *3–4 (Tex. App.—Dallas Jan. 2, 2018, no. pet.) (mem. op.) (discussing the split in authority).
60. *See In re* Venkatraman, No. 05-19-00088-CV, 2019 WL 698023 (Tex. App.—Dallas Feb. 20, 2019, no pet.) (mem. op.).
61. *Id.* at *1.

upon each other.[62] After trial, the district court signed a final modification order, captioned 2nd Reformed Order in Suit to Modify Parent-Child Relationship (2nd Reformed Order). The parties immediately filed new modification petitions, and Mother also filed a timely appeal of the 2nd Reformed Order.[63] The parties entered into a Rule 11 agreement for the new modification matters which rendered the conservatorship, possession, child support, medical support, and education expense issues moot on appeal. However, the trial court's 2nd Reformed Order, which Mother appealed, had also found good cause to award Father a $45,000.00 attorney's fees judgment against Mother.[64]

Both parties argued that the Rule 11 settlement rendered the appeal of the attorney's fees award moot but arrived at opposite conclusions as to how. Mother argued that the settlement of the moot issues also mooted the attorney's fees judgment because Father was not a "prevailing party."[65] Father argued that the settlement mooted Mother's appeal of the attorney's fees award, requiring it to stand. The court of appeals first noted that Family Code Section 106.002, authorizing a trial court to award attorney's fees in a modification matter, did not require a party to be named as the prevailing party in order to award attorney's fees.[66] Further, the court echoed the Texas Supreme Court statement that a case "is not rendered moot simply because some of the issues become moot during the appellate process."[67] Accordingly, neither party was entitled to have the attorney fee award dispensed with due to mootness.[68] The court then analyzed Mother's complaint that the trial court abused its discretion in awarding attorney's fees and found that the trial court did not.[69] The court affirmed the trial court ruling as modified by the agreement.[70]

V. STANDING/SAME-SEX PARENTAGE

A. *In re N.M.B.*

The Fourth San Antonio Court of Appeals affirmed dismissal of a SAPCR requesting adjudication of conservatorship for a former same-sex partner of the biological mother, affirming the trial court's ruling that the partner lacked standing.[71] Channel Beverly was the partner who initiated the SAPCR. Shante Posey lived with Channel Beverly when Posey conceived N.M.B. through artificial insemination. N.M.B. was fifteen months

62. *In re* S.R., No. 02-16-00401-CV, 2018 WL 6816108, at *1 (Tex. App.—Fort Worth Dec. 27, 2018, no pet.) (mem. op.).

63. The parties have been litigating custody of their fourteen-year-old daughter since she was four years old. *Id.* at *1.

64. *See id.* at *1–3.

65. *Id.*

66. *Id.* at *3–4.

67. *Id.* at *4 (quoting State *ex rel.* Best v. Harper, 562 S.W.3d 1, 6 (Tex. 2018)).

68. *Id.*

69. *Id.* at *5.

70. *Id.*

71. *In re* N.M.B., No. 04-18-00111-CV, 2018 WL 6516120, at *2 (Tex. App.—San Antonio Dec. 12, 2018, pet. denied) (mem. op.).

old in July 2016 when the couple separated. Posey moved with N.M.B. to Ohio for a short time after the separation but then returned to Texas. Throughout the separation, Posey refused Beverly access to N.M.B. So, in March 2017, Beverly filed a SAPCR.[72] Posey moved to dismiss Beverly's SAPCR because Beverly lacked standing. The trial judge dismissed Beverly's suit with prejudice, and Beverly appealed.[73] In her de novo review, Justice Martinez did not reach the substance of Beverly's first issue arguing that she was an "intended parent" under Section 160.602(a)(8) of the Family Code because Beverly did not plead for Chapter 160 relief.[74] Section 160.602(a)(8) pertains to proceedings to adjudicate parentage. While Beverly's pleadings included a section entitled petition to adjudicate parentage, the relief she requested was Chapter 153 relief for conservatorship, possession, and access.[75] Section 102.003, not Section 160.602(a)(8), confers standing for Chapter 153 relief.[76] Since the requested relief was not available under the standing statute pled, the court overruled Beverly's first issue.[77] When addressing the issues presented in *In re N.M.B.*, practitioners should plead in the alternative and ensure their pleadings request relief available under all applicable standing statutes.

Justice Martinez rejected several of Beverly's additional arguments because standing, like all subject matter jurisdiction issues, is a question of law.[78] Beverly is a party to a separate pending lawsuit brought by the Office of Attorney General to adjudicate N.M.B.'s parentage that is set for trial in March 2020.[79] It will be interesting to see if she prevails as to standing in that case.

VI. PROPERTY ENFORCEMENT

A. *CHAKRABARTY V. GANGULY*

The Fifth Dallas Court of Appeals sat en banc to reconsider whether money is "tangible personal property" subject to the two-year statute of limitations of Section 9.003(a).[80] Under Section 9.003(a), an enforcement action for division of personal property that exists at the time of the di-

72. Beverly's petition was for divorce or, in the alternative, a SAPCR to adjudicate parentage. In both the divorce and SAPCR portions of the petition, she sought joint managing conservatorship of N.M.B. Judge Peter Sakai dismissed the divorce case because he found the parties' relationship was not an informal marriage. Beverly did not appeal dismissal of the divorce action. *Id.* at *2.

73. *Id.*

74. *See generally id.*; TEX. FAM. CODE ANN. § 160.602(a)(8).

75. *See generally In re N.M.B.*, 2018 WL 6516120, at *4; *see also* TEX. FAM. CODE ANN. § 153, *et seq.*

76. TEX. FAM. CODE ANN. § 102.003.

77. *In re N.M.B.*, 2018 WL 6516120, at *3–4.

78. Beverly's arguments for estoppel, application of the contract-law based ratification doctrine, and equitable tolling all failed because standing must be conferred via statute. *See id.* at *2.

79. *Id.*

80. Chakrabarty v. Ganguly, 573 S.W.3d 413, 416 (Tex. App.—Dallas 2019, no pet.) (en banc); TEX. FAM. CODE ANN. § 9.003(a). The case was heard en banc because a prior panel decision from the same court reached a contrary decision.

vorce must be filed before the second anniversary of the date of divorce.[81] "Tangible personal property" is not defined in the Family Code. Former husband, Chakrabarty, appealed the Collin County trial court's enforcement order arguing that the action for enforcement of division of funds was barred by the Section 9.003(a) statute of limitation.[82] Chakrabarty's appeal was heard by a three-justice appellate panel. Appellee, Ganguly, relied on a Texas Supreme Court case and opinions from other Texas courts of appeals to rebut the assertion that cash is "tangible personal property" subject to the two-year limitation.[83] During oral arguments, the panel noted that a previous panel of the Fifth Dallas Court of Appeals had considered this issue and held that money was "tangible personal property."[84] Since subsequent panels of a court of appeals are bound by previous panel opinions, Husband prevailed on his statute of limitations argument in the 2018 panel opinion. Wife moved for rehearing en banc, and the motion was granted. Rehearing en banc is granted as the court deems necessary.[85] Granting the en banc motion was necessary for the court to reexamine this issue, as panel opinions can be overruled only by later en banc decisions or supreme court decisions.

Justice David Schenck reviewed the authority relied on by Ganguly. He explained that in interpreting the relevant tax statute in *Great South Life Insurance Co. v. City of Austin*, the supreme court held that money was "intangible" personal property.[86] While this holding is not directly on point as to the definition of "tangible personal property" in Section 9.003(a), it can be presumed that the supreme court would follow their previous ruling in defining the phrase as used in the Family Code.[87] It can further be presumed the legislature intended the same definition to apply in later enacted statutes as earlier statutes and that the legislature is aware of judicial opinions interpreting statutory definitions and adopts those definitions in later enacted statutes.[88] So, the definition of money from *Great South Life Insurance Co.* is persuasive authority that money is not "tangible personal property" under Section 9.003(a). Turning to the decisions from the sister courts of appeals, Justice Schenck first examined an enforcement case from the Fourteenth Houston Court of Appeals. The court of appeals used definitions from the tax code, *Black's Law Diction-*

81. The time for tolling is the second anniversary of (a) rendering of the decree or (b) the date the decree becomes final after appeal, whichever is later. TEX. FAM. CODE ANN. § 9.003(a).

82. The parties' divorce was granted in 2012, and the former wife filed for enforcement in 2016, unquestionably after expiration of the two-year statute of limitations. *Chakrabarty*, 573 S.W.3d at 414.

83. *See generally id.*

84. *Id.* at 415; Long v. Long, 196 S.W.3d 460, 468 (Tex. App.—Dallas 2006, no pet.).

85. TEX. R. APP. P. 41.2(c).

86. Great S. Life Ins. Co v. City of Austin, 243 S.W. 778, 781 (Tex. 1922). "[C]ertain classes of . . . personal property, as well as intangible property having similar characteristics, as for example, money, state and municipal bonds, circulating band notes, and shares of stock . . . ." *Id.*

87. *Chakrabarty*, 573 S.W.3d at 416.

88. *Id.*

ary, and two Supreme Court decisions and found, ". . . money is not a 'tangible chattel' or 'goods.'"[89] Two other courts of appeals also rejected the argument that money was "tangible personal property."[90] Following "[p]rior judicial interpretations of the same terms, particularly where, as here, those constructions are uniform, include a decisive reading from a terminal court, and cover a vast expanse of time," the Dallas Court of Appeals stated that money and shares of stock are not tangible personal property under Section 9.003(a).[91] The trial court's judgment on this issue was affirmed.[92]

VII. INTERSECTION OF CIVIL ACTIONS AND FAMILY LAW

A. *Mustafa v. Pennington*

Family law practitioners continued to apply the Texas Citizens Participatory Act (TCPA) to their cases in 2019. As discussed in the 2019 Survey, the TCPA was intended to protect defendants from costly litigation designed to keep them from exercising their constitutional rights to petition, speak freely, and participate in government.[93] The broad definitions in TCPA of "legal action," "right to petition," and "communication"[94] allowed its application to a wide range of civil cases. Protecting free speech is a paramount right, but the broad definitions arguably led to the application of TCPA to cases where its purpose is not furthered. Application of TCPA to family law matters was recently criticized by the Fifth Dallas Court of Appeals.[95]

In *Mustafa v. Pennington*, appellant Mustafa sued Pennington, the amicus attorney appointed to assist the court during a child custody case.[96] After a jury trial in which Pennington participated, the jury named Mustafa's ex-wife as sole managing conservator. While the custody case was

89. Ford v. Ford, No. 14-99-00246-CV, 2000 WL 1262469, at *2 (Tex. App.—Houston [14th Dist.] Sept. 7, 2000, no pet.) (mem. op., not designated for publication).

90. *See* Wilke v. Phillips, No. 04-12-00604-CV, 2013 WL 6022245, at *2 (Tex. App.—San Antonio Nov. 13, 2013, no pet.) (mem. op.); Gentile v. Gentile, No. 13-04-167-CV, 2007 WL 271144, at *1 (Tex. App.—Corpus Christi–Edinburg Feb. 1, 2007, pet. denied) (mem. op.).

91. *Chakrabarty*, 573 S.W.3d at 416–17 (quoting Kennedy v. Hyde, 682 S.W.2d 525, 529 (Tex. 1984)).

92. *Id.*

93. *2019 Survey*, *supra* note 3, at 138–40.

94. A "legal action" included any judicial filing requesting legal or equitable relief. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(6) (version before 2019 revisions). The "right to petition" includes a communication in or pertaining to a judicial proceeding. *Id.* § 27.001(4)(A)(i). A "communication" is "the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic." *Id.* § 27.001(1).

95. Misko v. Johns, 575 S.W.3d 872, 874 (Tex. App.—Dallas 2019, pet. denied) ("based upon the broad definitions in the statute, parties have sought to apply the protections of the TCPA to an increasing range of situations that do not further this purpose, including filing motions to dismiss (1) a suit affecting the parent-child relationship under the family code").

96. Mustafa v. Pennington, No. 03-18-00081-CV, 2019 WL 1782993 (Tex. App.—Austin Apr. 24, 2019, no pet.) (mem. op.).

on appeal, Mustafa filed a breach of contract, negligence, and defamation case against Pennington. Pennington moved to dismiss the case under the TCPA. In response, Mustafa amended his suit, dropped his defamation claim, and stated intent to nonsuit any claims that invoke the TCPA.[97] Mustafa continued to litigate his breach of contract claim and filed discovery requests. At the TCPA hearing, the court denied the discovery requests and dismissed Mustafa's case pursuant to the TCPA. The trial court also awarded Pennington the TCPA's required attorney's fees and expenses.[98]

On appeal, the Third Austin Court of Appeals found that the legal action was based on or related to Pennington's right to petition, invoking the TCPA. Mustafa argued that his allegations were that Pennington failed to communicate, rather than communicate, as defined by the TCPA. The court of appeals recast Mustafa's alleged failure to communicate as a criticism of Pennington's communications.[99] Therefore, the court found that the TCPA applied, despite Mustafa's attempt to nonsuit any claims invoking the TCPA.[100]

Having found that the TCPA applied, the burden shifted to Mustafa, who could only avoid dismissal if he could establish clear and specific evidence for a prima facie case on each essential element of his claim.[101] The court of appeals found that Mustafa was unable to establish a prima facie case that an express or implied contract existed between Mustafa and Pennington, and therefore affirmed the dismissal of the suit.[102]

B. *Lipper v. Haynes*

Lipper v. Haynes also involved an attorney using the TCPA to dismiss a suit.[103] Attorney Lipper represented Wife Alicia in a divorce case against Husband Haynes and also simultaneously represented a lender against Haynes in a separate suit. The suit on the promissory note settled, and the divorce case proceeded to trial. During the bench trial, Lipper acknowledged that he had inadvertently applied a time entry from the promissory note case onto the summary of his attorney's fees for the divorce case.[104] Despite Lipper's admission, the court awarded attorney's fees based on the billing without adjusting for the inadvertent time entry.[105]

Rather than appeal the divorce matter, Haynes sued Lipper and Alicia for breach of contract, tortious interference, and conspiracy. Lipper moved to have the suit dismissed under the TCPA but the trial court de-

97. *Id.* at *2.
98. *Id.*
99. *Id.* at *3.
100. *Id.*
101. *Id.*
102. *See id.* at *4.
103. Haynes v. Lipper, Nos. 01-19-00055-CV, 01-19-00345-CV, 2019 WL 3558999, at *1 (Tex. App.—Houston [1st Dist.] Aug. 6, 2019, no pet.) (mem. op.).
104. *See id.*
105. *See id.*

nied his motion.[106] Lipper then filed an interlocutory appeal alleging that the denial of his motion to dismiss was error. The First Houston Court of Appeals reviewed the matter and agreed, finding that the definitions under the TCPA unambiguously included an attorney's in-court statements, and therefore applied the TCPA to Hayne's claims against Lipper.[107] The court of appeals remanded the matter back to the trial court for a determination of the attorney's fees and sanctions to be assessed against Haynes.[108]

The *Mustafa* and *Lipper* cases could be seen as a quick and thus proper vehicle to dismiss dubious cases, but the authors envisioned improper extension of the TCPA to less narrowly tailored family law matters. Luckily, the Texas Legislature stepped in and, effective September 1, 2019, dramatically narrowed the scope of the TCPA, exempting many civil litigation matters from the TCPA. Important to family law practitioners, legal actions under Title 1, 2, 4, and 5 of the Family Code, as well as an application for a protective order under criminal laws, were exempted from the TCPA.[109] Alternative dispute resolution proceedings and post-judgment enforcement actions were also expressly removed from the definition of a "legal action."[110] The legislative changes should allow the TCPA to be applied to civil actions such as *Mustafa* and *Lipper* while prohibiting the extension of the TCPA into areas of family law where it was not intended.

C. *Guimaraes v. Brann*

The First Houston Court of Appeals denied reconsideration en banc of Marcelle Guimaraes's appeal in the ongoing cross-border custody litigation between Ms. Guimaraes and her former husband, Christopher Brann.[111] The parties filed competing cases in Harris County and Brazil, which led to extended litigation. This mandamus was based on subject matter jurisdiction issues raised by Guimaraes. In a three-justice appellate panel opinion issued in July 2018, the court of appeals determined

106. *See id.*

107. The appellate court further ruled that even if Haynes was successful in establishing a prima facie case against Lipper by clear and specific evidence, the attorney immunity defense still entitled Lipper to dismissal of Hayne's claims under the TCPA. *Id.* at *3. Establishing an affirmative defense as a matter of law allows the matter to still be dismissed despite the party bringing the claim being able to establish a prima facie case. Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d).

108. *Lipper*, 2019 WL 3558999, at *4.

109. Tex. Civ. Prac. & Rem. Code Ann. § 27.010(6).

110. *Id.* § 27.001(6).

111. Guimaraes v. Brann, 583 S.W.3d 652, 652 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (Keyes, J., dissenting); *see 2019 Survey*, *supra* note 3, at 138 (discussing a small part of the previous litigation between these parents.). *See also* Samantha Ketterer, *Harris County Judge Denies Dismissal of Suit Against Kidnapped Boy's Father*, Hous. Chronicle (May 28, 2019, 6:17 PM), https://www.chron.com/news/houston-texas/houston/article/Harris-County-judge-denies-dismissal-of-suit-13902103.php [https://perma.cc/L7PF-RY3R] (discussing the ongoing litigation between Christopher Brann and his son's maternal grandparents. Both grandparents were sentenced to federal prison in 2018 for aiding their daughter in the kidnapping of her son. The grandparents allege Brann made false statements in their criminal trials.).

there was no question of subject matter jurisdiction and instead recast the issue as one of international comity.[112] The principle of international comity gives discretionary power to a Texas court with subject-matter jurisdiction to defer to a foreign court. In *Guimaraes*, the Harris County trial court could have deferred to the Brazilian court after the Brazilian court assumed jurisdiction under two exceptions to the Hague Convention, but the court chose not to defer.[113] Dismissal of a Texas case under comity is not a right, and a trial court's decision not to extend comity is reviewed for abuse of discretion.[114] The panel found the Harris County district court did not abuse its discretion when it "[r]efused to extend comity to the Brazilian courts' resolution of Brann's Hague Convention Petition," that resolution being to deny Brann's request for his son to be returned to the United States.[115] Guimaraes's argument that, under the Hague Convention, the trial court "'must give deference' to the Brazilian court," was soundly rejected and the panel affirmed the trial court judgment.[116] Guimaraes filed a request for en banc reconsideration that was denied, and Justice Evelyn Keyes filed a dissenting opinion.[117] She explained that the panel went awry by "only selectively address[ing] application of the International Child Abduction Remedies Act (ICARA)," to return of a child under the Hague Convention[118] and failing to apply the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which directly addresses jurisdictional questions in international disputes, to the issues Guimaraes presented.[119] Justice Keyes found that failure to apply the applicable statutory standards resulted in an unjust ruling.[120] The thrust of the dissent is that the appellate panel sidestepped the jurisdictional issue of whether the Brazilian court had adequate grounds to assume jurisdiction. The Hague Convention and related statutes are meant to provide courts with mechanisms to avoid cross-border fights, but the statutes must be appropriately applied to be effective. Justice Keyes flatly stated that the controversy in this case is jurisdictional and she would have granted en banc consideration and voted for Brazil to assume jurisdiction.[121] These questions remain: (1) did the Brazilian court obtain jurisdiction even though (a) Brann filed his petition less than a

112. *Guimaraes*, 583 S.W.3d at 653, 663; *see* Guimaraes v. Brann, 562 S.W.3d 521, 536–37 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

113. *Guimaraes*, 583 S.W.3d at 662–63. If a child is wrongfully removed from their home country, courts in Hague Convention signatory countries are obligated to return the child if a timely petition is filed and no exception to return is applicable. The Brazilian Court found two applicable exceptions, that (1) the child was well-settled in Brazil, and (2) returning the child to the United States would put the child in grave risk of harm. *Id. See* Hague Convention on the Civil Aspects of International Child Abduction, art. 12 & 13(b), Oct. 25, 1980, T.I.A.S. No. 11,670; 22 U.S.C. § 9003 (2018).

114. *Guimaraes*, 583 S.W.3d at 663.

115. *Id.*

116. *Id.*; *see Guimaraes,* 562 S.W.3d at 532, 537.

117. *Guimaraes*, 583 S.W.3d at 652.

118. *Id.* at 653 (Keyes. J., dissenting); *see* 22 U.S.C. § 9003 (2018).

119. *Guimaraes*, 583 S.W.3d at 653; *see* TEX. FAM. CODE ANN. § 152.

120. *Guimaraes*, 583 S.W.3d at 653.

121. *Id.* at 663.

year after the child's wrongful removal so the Article 12 "well-settled exception" is arguably not applicable and (b) if there was no grave danger to the child;[122] or (2) was the Texas court divested of jurisdiction by the Brazilian court's resolution denying Brann's request for his son to be returned to the United States.[123]

VIII. CONCLUSION

During the Survey period, a Fifth Circuit panel opinion found the Indian Child Welfare Act and related regulations constitutional. Their decision will be reconsidered by the full Fifth Circuit this year. The Texas Supreme Court settled a split of authority on compliance with Texas Family Code Section 105.006 and explained the requirements of Texas Family Code Section 6.602(a). The trend of the Texas courts of appeals seems to support district courts having authority to hear modification matters when an appeal of a prior child custody order is pending.

122. The grave danger to the child argument stems from allegations that Brann had violent episodes and is supported by his admissions and Guimaraes's testimony. Brann maintained his son is safe with him. The Brazilian court found that returning the child to Brann would put the child in danger of harm because of Brann's violent tendencies and the emotional damage that would be caused by separating a four-year-old from his Mother. The Texas court may view the evidence differently. *Id.* at 655, 659.

123. *Id.* at 663, 669.