Winning Your Case Before You Go To Trial

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State Bar of Texas
Advanced Family Law Course 2009
Honoring the Past… Embracing the Future

Chapter 16

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Ms. O'Neil founded the firm with her friend and partner Nathan T. Anderson based on their desire to provide clients with high-quality representation in a personalized atmosphere. She has over 18 years of experience representing men, women, and children related to family law matters such as divorce, child custody, and complex property division. Described by one lawyer as "a lethal combination of sweet-and-salty", Ms. O'Neil exudes genuine compassion for her client's difficulties, yet she can be relentless when in pursuit of a client's goals.

Ms. O'Neil became a certified family law specialist by the Texas Board of Legal Specialization in 1997 and has maintained her certification since that time. Representing clients in litigation before the trial court is an important part of her practice. In addition, family law appellate matters are a niche of Ms. O'Neil's practice. Lawyers frequently consult with Ms. O'Neil on their litigation cases about specialized legal issues requiring particularized attention both at the trial court and appellate levels.

Most recently, Ms. O'Neil was asked to participate in co-authoring a book entitled *Children and the Law in Texas*, scheduled for publication by Texas Lawyer Press in the Fall of 2009. The State Bar of Texas and other providers of continuing education for attorneys frequently enlist Ms. O'Neil to provide instruction to attorneys on topics of her expertise in the family law arena. She has, further, been honored by her peers with an "A-V" peer review rating by Martindale-Hubbell Legal Directories for the highest quality legal ability and ethical standards, as well as selection as a Barrister in the Annette Steward Inns of Court, an organization devoted to the professionalism of the practice of law.

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Bill Harris is the Judge of the 233rd District Court in Fort Worth, Texas. Judge Harris practiced civil trial and family law in Bedford, Texas from 1983 to 1995, when was appointed to the bench by then Governor George W. Bush.

Judge Harris has served on the adjunct faculty of Tarrant County Junior College and The University of Texas at Arlington. He is the past course director for the *Trial Skills* course sponsored by the Tarrant County Family Law Bar and West Texas Legal Services. Judge Harris has served on the faculty of the College of Advanced Judicial Studies for the Texas Center for the Judiciary, as well as the faculty of the Advanced Family Law Course. Judge Harris currently serves as chairman of the Tarrant County Juvenile Board.

Judge Harris is a native Texan who earned his undergraduate degree from the University of Texas at Arlington and his law degree from the Texas Tech University School of Law.

WINNING YOUR CASE BEFORE YOU GO TO TRIAL

I. INTRODUCTION

Dictionary.com defines a "win" as achieving victory or finishing first in a competition. Many times in family law litigation it is hard to define what constitutes a "win" in any particular case. What really is a "victory"? For some clients the simple act of obtaining the divorce will be considered a "victory". Others set their standard of a "victory" very high, such as when a client will only be happy if he or she has the child 100% of the time.

Much of "winning" is determined by where the bar gets set to define a win. Establishing achievable goals remains one of the most essential aspects of client relations, as well as "winning" the case.

An additional aspect of "winning" might be to cut short what might otherwise be protracted litigation. This paper aims to review methods of "winning" the case prior to an extended trial on the merits of the case. This paper presumes that "winning" is defined as achievement of the client's reasonable goals in a quick and efficient manner. This paper discusses various aspects of disposition of a case, both on procedural grounds as well as the merits of a claim, prior to trial. Areas such as jurisdiction, special exceptions, default judgments, summary judgments, declaratory judgments, discovery, sanctions, and pretrial appeal are covered.

II. WINNING WITH JURISDICTION

Jurisdiction presents the first opportunity to "win" before trial. Without jurisdiction over the matter at hand, or the parties involved, the court has no power to act with respect to your client and/or the subject matter at issue. Therefore, the jurisdictional challenges discussed below are powerful defensive tactics for a responding party to a lawsuit where proper jurisdiction is at issue.

A. Special Appearance

The Due Process Clause of the United States Constitution guarantees that a party cannot be bound by the judgment of a forum with which the party has established no meaningful contacts, ties, or relations. *National Indus. Sand Ass'n v. Gibso*n, 897 S.W.2d 769, 722 (Tex, 1995). A special appearance addresses the issue of whether a Texas court can properly exercise jurisdiction over a respondent. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 202 (Tex. 1985). Texas Rule of Civil Procedure 120a, allows a nonresident respondent to challenge the court's personal jurisdiction without the respondent becoming subject to the jurisdiction of the Texas court. Tex. R. Civ. P. 102a; Kawasaki Steel Corp. v. Middleton, 699 S.W.2d 199, 201 (Tex. 1985).

In a special appearance, the respondent must negate all grounds for personal jurisdiction alleged by petitioner. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 793 (Tex. 2002). The respondent should plead and prove (1) he or she is not a resident of Texas, (2) did not have minimum contacts with Texas, and (3) even if he or she had some minimum contact with Texas, the exercise of jurisdiction will "offend traditional notions of fair play and substantial justice". *Id*., at 795. Once the respondent produces sufficient evidence negating jurisdiction, the burden shifts to the petitioner to establish the court's jurisdiction over respondent. *M.G.M. Grand Hotel, Inc. v. Castro*, 8 S.W.3d 403, 408 (Tex. App. – Corpus Christi 1999, no pet.).

The respondent must file a special appearance before any other pleading the in the case. Tex. R. Civ. P. 120a(1); see 86(1). To avoid the risk of a possible default judgment, a special appearance must be filed within the same time as the answer. If other pleadings are filed first, the respondent has submitted to the jurisdiction of the Texas court. Tex. R. Civ. P. 120a(1). Further, the special appearance should:

- Be verified, see Texas Rule of Civil Procedure 102a(1);
- Attach affidavits supporting the factual allegations contained in the special appearance, filed and served on opposing counsel at least seven days before the

hearing, see Texas Rule of Civil Procedure 102a(3); and

- Contain a request for a hearing, which must be secured or the special appearance is waived.

Winning on a special appearance means that the Court cannot exercise jurisdiction over the respondent, usually meaning that the lawsuit cannot be maintained in particular county or state in which it was originally filed. This allows the respondent to avoid the suit in that particular forum and enables them to either file their case in another state or county in which they have established meaningful contacts. This can be of great tactical advantage to the respondent, often making the litigation more convenient and more cost efficient.

B. Plea to the Jurisdiction

A plea to the jurisdiction seeks dismissal of a cause of action without regard to whether the underlying claim has merit. *Blad ISD v. Blue,* 34 S. W.3d 547, 554 (Tex. 2000). The plea challenges the power of the court to adjudicate the subject matter of the controversy. *Texas DOT v. Arzate*, 159 S.W.3d 188, 190 (Tex. App. -- El Paso 2004, no pet.) A court must have subject-matter jurisdiction to decide the merits of a case. . *Blad,* 34 S. W.3d at 553-54. A court cannot render a valid judgment without subject-matter jurisdiction. *Dubai Pet. Co. v. Kazi*, 12 S.W.3d 71, 74-75 (Tex. 2000).

Some of the proper grounds for a plea to the jurisdiction include the following:

- Lack of a justiciable issue;
- Lack of standing;
- Lack of ripeness;
- Continuing exclusive jurisdiction by another court;
- Failure to comply with statutory (jurisdictional) prerequisites to filing suit.

Subject-matter jurisdiction is a matter of law. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Subject matter jurisdiction cannot be presumed and cannot be waived. *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 n. 2 (Tex. 1996). Judgment rendered by a court lacking subject-matter jurisdiction is void, not just voidable. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990). There is no deadline to file a plea to the jurisdiction; subject-matter jurisdiction is fundamental error and can be raised at any time. *Sivley v. Sivley*, 972 S.W.2d 850, 855 (Tex. App. – Tyler 1998, no pet.)

When evidence is necessary to determine jurisdictional fact, the court must consider evidence on a plea to the jurisdiction. *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). If the evidence is undisputed or if there is no fact question on the jurisdictional issue, the court will rule on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 226-27. If the facts are disputed, the court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact-finder at trial. *Id.*

If the court rules that the claim is not within the court's jurisdiction there are two possible outcomes. If the obstruction to the court's jurisdiction cannot be removed, the case must be dismissed (usually without prejudice). *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex. 2006). If the court determines the impediment can be cured, then the proceedings should be abated to allow the plaintiff to cure the defect. *Id.*

C. Family Law Jurisdiction Issues

1. Status divorce, In rem jurisdiction

The Family Code's "General Residency Rule for Divorce Suit", section 6.301, provides the following prerequisites for maintaining a suit for divorce in Texas:

A suit for divorce may not be maintained in this sate unless at the time the suit is filed either the petitioner or the respondent has been:

(1) a domiciliary of this state for the proceeding six-month period; and

(2) a residence of the county in which the suit is filed for the proceeding 90-day period.

Tex. Fam. Code §6.301.

In *Reynolds v. Reynolds*, the Austin court explained that the residence requirement for a divorce, provided by TFC 6.301 is not itself jurisdiction, but is instead "akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and is a mandatory requirement that parties cannot waive. *Reynolds v. Reynolds*, 86 S.W.272, 276 (Tex. App – Austin 2002 – no pet.)

While the requirements of section 6.301 must be met in order for the petitioner to maintain their suit for divorce in Texas, it is possible for the court to have jurisdiction to grant the divorce without having jurisdiction to divide the property. As stated by the Texas Supreme Court in *Dawson –Austin v. Austi*n, a court can have jurisdiction to grant a divorce – an adjudication of the parties' status – without having jurisdiction to divide their property – an adjudication of the parties' rights. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998); see also *Hoffman v. Hoffman*, 821 S.W.2d 3, 5 (Tex. App. – Fort Worth 1992, no writ).

2. Personal jurisdiction over parties to divide property

For a trial court to have jurisdiction over a party, and adjudicate the rights of the parities, the party must be properly before the court in the pending controversy as authorized by procedural statues and rules. *In re Ashton*, 266 S.W.3d 602, 604 (Tex. App. – Dallas 2008, orig. proceeding).

Section 6.305 of the Texas Family Code establishes the requirements for a Texas court to acquire personal jurisdiction over a nonresident respondent when the petitioner is a resident or domicillary of Texas at the time the suit for divorce was filed. Pursuant to section 6.305, under these circumstances, the Texas court can exercise personal jurisdiction over respondent if:

(1) this state is the last marital residence of the petitioner and respond and the suit is filed before the second anniversary of the date on which the marital residence ended; or

(2) there is any basis consisted with the constitutions of this state and the United States for the exercise of personal jurisdiction.

Tex. Fam. Code §6.305(a)(1)-(2).

In a decree for divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. Tex. Fam. Code §7.001.

Texas Family Code §7.002 provides that a trial court has the authority to divide amongst the parties to a divorce assets owned by them, even if the assets are located in another state. Tex. Fam. Code §7.002. Known as quasi-community property because the divorce court treats the asset as if it were acquired and held subject to Texas' community property laws, the assets themselves, however, remain subject to the jurisdiction of the situs.

A Texas court does not have, and cannot acquire, in rem jurisdiction over real estate lying outside the state of Texas. *In re Glaze*, 605 S.W.2d 721, 724 (Tex. Civ. App. – Amarillo 1980, no writ); *see also Deger v. Deger*, 526 S.W.2d 272, 274 (Tex. App. – Waco 1975, no writ) (A trial court in Texas has no jurisdiction over real estate lying outside the State). Generally, real property is exclusively subject to the laws of the state where it is situated, and all matters concerning the title of real property are determined by law of situs of the property. *Estabrook v. Wise*, 506 S.W.2d 248, 249-50 (Tex. App. – Tyler 1974), writ granted, judgment

vacated w.r.m., 519 S.W.2d 632 (Tex. 1974). Texas courts have adopted the axiom "the law of the situs controls as to land." *Kaherl v. Kaher*l, 357 S.W.2d 622, 624 (Tex. Civ. App. -- Dallas 1962, no writ).

While the trial court does not have jurisdiction to render a judgment or decree which acts directly upon title to real property situated in another state; a court with jurisdiction of the parties can determine rights and equities of such parties even as related to realty in other states and then exercise its equitable, in personam powers to require a conveyance to carry out its decree if necessary. *Estabrook*, 506 S.W.2d at 250-251. Thus, a Texas divorce court has the authority to divide an asset located outside the state between the parties, but has no in rem jurisdiction as to the title of the property and cannot adjudge the rights or remedies available to third parties involved with such assets.

3. UIFSA jurisdiction over child support

A successful challenge to the court's jurisdiction to decide child support issues in your case can lead to dismissal, requiring the opposing party to choose between pursuing their claims in another state, which is likely less convenient for them and more costly, or else drop the suit all together. While the latter option is obviously the better alternative, both outcomes can amount to an advantage to your client and constitute a win before trial.

In a proceeding to establish, enforce, or modify a support order or to determine parentage under UIFSA, a Texas court has personal jurisdiction over nonresident respondents under the following circumstances:

- the individual is personally served with citation in this state;
- the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;
- the individual resided with the child in this state;
- the individual resided in this state and provided prenatal expenses or support for the child;
- the child resides in this state as a result of the acts or directives of the individual;
- the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse;
- the individual asserted parentage in the paternity registry maintained in this state by the bureau of vital statistics; or
- there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

Tex. Fam. Code §159.201(a).

In simultaneous proceedings under UISFA, where a suit is filed in another state after the initial petition is filed in a Texas court, the Texas court is only permitted to exercise its jurisdiction to establish a support order if:

- the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
- the contesting party timely challenges the exercise of jurisdiction in the other state; and
- if relevant, this state is the home state of the child.

Tex. Fam. Code 159.204(a).

Note that under the provision above, the Texas court's exercise of jurisdiction is not mandatory even if the conditions are met. This provides an opportunity for you to argue that, although the court can exercise jurisdiction according to 159.204, Texas is still not the proper court to decide the merits of your particular case and jurisdiction should be declined for other reasons.

In simultaneous proceedings where the petition or comparable pleading is filed in another state before the initial petition is filed in the Texas court, the Texas court is prohibited from exercising jurisdiction to establish a support order if:

- the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;
- the contesting party timely challenges the exercise of jurisdiction in the other state; and
- if relevant, this state is the home state of the child.

Tex. Fam. Code §159.204(b).

Whether you are seeking to win on determining or declining the jurisdiction of the Texas court to establish a child support order, be aware that the UISFA provisions for simultaneous proceedings both a contesting party to timely challenge the jurisdiction of the other state – implying that such challenge can be waived if there is too much delay.

The cornerstone of UISFA rests on the basic concept that the tribunal issuing a support order retains continuing exclusive jurisdiction to modify that order. Under the UISFA provision for continuing exclusive jurisdiction, Texas Family Code section 159.205, as long as one of the individual parties or the child continues to reside in the issuing state, and as long as the parties do not agree to the contrary, the issuing tribunal has continuing, exclusive jurisdiction over its child support order. Tex. Fam. Code §159.205 – cmt. Even if all parties and the child have left the issuing state, the support order continues in effect and is fully enforceable unless and until a modification takes place in accordance with the requirements of Article 6. *Id.* Note that a Texas court that does not have jurisdiction to modify a child support order can act an initiating tribunal to request that another state modify a support order issues in that state. Tex. Fam. Code §159.205(d). This gives you the option to request relief in a Texas proceeding, even if the Texas court itself cannot modify the order.

Also an important to UISFA is the concept that the power to enforce the order of the issuing State is not "exclusive" with that State. Tex. Fam. Code §159.206 -- cmt. Rather, on request one or more responding States may exercise authority to enforce the order of the issuing state. *Id.* As in a modification under UISFA, the issuing tribunal can initiate a request that another state enforce its order or request reconciliation of the arrears and interest due on its order if another order is controlling. Tex. Fam. Code §159.206(a). The issuing State has jurisdiction to serve as a responding State to enforce its own order if another order is controlling. Tex. Fam. Code §159.206(b).

Whether you are representing the petitioner or respondent in a proceeding to modify or enforce a child support obligation where multiple orders have been issued, you will obviously want to argue the applicability of the most beneficial order for your client. You also obviously want to make sure you are enforcing, modifying, or defending the correct order. UISFA is based on a one-order system, so recognition and/or determination of the controlling child support order is essential. The guidelines for the determining the controlling child support order under UISFA, codified in Texas Family Code section159.207, provide as follows:

- One Order - If only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized.
- Two or more Orders - If two or more child support orders have been issued by tribunals of this state or another state with regard to the same obligor and same child, the following rules apply to determine by order which order controls:
  - if only one of the tribunals would have continuing, exclusive jurisdiction under this chapter, the order of that tribunal controls and must be so recognized;
  - if more than one of the tribunals would have continuing, exclusive jurisdiction under this chapter:

- an order issued by a tribunal in the current home state of the child controls if an order is issued in the current home state of the child; or
- the order most recently issued controls if an order has not been issued in the current home state of the child; and
- if none of the tribunals would have continuing, exclusive jurisdiction under this chapter, the tribunal of this state shall issue a child support order that controls.

Tex. Fam. Code §159.207(a), (b)(1)-(3). Also, if this state has personal jurisdiction over both obligor and oblige, a party can request the court to determine which order controls when two or more child support orders have been issued for the same obligor and same child. Tex. Fam. Code §159.207(c).

Under UISFA, child support order issued by other states can be enforced in Texas, provided the requirements of section 159.611 are met and the order is registered in Texas pursuant to the procedures of Texas Family Code sections 159.601, 159.602. However, as long as the state issuing the child support order retains continuing, exclusive jurisdiction over, other states are precluded from modifying that order. If you are seeking to modify a child support order from another state, make sure the order at issue is properly registered in Texas. *Id*. If you are defending against a suit to modify and out-of-state order in Texas, note the procedure for contesting the validity or enforcement of registered orders and the defenses to enforcement of a registered order, provided in sections 159.606 and 159.607. Tex. Fam. Code §§159.606, 159.607.

4. UCCJEA jurisdiction over child custody determination

Like UISFA above, a successful challenge of the court's jurisdiction over petitioner's suit under UCCJEA can lead to dismissal of the petitioner's claims. Again, this forces the petitioner to either bring their suit in the appropriate jurisdiction, which can be inconvenient and cost-prohibitive, or drop their claims against all together. For the petitioner, successfully establishing jurisdiction under UCCJEA can provide you with the advantage of forcing an out-of-state respondent to defend against your claims in a Texas court.

In determining jurisdiction, the UCCJEA prioritizes the child's home state over other jurisdictional bases. 152.201 - cmt. Under UCCJEA, a Texas court is given jurisdiction of an initial child custody determination in only four situations, with the child's home state being dominant:

- This state was the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

- A court of another state does not have jurisdiction under section 152.201(a)(1) or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 152.207 (inconvenient forum) or 152.208 (jurisdiction declined by reason of conduct), and:
  - the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this state other than mere physical presence; and
  - substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

- All courts having jurisdiction under sections 152.201(a)(1) or 152.201(a)(2) have declined to exercise jurisdiction on the foundation that a court of this state is the more appropriate forum to determine the custody of a child under section152.207 (inconvenient forum) or 152.208 (jurisdiction declined by reason of conduct), or

- No court of any other state would have jurisdiction under the criteria specified in 152.201(a)(1), (2) or (3).

Tex. Fam. Code §152.201(a).

The four situations provided by 152.201(a) are the exclusive jurisdictional basis for a Texas court to make a child custody determination in UCCEJA cases. Tex. Fam. Code §152.201(b). Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination. Tex. Fam. Code 152.201(c).

Since the jurisdiction is specifically limited to the four situations provided in 152.201(a), if you are responding to a petition that does not conform to the jurisdictional limitations provided by the statue, challenge the jurisdiction of the Texas court and request dismissal of the other party's claim against your client. In addition to another state being the home state of the child, under the UCCJEA, a Texas court can decline jurisdiction over a child custody determination because Texas is an inconvenient forum or because the party seeking to invoke jurisdiction has engaged in unjustifiable conduct. Tex. Fam. Code §§152.201(a), 152.207, 152.208. Argue either or both of these bases for the Texas court to decline jurisdiction if your case provides the appropriate facts, again seeking dismissal of the petitioner's claims against your client.

Once the court renders an order in an initial custody determination under the UCCJEA, that court retains continuing exclusive jurisdiction over the determination until one of the following two events occur:

- a court of this state determines neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state, and that substantial evidence is no longer available concerning the child's care, protection, training an personal relationships; or
- a court of this state or a court of another state determines that the child, the child's parents, and any person acting as the child's parent do not presently reside in this state.

Tex. Fam. Code §152.202(a). Under 152.202(b), A court of this state that has made a child custody determination and does not have exclusive jurisdiction under this section may cannot modify that determination unless it has jurisdiction to make an initial determination under 152.201. Tex. Fam. Code §152.202(b).

Under the UCCJEA, except for cases where temporary emergency jurisdiction is appropriate, a Texas court has jurisdiction to modify a child custody determination made by a court of another state only if a court of this state has jurisdiction to make an initial determination under 152.201(a)(1) or (2) and either:

- the court of the other state determines it no longer has continuing exclusive jurisdiction under Section 152.202 or that a court of this state would be a more appropriate forum under Section 152.207; or
- a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

Tex Fam. Code 152.203.

If your case involves a previous order, keep the UCCJEA provision for continuing exclusive jurisdiction in mind and remember that, absent a finding by either the Texas court or the court of another state to the contrary, the court that issued the previous order maintains jurisdiction over this matter. If you are pursing a claim in a court other than the court that issued the order, make sure you secure a determination that the court you are in is the appropriate court for your case. If you are responding to the opposing party's claims, argue the continuing exclusive jurisdiction of the court that issued an order – absent a determination to the contrary, jurisdiction in the court that issued the order is proper.

A Texas court has temporary emergency jurisdiction if the child is present in this state and has been abandoned or it is necessary to protect

the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. Tex. Fam. Code §152.204(a). The purpose of an order under the temporary emergency jurisdiction provision of the UCCJEA is to protect the child until the State that has jurisdiction under 152.201-152.203 enters and order. Tex. Fam. Code §152.204 - cmt. In cases involving temporary emergency jurisdiction under the UCCJEA, the concept of "home state" differs from 152.102(7) and omit the requirement that the 6 months or residence occur before the proceeding is commenced. *In re J.C.B*., 209 S.W.3d 821, 824 n. 4 (Tex. App. – Amarillo 2006, no pet.)

Temporary emergency jurisdiction is reserved for extraordinary circumstances. *Saavedra v. Schmidt*, 96 S.W.3d 533, 5548-59 (Tex. App. – Austin 2002, no pet.) The trial court's assumption of temporary emergency jurisdiction does not include jurisdiction to modify the child custody determination of another state. *Id*. A court's exercise of temporary emergency jurisdiction is temporary in nature and may not be used as a vehicle to attain modification jurisdiction for an ongoing, indefinite period of time. *Id.* If represent the responding to a petition for temporary emergency relief and another state would otherwise have jurisdiction, draw the distinction for the court between situations requiring temporary emergency jurisdiction and basic modification under the UCCJEA. If the other side has not shown the court that the child has been abandoned or is in danger, as required by 152.204(a), jurisdiction by the Texas court is not appropriate and your opponent's case should be dismissed.

Section 152.206 of the Texas Family Code addresses simultaneous custody determination proceedings under the UCCJEA. Tex. Fam. Code §152.206. Except in emergency situations falling under section 152.204, this provision prohibits the Texas court from exercising its jurisdiction, if, at the time the proceeding in this state commenced, a child custody determination had already been commenced in another state with jurisdiction "substantially in conformity with this chapter". Tex. Fam. Code §152.206(a). The courts of both states are required to communicate regarding the case. Tex. Fam. Code §152.206 (b). If the court of the other state agrees that Texas is a more appropriate forum, then the Texas court will continue with the case. If the court of the other state determines that the case should stay there, the Texas court will dismiss their proceeding. Tex. Fam. Code §152.206(a).

Under the UCCJEA, the simultaneous proceedings problem only arises when there is no home State, no State with exclusive, continuing jurisdiction and more than one significant connection State. Tex. Fam. Code §152.206 – cmt. For those cases, this section retains the "first in time" rule of the UCCJA. *Id*.

In situations involving simultaneous modification proceedings pending in this state and another state, the court of this State will determine whether a proceeding to enforce the custody determination has been commenced in another State. If a modification proceeding has been commenced in another state, the Texas court may stay the Texas modification pending entry of an order from the other court on the pending modification. Tex. Fam. Code §152.206(c)(1). The Texas court also has the option to enjoin the parties from continuing with the proceeding enforcement. Tex. Fam. Code §152.206(c)(3). The Texas court can also proceed with the modification if the court considers it to be appropriate. *Id.*

Under circumstances where an enforcement proceeding in this state is simultaneous to a modification pending in another state with jurisdiction to modify the custody determination, the UCCJEA provides that the enforcing court of this state shall immediately communicate with the modifying court of the other state. Tex. Fam. Code §152.307. The enforcement proceeding in this state shall continue unless the enforcing court, after consultation with the modifying court, stays or dismisses the enforcement proceeding. *Id.*

If your case involves simultaneous proceedings, be aware of the rules for your

particular circumstances and seek dismissal of the pending claim against your client, if applicable, or a stay of certain proceedings until the appropriate jurisdiction can be determined. This will at least allow you time to evaluate your strategy and discuss the various options with your client.

Regarding enforcement, the UCCJEA provides that a court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter. Tex. Fam. Code §152.303. The UCCJEA allows a court of this state to grant any relief normally available under the law of this state to enforce a child custody determination made by a court of another state registered pursuant to 152.305. Tex. Fam. Code §§152.305, 152.306.

With respect to temporary visitation, the UCCJEA allows a court of this state, which does not have jurisdiction to modify a child custody determination to issue a temporary order enforcing either:

- a visitation schedule made by a court of another state; or
- the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

Tex. Fam. Code §152.304(a). Securing an order for temporary visitation for your client from a court of this state, amounts to a victory before trial in that it enables your client to exercise visitation with their child during the pendency of a proceeding. Further, such a victory allows your client's right to visitation with the child until an order can be obtained from the appropriate court having jurisdiction over the matter. Tex. Fam. Code §152.304(b).

5. What happens when you have split jurisdiction?

In certain situations where both and the UCCJEA apply, such statues can have differing effects on jurisdictional issues regarding child support and child custody determinations in the same case. While the UCCJEA prioritizes the home state of the child as the primary basis for a court's jurisdiction over a child custody determination, jurisdiction under UISFA remains with the court that issued the initial order provided the one of the parties *or* the child still reside in that state. Tex. Fam. Code §§ 152.201, 159.205. In situations where one party and the child move to another state (provided the requirements for the child's home state are met) and the other party remains in the state that issued the child support order, then split jurisdiction issues between the UCCJEA and UIFSA may arise. *See e.g. In re Hattenbach*, 999 S.W.2d 636 (Tex. App. – Waco 1999, orig. proceeding). The Waco Court of Appeals in *Hattenbach*, acknowledged the less-than-ideal situation posed by split jurisdiction between the UCCJEA and UISFA, stating:

> "*By adopting these uniform acts, the legislature has created an unsatisfactory situation in which a suit affecting a parent-child relationship is severed into parallel proceedings in different states. However, any remedy for this awkward result must come from the legislature, not the courts*."

In re Hattenbach, 999 S.W.2d at 639.

In cases where split jurisdiction between the UCCJEA and UISFA are an issue, the court will determine appropriate jurisdiction over the child support portions and the child custody portions of the case. Under the UCCJEA, the possibility of split jurisdiction between the child custody portions of the case and the child support portion of the case allow a party the opportunity to assert inconvenient forum as an attempt to convince a court to decline jurisdiction over that particular matter and try all portions of the case together. *See* Tex. Fam. Code §152.207. If you are responding to a suit involving either child support or a child custody determination, provided you have a sufficient factual basis, attempt to dismiss opposing party's claim due to lack of jurisdiction. Such dismissal can amount to a win before trial on that issue, leaving open the possibility for an argument of inconvenient forum for remaining claim, or the opportunity to decide

child custody and child support issues separately in the states deemed appropriate by the court.

D. Appellate remedies

1. Special Appearance

Except in a suit brought under the Family Code, an order granting or denying a special appearance may be appealed immediately. Tex. Civ. Prac. & Rem. Code §51.014(a)(7). For cases brought under the Family Code involving child-custody and child-support issues, mandamus is the appropriate method to seek review of the trail court's ruling on a special appearance. *In re Barnes*, 127 S.W.3d 843, 846 (Tex. App. – San Antonio 2003, orig. proceeding); *see also* Tex. Civ. Prac. & Rem. Code §51.014(a)(7). On appeal, the appellate court will examine whether the nonresident respondent negated all the alleged grounds for personal jurisdiction. *Kawasaki Steel Corp. v. Middleto*n, 699 S.W.2d 199, 203 (Tex. 1985).

The potential of mandamus relief in family law cases allows the respondent to revisit the issue of jurisdiction before the case progresses – giving the respondent another chance to "win" before trial.

2. Plea to the Jurisdiction

An interlocutory order granting or denying a plea to the jurisdiction, for the most part, cannot be appealed until entry of the final judgment. The appellate court will review the trial court's ruling on a plea to the jurisdiction de novo. *Houston Mun. Employees Pension Sys. v. Ferrell*, 248 S.W.3d 151, 156 (Tex. 2007). If the trial court considered jurisdictional facts in reaching its ruling, then the appellate court will consider the petitioner's pleading and the evidence presented regarding the jurisdictional allegations at trial. *Blad*, 34 S. W.3d at 554. If petitioner's case was dismissed based on their petition then the appellate court must accept as true all factual allegations contained in the petition. *Axtell v. University of Tex.*, 69 S.W.3d 261, 264 (Tex. App. – Austin 2002, no pet.)

In limited cases, mandamus is available to challenge the trial court's ruling on a plea to the jurisdiction. Mandamus is available to challenge the trial court's ruling on a plea to the jurisdiction when conflicting child custody orders are issued by two difference courts. *Geary v. Peavy*, 878 S.W.2d 602, 603-05 (Tex. 1994). Further, mandamus is available to resolve the jurisdictional issue before a trial on the merits if a constitutional issue has not been resolved by the trial court. *See e.g. Tilton v. Marshall*, 925 S.W.2d 672, 676 & n.4 (Tex. 1996). The availability of mandamus to raise constitutional challenges to a trial court's ruling on a plea to the jurisdiction gives way to many valid and interesting due process, equal protection, and open courts arguments.

III. WINNING WITH SPECIAL EXCEPTIONS

Another method for adjudicating matters prior to trial is the use of special exceptions which is controlled by Texas Rules of Civil Procedure 90 and 91. The purpose of a special exception is to inform the opposing party, most frequently the plaintiff, of a defect in its pleading so that it may amend its pleadings to remedy the defects. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000). The party filing the special exceptions must specifically identify the defects in the non-moving party's pleadings. *O'Neal v. Sherck Equip. Co.*, 751 S.W.2d 559, 562 (Tex. App. – Texarkana 1988, no writ).

A. Defects in Form vs. Defects in Substance

Special exceptions come in two types: (1) objections to defects in the form of the pleading; and (2) objections to substance (or lack thereof) in the pleading. *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.*, 48 S.W.3d 225, 233 (Tex. App. – San Antonio 2001, pet. denied).

Defects in form are voiced by a special exception when a pleading that requires verification is absent of such, *see Huddleston v. Western Nat'l Bank*, 577 S.W.2d 778, 781 (Tex.

App. – Amarillo 1979, writ ref'd n.r.e.), or the plaintiff's petition fails to specify what discovery level is to be used. Tex. R. Civ. P. 190.1. As the reader may suspect, defects in substance comprise the majority of special exceptions.

If a plaintiff merely makes general allegations in its pleadings, the defendant should file a special exception. *Subia v. Texas Dept. of Human Svcs.*, 750 S.W.2d 827, 829 (Tex. App. – El Paso 1988, no writ). Texas courts have consistently held that the plaintiff must provide sufficient information in its pleadings to provide the defendant with "fair notice" – thus allowing the defendant to ascertain the nature and the basic issues of the controversy as well as what testimony will likely be relevant in defending against plaintiff's claims. *Horizon*, 34 S.W.3d at 896; *see also* Tex. R. Civ. P. 45(b); Tex. R. Civ. P. 47(a). Note, however, that the plaintiff is not required to describe its evidence in detail in its petition. *Paramount Pipe & Supply v. Muhr*, 749 S.W.2d 491, 494-95 (Tex. 1988).

Failing to plead all the elements of a cause of action is another substantive defect addressed through special exceptions. *Mowberry v. Avery*, 76 S.W.3d 663, 677 (Tex. App. – Corpus Christi 2002, pet. denied). In filing a special exception under this ground, the moving party must specify the missing elements that are lacking from the non-moving party's pleading. *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957 (Tex. App. – Dallas 1985, no writ). Note that the plaintiff's omission of an element does not deprive the court of jurisdiction; the plaintiff retains the right to amend its pleading and cure the defect.

B. Procedural Considerations

Special exceptions must be made in writing and identify the particular part of the pleading it challenges as well as point out the particular insufficiency. Tex. R. Civ. P. 90 & 91; *Muecke v. Hallstead*, 25 S.W.3d 221, 224 (Tex. App. – San Antonio 2000, no pet). The moving party is also required to specify how the defect in the pleading can be corrected. If the special exception does not provide the requisite specificity, the court will view it as a general demurrer and overrule it. Tex. R. Civ. P. 90; *Fuentes v. McFadden*, 825 S.W.2d 772, 778 (Tex. App. – El Paso 1992, no writ).

Special exceptions should be filed by the defendant along with its answer or immediately thereafter. Although special exceptions may be raised during trial, it is important to note that special exceptions must be submitted prior to the court reading the charge to the jury. *Husdpeth v. Hudspeth*, 756 S.W.2d 29, 34 (Tex. App. – San Antonio 1988, writ denied).

If the court overrules the special exceptions its will proceed with other matters. When exceptions are overruled, the error regarding the defects in the pleadings are preserved. *Johnson v. Willis*, 595 S.W.2d 256, 260 (Tex. App. – Waco 1980). If the court sustains the special exceptions, the plaintiff must be provided with an opportunity to amend its pleadings. *Parker v. Barefield*, 206 S.W.3d 119, 120 (Tex. 2000); *Texas Dept. of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974). Accordingly, the court cannot dismiss the plaintiff's case at the same time it orders the plaintiff to amend its pleadings to cure the defect. *Mowberry*, 76 S.W.3d at 678.

C. Options Available to Parties After the Court's Ruling

There are several options available for the plaintiff should the court sustain the special exceptions. First, the plaintiff can amend its pleadings to cure the defect; in doing so, the plaintiff is permitted to include new allegations. *Butler Weldments Corp. v. Liberty Mut. Ins. Co.*, 3 S.W.3d 654, 658 (Tex. App. – Austin 1999, no pet.). Second, the plaintiff may refuse to amend its pleadings. In doing so, the plaintiff can test the validity of the court's ruling on appeal. *Mowbray*, 76 S.W.3d at 677. Finally, the plaintiff may request time to amend its pleadings and obtain a ruling if the court did not provide it with an opportunity to amend its pleadings prior to dismissal. *Parker v. Barefield*, 206 S.W.3d 119, 120-21 (Tex. 2006). In doing so, the plaintiff

must ask the court for leave and obtain a ruling on the record or the error is waived. *Inglish v. Prudential Ins. Co.*, 928 S.W.2d 702, 705 (Tex. App. – Houston [1st Dist.] 1996, writ denied).

If the moving party's special exceptions are granted, there are several possible options. If the defect identified in the pleadings is not cured, and the non-moving party was given an opportunity to amend its pleadings, then the moving party can file a motion to dismiss. *Baca v. Sanchez*, 172 S.W.3d 93, 96 (Tex. App. – El Paso 2005, no pet.). The moving party can also move to strike the offending portions of the pleadings rather than moving to dismiss the entire suit. Finally, the moving party can file for a partial or full summary judgment. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

Should the non-moving party fail to correct its deficient pleadings after given an opportunity to correct them, the court cannot strike the pleadings so long as a good faith attempt to cure the defects was made. *Humphreys v. Meadows*, 938 S.W.2d 750. 753 (Tex. App. – Fort Worth 1996, writ denied). If the non-moving party did not make a good faith attempt to amend its deficient pleadings, the court can strike the offending portions of the pleading. *Cruz v. Morris*, 877 S.W.2d 45, 47 (Tex. App. – Houston [14th Dist.] 1994, no writ).

Finally, if the non moving party refused to cure the defects in its pleading, then the court should proceed to adjudicating the remainder of the case that is not tainted by the deficiencies. *Cruz*, 877 S.W.2d at 47. If, however, no cause of action remains, the court will dismiss the suit, and in most cases, with prejudice. *Kutch v. Del Mar College*, 831 S.W.2d 506, 508 (Tex. App. – Corpus Christi 1992, no writ); *Mowbray*, 76 S.W.3d at 678.

IV. WINNING WITH DEFAULT JUDGMENTS

A default judgment allows the petitioner to win before trial, provided the procedural requirements are met and the applicable rules are followed. A default cannot be rendered for a defendant. *Freeman v. Freeman*, 327 S.W.2d 428, 431 (Tex. 1959). The proper corresponding remedy for a defendant is dismissal of the petitioner's suit.

A. No-Answer Default Judgment

If the respondent has failed to file and answer, the court can render a default judgment against the respondent. Tex. R. Civ. P. 239. A defendant against whom a no-answer default is entered admits all allegations of facts in petitioner's petition, except for unliquidated damages. *Argyle Mech., Inc. v. Unigus Steel, Inc*. 156 S.W.3d 865, 687 (Tex. App. – Dallas 2005, no pet.) The plaintiff's petition will support default judgment if the petition:

(1) states a cause of action within the court's jurisdiction;

(2) gives fair notice to the defendant of the claim asserted; and

(3) does not affirmatively disclose the invalidity of the claim on its face.

Jackson v. Biotectronics, Inc., 937 S.W.2d 38, 42 (Tex. App. – Houston [14 th Dist.] 1996, no writ).

When presenting a no-answer default judgment, it is essential to show strict compliance with the type of service used. The default judgment could be set aside on appeal if service on the respondent is shown to be defective.

B. Post-Answer Default Judgment

In contrast to the procedure required for a no-answer default, when a defendant appears in a case or files an answer, the they must be given 45 days' notice of a setting that results in a post-answer default judgment. See Tex. Rule. Civ. P. 245; see also *Pessel v. Jenkins*, 125 S.W.3d 807, 808-09 (Tex. App.–Texarkana 2004, no pet.) Further, a post-answer 'default' constitutes neither an abandonment of a defendant's answer nor an implied confession of any issues thus joined by the

defendant's answer. *Mays v. Pierce*, 203 S.W.3d 564, 571 (Tex. App. – Houston [14 Dist.] 2006, pet. denied).

A post-answer default judgment is subject to evidentiary attack on appeal. *Agraz v. Carnley*, 143 S.W.3d 547, 552 (Tex. App.–Dallas 2004, no pet.) Judgment cannot be entered on the pleadings, but the plaintiff in such case must offer evidence and prove his case as in a judgment upon a trial. *Stoner v. Thompson*, 578 S.W.2d 679, 682 (Tex. 1979). At trial, the plaintiff must carry its burden to prove all elements of its cause of action; the defendant has admitted nothing by its default. *Sandone v. Miller-Sandone*, 116 S.W.3d 204, 207 (Tex. App. – El Paso 2003, no pet.).

For example, if the division of marital property in a divorce proceeding lacks sufficient evidence in the record to support it, then the trial court's division is an abuse discretion. *Wilson v. Wilson*, 132 S.W.3d 533 (Tex. App.–Houston [1st Dist.] 2004, pet. denied). "Without the ability to determine the size of the community pie, [the court] can make no determination that the slices awarded to each spouse were just and right." *Sandone v. Miller-Sandone*, 116 S.W.3d at 207-208; see also *Todd v. Todd,* 173 S.W.3d 126, 129 (Tex. App.–Fort Worth 2005, pet. denied) ("The values of individual items are evidentiary to the ultimate issue of whether the trial court divided the properties in a just and right manner").

V. WINNING WITH SUMMARY JUDGMENTS

The purpose of summary judgment procedure is to permit the trial court to promptly dispose of cases that involve unmeritorious claims or untenable defenses. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n. 5 (Tex. 1979). We often seem to underutilize summary judgment in family law cases. A motion for summary judgment can be invaluable for dismissing an opponent's claim that is not supported by evidence, or shoring up an aspect of your own case that you are able to establish conclusively. Securing a summary judgment can narrow the issues before the court at trial. It can also provide you with a tactical advantage in mediation and informal settlement discussions by taking decided issues off the table.

A. Summary judgment standards

There are two distinct types of motions for summary judgment: traditional and no-evidence, each with different standards as discussed below. Although the legal standards for traditional and no-evidence motions for summary judgment are different, the following relevant deadlines apply to both:

- Summary Judgment Motion (traditional and no-evidence): motion for summary judgment and notice of hearing must be filed and served on the opposing party twenty-one (21) days before the hearing. Tex. R. Civ. P. 166a(c).

- Response: the opposing party must file and serve its response and affidavits at least seven (7) days before the hearing. Tex. R. Civ. P. 166a(c).

- Reply: There is no deadline for the movant to file a reply to a summary judgment response under the Texas Rules of Civil Procedure. However, check the local rules of your specific court to see if there is a local deadline for responsive pleadings.

- Amended Pleadings: A party should file an amended petition or answer as soon as it becomes aware it is necessary, but no later than seven (7) days before the hearing. Tex. R. Civ. P. 63.

- Special Exceptions: Nonmovant may file special exceptions to motion for summary judgment at least seven (7) days before hearing. *McConnell v. Southside ISD* 858 S.W.2d 337, 343 n. 7 (Tex. 1993). Movant can file special exceptions to the response to their motion for summary judgment at least three (3) days before the hearing. *Id.*

1. Traditional summary judgment

Traditional motions for summary judgment are filed by the movant, contending that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Lear Siegler, Inc. v. Perex*, 819 S.W.2d 470, 471 (Tex. 1991). Either party may file a traditional motion for summary judgment, regardless of which party has the burden of proof. Tex. R. Civ. P. 166a(a). A traditional motion for summary judgment may be filed at any time after the adverse party has filed an answer. Id.

In a motion for summary judgment on an affirmative claim or affirmative defense, the court can grant the motion only when the evidence proves all elements of the movant's claim or defense as a matter of law. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995). A traditional motion for summary judgment can also be used to interpret applicable law. *Curtis v. Anderson*, 106 S.W.3d 251, 254-55 (Tex. App. – Austin 2003, pet. denied).

A motion for summary judgment must give fair notice to the non-movant of the basis on which summary judgment is sought. *Waite v. Woodward, Hall & Primm, P.C.*, 137 S.W.3d 277, 281 (Tex. App. – Houston [1st Dist.] 2004, no pet.) The motion must state, with specificity, the grounds upon which the movant is relying. *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 204 (Tex. 2002). A motion for summary judgment must rest on the grounds expressly presented in the motion. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997). To determine if the grounds are expressly presented in the motion, neither the court nor the movant may rely on supporting briefs or summary judgment evidence. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340-41 (Tex. 1993)

Your summary judgment evidence is essential to either proving all elements of your claim or defense or disproving an essential element of your opponent's claim or defense as a matter of law. Just like evidence offered at trial, summary judgment evidence must be admissible under the rules of evidence. United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997); see Tex. R. Civ. P. 166a(f). However, unlike trial, oral testimony is not permitted at a summary judgment hearing. Tex. R. Civ. P. 166a(c). Instead, all facts offered in support of your motion for summary judgment must be proved by affidavits, depositions, interrogatories, and other discovery. *Id.*

In order to support summary judgment, factual testimony contained in affidavits of interested witnesses must be clear, positive, direct, credible, free from contradiction, and uncontroverted even though it could have been easily controverted. Tex. R. Civ. P. 166a(c). The affidavit must also authentic and establish the admissibility of any exhibits attached. Expert testimony in the form of an affidavit is also proper summary judgment proof, but, as in trial, must include the expert's qualifications, opinion, as well as the facts and reasoning on which the opinion is based. *See United Blood Servs. v. Longoria*, 938 S.W.2d at 30-31. Be aware of hearsay in crafting your summary judgment affidavits, as this is a common error and will not support summary judgment. *See e.g. Powell v. Vavro, McDonald & Assocs.*, 136 S.W.3d 762, 765 (Tex. App. – Dallas 2004, no pet..) (hearsay statements in summary judgment affidavits were inadmissible and should have been excluded).

Since evidence is essential to prevailing on a motion for summary judgment, it is important to make sure that your summary judgment evidence has been properly produced in discovery (when necessary), that your affiants have been appropriately designated as witnesses, and that all documents offered have been properly authenticated prior to filing your motion. See Tex. R. Civ. P. 166a(c). Finally, since the Court cannot grant relief beyond that requested in your pleadings, make sure your pleadings contain all claims and/or affirmative defenses on which you are seeking summary judgment. *Johnson*, 73 S.W.3d at 204.

2. No-evidence summary judgment

In a no-evidence motion for summary judgment, the movant contends that there is no evidence supporting one or more essential elements of a claim or defense on which the adverse party will have the burden of proof at trial. Tex. R. Civ. P. 166a(i). The party without the burden of proof may file a no-evidence summary judgment arguing there is no evidence to support the claims or defenses on which the other party would have the burden of proof at trial. Id.

Unlike traditional motions for summary judgment that can be filed by either party; the party with the burden of proof cannot properly file a no-evidence motion for summary judgment. *Harrill v. A.J's Wrecker Serv., Inc*, 27 S.W.3d 191, 194 (Tex. App. – Dallas 2000, pet. dism'd w.o.j.). Also, no-evidence summary judgments are not appropriate to decide purely legal issues. Id.

To prevail on a no-evidence motion for summary judgment, the movant must show that adequate time for discovery has passed, and the non-movant has no evidence to support one or more essential element of their claim or defense. Tex. R. Civ. P. 166a(i). The no-evidence motion should state the specific elements of the nonmovant's cause of action and specifically challenge the evidence for one or more elements of that claim – for example, breach or damages in a breach of contract claim.

In a no-evidence motion for summary judgment, the movant does not need to produce any evidence in support of its contention. Once their no-evidence motion for summary judgment is filed, the burden shifts to the nonmovant to respond with enough evidence to raise a genuine issue of material fact in support of their challenged claim or defense. Tex. R. Civ. P. 166a(i); *see Espalin v. Children's Med. Ctr. Of Dallas*, 27 S. W. 3d 675, 683 (Tex. App. – Dallas 2000, no pet.). If the nonmovant fails to meet this burden, then the court must grant summary judgment. Tex. R. Civ. P. 166a(i). If they produce no summary judgment evidence at all in response, the court is required to grant summary judgment. *Watson v. Frost Nat'l Bank*, 139 S.W.3d 118, 119 (Tex. App. – Texarkana 2004, no pet.)

Unlike a traditional motion for summary judgment which can be filed any time after the defendant files their answer, a no-evidence motion for summary judgment must be filed after adequate time for discovery has passed. Tex. R. Civ. P. 166(a)(a), (i). In most family law cases, this is typically thirty (30) days before trial. Tex. R. Civ. P. 190.3(b)(1)(A). Although 166(a)(i) does not expressly state that a no-evidence motion for summary judgment must be filed after the close of the discovery period, the recent Supreme Court case, Fort Brown Villas, suggests that a no-evidence motion for summary judgment filed before the end of the discovery period is premature, stating "the no-evidence rule, by its very language is to be used following discovery." *Fort Brown Villas III, Condominium Ass'n, Inc. v. Gillenwater*, __ S.W.3d __, 2009 WL 1028047, *2 (Tex. 2009) (per curiam)

The same rules of evidence previously discussed apply to evidence offered by the party opposing a no-evidence motion for summary judgment. See Tex. R. Civ. P. 166a(f). So, be prepared to object to and challenge the evidence offered by your opponent in their response. Formal defects in summary judgment evidence must be made in writing, or they are waived. *See City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 677 (Tex. 1979). While a defect in the substance of summary judgment evidence may be raised for the first time on appeal, the better practice is to object in writing to all defects in summary judgment evidence, procedural or substantive, in order to guard against waiver. *See Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App. – Dallas 2004, pet. denied). Be sure to secure a ruling from the trial court on all of your objections, preferably in writing, to ensure they are preserved for appeal.

B. Types of issues for summary judgment

While the usefulness of both traditional and no-evidence summary judgments will necessarily depend on the strength of either your own or your opponent's supporting evidence, certain claims

and defenses common to family law litigation are particularly well-suited for summary judgments.

- Characterization of assets, separate or community, such as real property, retirement benefits, and business interests;
- Claims for reimbursement for contribution by one marital estate to another;
- Affirmative defenses, including *res judicata*, statute of limitations, and payment;
- Validity and enforceability of premarital and marital agreements, as well as statutory defenses.

Traditional summary judgments are appropriate for the multitude of other issues that arise in the context of a family law case on which you have the burden of proof, ranging from fraud in an annulment case to characterization of the marital residence. Family law claims and defenses that your opponent has the burden proof, such as their separate property or reimbursement claims, or inability to pay defenses, are perfectly suit for a no-evidence motion for summary judgment under the appropriate circumstances.

Both traditional and no-evidence motions for summary judgment allow you to "win" on various issues of your case before trial. Use a traditional motion for summary judgment to obtain a judgment on your strong claims or to dispense with your opponent's unfounded claims or defenses. Use a no-evidence motion to call your opponent's bluff on their unsupported claims or defenses, taking them off the table at trial or mediation if you prevail. Even if you are unsuccessful on your motion for summary judgment, preparing and presenting the motion helps you prepare your case for trial and affords you the often invaluable opportunity to preview your opponent's supporting evidence and argument in advance of final trial.

C. Appellate remedies

Generally, only an order granting final summary judgments can be appealed. A summary judgment becomes final for purposes of appeal when the court disposes of all parties and all issues in the lawsuit. *Lehmann v. Har-Con Corp*., 39 S.W.3d 191, 195 (Tex. 2001); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995). The non-movant in a motion for summary judgment may appeal the granting of a final summary judgment.

If a summary judgment, such as a partial summary judgment, leaves undecided claims, the order is interlocutory and cannot be appealed until a final judgment is entered. *Lehman*, 39 S.W.3d at 205. Usually, an order denying a motion for summary judgment is not a final order and is, therefore, not appealable. *See Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1996).

Regardless of whether the trial court states the basis on which it either granted or denied summary judgment, the appellate court may review and affirm the trial court's decision on any of the grounds presented in the motion for summary judgment. *Cincinnati Life Ins., Co. v. Cate*s, 927 S.W.2d 623, 625 (Tex. 1996). If the trial court does not state the grounds on which summary judgment is granted, the nonmovant must establish that each of the grounds presented for summary judgment are inadequate. *Jones v. Hyman*, 107 S.W.3d 830, 832 (Tex. App. – Dallas 2003, no pet.)

Mandamus is appropriate when the trial court refuses to rule on a timely submitted motion for summary judgment, thus preventing the movant from perfecting their interlocutory appeal. *See In re American Media Consol*., 121 S.W.3d 70, 73 (Tex. App. – San Antonio 2003, orig. proceeding). In contrast, mandamus is not appropriate where the trial court merely fails to rule, instead of refuses to rule. *Id.*

VI. WINNING WITH DECLARATORY JUDGMENTS

Declaratory judgments are actions brought to establish rights, status, or other legal relationships. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). Declaratory judgments are not specifically governed by the Texas Rules of Civil Procedure; rather, the provisions found in Chapter 37 of the Civil Practice and Remedies Code control their use. A declaratory judgment is an additional remedy and does not supplant other remedies. *Creative Thinking Sources, Inc. v. Creative Thinking, Inc.*, 74 S.W.3d 504, 513 (Tex. App. – Corpus Christi 2002, no pet.). Declaratory judgments are procedural devices utilized when cases are within the court's jurisdiction. *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996).

A. Availability

Declaratory judgments are appropriate only when there is a justiciable controversy and the declaration of the parties' rights and/or interests would resolve the controversy. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). The controversy does not need to be fully ripe; however it must indicate that immediate litigation is unavoidable should the court decline to provide a declaratory judgment. *Unauthorized Practice of Law Committee v. National Mut. Ins. Co.*, 155 S.W.3d 590, 595 (Tex. App. – San Antonio 2004, pet. Denied).

If there is not justiciable conflict, a declaratory judgment is not available. *Bonham State Bank*, 907 S.W.2d 465, 467 (Tex. 1995). Nor is one available to resolve matters that are net yet mature and are subject to change. *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex. 1985). Declaratory judgments are also unavailable to resolve an issue involving the same parties which is being adjudicated in a separate proceeding in a different court, *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 895 (Tex. 1970), or to seek a court's interpretation of a prior judgment. *Samedan Oil Corp. v. Louis Dreyfus Natural Gas Corp.*, 52 S.W.3d 788, 792 (Tex. App. – Eastland 2001, pet. denied).

B. Procedural Considerations

Only a court that has appropriate jurisdiction may hear a declaratory judgment action. Tex. Civ. Prac. & Rem. Code § 37.003(a). The petition requesting declaratory relief must name as parties all persons or entities the could be affected by the judgment or who have an interest in the matter. *Id.* a § 37.006(a). Appropriate venue for a declaratory judgment action is determined by traditional civil litigation venue rules. *Bonham State Bank*, 907 S.W.2d at 471.

A declaratory judgment action may ask for negative or affirmative relief. A declaratory judgment action may ask for relief in questions of construction in a decree, deed, pre-marital agreement, or the legal status/relationship of the parties. Tex. Civ. Prac. & Rem. Code § 37.005.

In the family context, declaratory judgment actions are frequently brought to adjudicate whether the parties are married, *Joplin v. Borusheski*, 244 S.W.3d 607 (Tex. App. – Dallas 2008, no pet.); to determine the rights provided under a final decree of divorce, *Kaplan v. Kaplan*, 129 S.W.3d 666 (Tex. App. – Fort Worth 2004, pet. denied); and rights and obligations arising under a premarital agreement. *Williams v. Williams*, 246 S.W.3d 207, 209 (Tex. App. – Houston [14th Dist.] 2007, no pet.).

VII. WINNING WITH DISCOVERY

Another significant means to help dispose of a matter prior to trial is through the use of discovery responses (or lack thereof). Despite the continual evolvement of our discovery rules, the Texas Supreme Court has long held that the purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts of the lawsuit before trial. *West v. Solito*, 563 S.W.2d 240, 243 (Tex. 1978). Further, discovery rules are in place to prevent trial by ambush. *Gutierrez v. Dallas Indep. Sc. Dist.*, 729 S.W.2d 691, 693 (Tex. 1987).

Discovery responses commit parties on what the issues to be resolved at trial are as well as control what evidence may be presented. In this regard, parties frequently preclude the other side from presenting evidence on a certain issue if it was not identified during discovery as well as using discovery response to form the basis of various pre-trial dispositive motions.

A party may also utilize sanctions to aid in adjudicating their dispute prior to trial. If a responding party does not serve answers or objections to interrogatories, or fails to respond to requests for disclosure, the court can impose sanctions under Tex. R. Civ. P. 215.1. Evasive or incomplete answers, frivolous objections, false discovery certification, spoliation of evidence, and a party's prior abuse of discovery can also serve as bases for sanctions. Tex. R. Civ. P. 215.1(c); *Childs v. Argenbright*, 927 S.W.2d 647, 649 (Tex. App. – Tyler 1996, no writ) (frivolous objections); *Schaver v. British American Ins. Co.*, 795 S.W.2d 875, 877-78 (Tex. App. – Beaumont 1990, no writ) (false testimony); *Cire v. Cummings*, 134 S.W.3d 835, 841 (Tex. 2004) (spoliation of evidence); and *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242-43 (Tex. 1985) (pattern of discovery abuse).

Note, however, the despite the availability of sanctions, the best interest of the child trumps the courts use of them. *In Re F.A.V.,* ___ S.W.3d ___, 2009 WL 1314165 (Tex. App.—Dallas 2009, no pet. h.) (5/13/09). Thus, prior to issuing sanctions, the court has an affirmative duty to make ensure it receives sufficient evidence allowing it to make a decision for the best interest of the child. *Id.*

A. Expert Witnesses

The Texas Rules of Civil Procedure categorize expert witnesses into two types: (1) testifying; and (2) consulting. Although there are several sub-categories to these, a discussion of them is beyond the scope of this paper.

For testifying and consulting experts, a party is entitled to obtain full discovery of each side's retained testifying experts. Tex. R. Civ. P. 192.3(e), 192.5(c)(1), 194.2(f); *Aluminum Co. of America v. Bullock*, 870 S.W.2d 2, 4 (Tex. 1994); *Collins v. Collins*, 904 S.W.2d 792, 800 (Tex. App. – Houston [1st Dist.] 1995, writ denied). Critically, parties are entitled to the names, addresses and telephone numbers of testifying expert witnesses, all of which is obtainable through a Request for Disclosure. Tex. R. Civ. P. 192.3(e)(1); 194.2(f)(1).

Parties are also entitled to discover the subject matter on which the testifying or consulting expert will testify, Tex. R. Civ. P. 192.3(e)(2); the facts known by the expert helping to form the expert's mental impressions or opinions, Tex. R. Civ. P. 192.3(e)(4); the mental impressions and opinions of the expert witness and any methods used to derive them, Tex. R. Civ. P. 192.3(e)(4); information about the expert's potential bias, Tex. R. Civ. P. 192.3(e)(5); *In re Doctors Hosp.*, 2 S.W.3d 504, 507 (Tex. App. – San Antonio 1999, orig. proceeding); all documents, tangible things, physical models, reports, or other materials provided to, reviewed by, or prepared by or for the testifying or consulting expert, Tex. R. Civ. P. 192.3(e)(6), 194.2(f)(4)(A), *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 437-38 (Tex. 2007); copies of reports prepared by or for the retained testifying expert in anticipation of the expert's testimony, Tex. R. Civ. P. 192.3(e)(6); and the current résumé and bibliography of the retained testifying expert. Tex. R. Civ. P. 192.3(e)(7).

Texas Rule of Civil Procedure 192.3(e)(4) permits discovery of the testifying expert's method in arriving at its opinion. Rule 194.2(f), however, does not specifically include this among the other matters that are required in a response to requests for disclosure. Because the responding party will the burden to show the expert's methodology is sound if it is challenged under *Daubert*, the responding party should include its expert's methodology in responding to requests for disclosure.

A party has a duty to amend and supplement discovery about its testifying experts.

Tex. R. Civ. P. 195.6. An expert cannot give an opinion at trial that was not provided in a discovery response unless it can be shown that the other party will not be unfairly surprised or prejudiced. Tex. R. Civ. P. 193.6(a); *Moore v. Memorial Hermann Hosp. Sys.*, 140 S.W.3d 870, 874 (Tex. App. – Houston [14th Dist.] 2004, no pet.).

If a testifying expert witness changes its opinions, the party must amend and supplement the expert's deposition testimony regarding the expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6. Note, however, that an expert can modify its testimony based on refinements in its calculations made before trial without invoking the need to supplement. *Exxon Corp. v. West Texas Gathering Co.*, 868 S.W.2d 299, 304 (Tex. 1993). Finally, a party has a duty to amend and supplement the report of the testifying expert's mental impressions or opinions and the basis for them. Tex. R. Civ. P. 195.6.

B. Unidentified Witnesses

If a party's responses to requests for disclosure are late, the trial court can exclude the information or testimony that was not timely disclosed. Tex. R. Civ. P. 193.6(a); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 273 (Tex. App. – Austin 2002, pet. denied). Further, if a party's responses fail to disclose all the information required by Tex. R. Civ. P. 194.2, the court must exclude any related testimony unless there is a showing of good cause, lack of surprise, or lack of prejudice. *Vingcard A.S. v. Merriman Hospitality System*, 59 S.W.3d 847, 856 (Tex. App. – Fort Worth 2001, pet. denied).

To exclude the testimony of witnesses not identified in disclosures, a party must object to it. This objection can be made either pre-trial or when the witness is offered at trial. *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex. 1989). There are, however, several examples of when an unidentified witness is permitted to testify. For example, defendant's experts were permitted to give the same opinions they provided in an earlier trial even though the Defendant did not disclose the experts' opinions in responded to requests for disclosure. *Mares v. Ford Motor Co.*, 53 S.W.3d 416, 419 (Tex. App. – San Antonio 2001 no pet.). Further, a plaintiff's unidentified witness should have been permitted to testify when she was merely a substitute for an identified employee of plaintiff but subsequent left her employment with plaintiff. *Best Indus. Unif. Supply Co. v. Gulf Coast Alloy Welding, Inc.*, 41 S.W.3d 145, 148-49 (Tex. App. – Amarillo 2000, pet. denied). Unidentified witnesses in interrogatory responses are also objected to in the same manner.

C. Use as Summary Judgment Evidence

Discovery responses are also particularly useful in summary judgment proceedings. This general rule is true for deposition testimony as well as responses to written discovery. When relying on another party's discovery responses a party does not need to authenticate them unless the producing party filed timely objections to their authenticity. Tex. R. Civ. P. 193.7; *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 451 (Tex. App. – Dallas 2002, no pet.). A party relying on its own discovery responses, however, must authenticate them before they are admissible as summary judgment evidence. *Blanche*, 74 S.W.3d at 451-52.

Finally, because interrogatory responses cannot be used by that party, a party cannot rely on its own answers to raise a fact issue precluding summary judgment. *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998); Tex. R. Civ. P. 197.3.

D. Special Considerations for Requests for Admissions

Responses to requests for admissions are yet another tool available to the practitioner to obtain favorable results without the need for trial. Requests for admissions are often utilized to prove the authenticity of documents and to commit the responding party to a specific fact or application thereof. Tex. R. Civ. P. 198.1. Note, however, that requests for admissions cannot require a party to admit a conclusion of law. *Boulet v. State*, 189

S.W.3d 833, 898 (Tex. App. – Amarillo 2000, no pet.).

In responding to requests for admissions, the responding party must either: (1) admit; (2) specifically deny; (3) set forth in detail the reasons why the responding party is unable to truthfully admit or deny the matter; (4) object; (5) assert a privilege; or (6) move for a protective order. Tex. R. Civ. P. 198.2(b); *Reynolds v. Murphy*, 188 S.W.3d 252, 261 (Tex. App. – Fort Worth 2006, pet. denied). If the court determined that a response does not comply with the requirements of Tex. R. Civ. P. 198, it may (1) deem the matter admitted; or (2) require the responding party to amend its answer. Tex. R. Civ. P. 215.4(a).

If the responding party seeks to amend or withdraw its omissions, the court has authority to permit same. *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989). The court may allow amendment or withdrawal of an admission so long as the moving party shows (1) good cause in seeking amendment or withdrawal; (2) that the non-moving party will not be unfairly prejudiced; and (3) that the purposes of legitimate discovery and the merits of the case will be furthered by amendment or withdrawal. *Texas Capital Secs. v. Sandefer*, 58 S.W.3d 760, 770-71 (Tex. App. – Houston [1st Dist.] 2001, pet. denied).

If the responding party fails to response in a timely manner, then requests are deemed admitted as a matter of law on the day after the responses were due. Tex. R. Civ. P. 198.2(c); *Marshall v. Vise*, 767 S.W.2d 699, 700 (Tex. 1989); *Payton v. Ashton*, 29 S.W.3d 896, 897-98 (Tex. App. – Amarillo 2000, no pet.); *Barker v. Harrison*, 752 S.W.2d 154, 155 (Tex. App. – Houston [1st Dist.] 1998, writ dism'd).

Once the responses are overdue and no response has been served, it is not necessary for the requesting party to ask the court to deem the requests admitted. *Marshall*, 767 S.W.2d at 945. If, however, the moving party seeks to deem the requests admitted because of evasive answers or invalid objections a motion to deem admissions is required. *State v. Carrillo*, 885 S.W.2d 212, 216 (Tex. App. – San Antonio 1994, no writ); *Taylor v. Taylor*, 747 S.W.2d 940, 945 (Tex. App. – Amarillo 1988, writ denied).

Admissions may be used by all parties in the lawsuit including those joined after the admissions were made. *Grimes v. Jalco*, 630 S.W.2d 282, 284 (Tex. App. – Houston [1st Dist.] 1981, writ ref'd n.r.e.). Answers to the requests, however, are limited to admissibility only in the same suit. Tex. R. Civ. P. 198.3; *Osteen v. Glynn Dodson, Inc.*, 875 S.W.2d 429, 431 (Tex. App. – Waco 1994, writ denied). Answers to admissions are also only admissible only against to whom the requests were addressed. Tex. R. Civ. P. 198.3; *Thalman v. Martin*, 625 S.W.2d 411, 414 (Tex. 1982); *Hartman v. Trio Transp.*, 937 S.2d 575, 578 (Tex. App. – Texarkana 1996, writ denied). Accordingly, the answering party is not entitled to use its own self-serving answers. *Sympson v. Mor-Win Prods.*, 510 S.W.2d 362, 364 (Tex. App. – Fort Worth 1973, no writ).

VIII. WINNING WITH SANCTIONS

Sanctions can provide a method of pretrial disposition as to unmeritorious claims. A party may sometimes employ a strategy of litigating unmeritorious claims or disputing otherwise meritorious claims out of spite, harassment, or needless increase in the cost of litigation. Such actions may be handled prior to trial via sanctions.

Sanctions may be imposed under the court's inherent power. A trial court has inherent power to impose sanctiosn for abuses of the judicial process not covered by rule or statute. *Kutch v. Del Mar College*, 831 S.W.2d 506, 501 (Tex. App. – Corpus Christi 1992, no writ). For the court to exercise this inherent power, the conduct complained about must significantly interfere with the court's legitimate exercise of one of its core functions. However, a judge must be very careful in granting sanctions in this manner and utilize the remedy sparingly. For example, a trial court's attempt to punish a spouse through its inherent sanctions power by granting an interlocutory divorce was error. *Kennedy v. Kennedy*, 125

S.W.3d 14, 19 (Tex. App – Austin 2002, pet. denied).

Most sanctions are imposed under the authority of a specific statue or rule that permits the court to order sanctions.

A. Standards for imposing sanctions

First and foremost, sanctions must be "just". There must be a direct link between the wrongdoing and the punishment. Tex. R. Civ. P. 215.2; *Spohn Hosp. Mayer*, 104 S.W.2d 878, 882 (Tex. 2003); *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991).

The sanctions must be directly related to the offensive conduct. A just sanction must be directed against the abuse and toward remedying the prejudice caused to the innocent party. For example, where the offending conduct was the failure to designate a witness, sanction of striking pleadings was not appropriate; the appropriate sanction is to exclude the witness. *Remington Arms co. v. Caldwell*, 850 S.W.2d 167, 171 (Tex. 1993).

Further, the sanction must not be excessive. The sanction should be no more severe than necessary to promote full compliance. *Spohn Hosp.*, 104 s.W.3d at 882. For example, fining an attorney $15,000 for his client's failure to appear at a deposition was found to be excessive. *Jones v. American Flood Research, Inc.*, 218 S.W.3d 929, 932-33 (Tex. 1991). Also, incomplete answers to discovery did not justify default judgment in a child custody suite. *Zappe v. Zappe*, 871 S.W.2d 910, 913 (Tex. App. – Corpus Christi 1994, no writ). The court must consider the least stringent sanction necessary to promote compliance. *Spohn Hosp.*, 104 S.W.3d at 882.

A death-penalty sanction is one that has the effect of adjudicating the dispute. *TransAmerican Nat. Gas Corp.*, 811 s.W.2d 913, 918 (Tex. 1991). Death penalty sanctions are only warranted in exceptional cases when they are clearly justivied and it is apparent that no lesser sanction would promote compliance with the rules. *Cire v. Cummings*, 134 s.W.3d 835, 840-41 (Tex. 2004). Death penalty sanctions include dismissal, default judgment, exclusion of evidence, and jury instructions resolving fact issues in favor of one party. Courts apply a four-part test to determine whether death-penalty sanctions are appropriate. First, there must be a direct relationship between the conduct and the sanction. Also, the sanction may only be as severe as necessary to promote compliance. Lastly, to uphold death penalty sanctions, there must be a showing that a lesser sanction was previously imposed and did not resolve the conduct at issue. In cases of egregious misconduct, a court is not required to attempt lesser sanctions before imposing death penalty sanctions as long as the record reflects that the court considered lesser sanctions and found that the party's conduct would not be deterred by lesser sanctiosn.

B. Authority for imposing sanctions

1. Discovery abuse

Any number of abuses of the discovery process can justify sanctions. Wrongdoing such as failing to designate a witness, failing to serve answers to written discovery, providing evasive or incomplete answers to written discovery, filing frivolous objections to written discovery, providing false testimony, using improper discovery methods, or destroying evidence. For example, a court was correct in imposing sanctions where the plaintiff's attorney went into the defendant's store and pretended to be interested in buying a vehicle. *Sanchez v. Brownsville Sports Center, Inc.*, 51 S.W.3d 643, 659 (Tex. App. – Corpus Christi 2001, pet. granted, judgm't vacated w.r.m.).

Sanctions for discovery abuse are permitted under Rule 215.2(b). Tex. R. Civ. P. 215.2(b). Such sanctions include disallowing further discovery of any kind or a particular kind, awarding costs and expenses incurred as a result of the conduct, establishing certain facts against the offending party, limiting or excluding evidence by the offending party, striking the pleadings of the offending party, staying the

proceedings until the order is obeyed, treating the conduct as contempt of court, awarding attorneys fees and reasonable expenses, or losing the offending privileged information.

2. Pleadings abuse

Sanctions for pleadings abuse are permitted under Chapters 9 and 10 of the Texas Civil Practice and Remedies Code, as well as Rule 13 of the Texas Rules of Civil Procedure. Of the three, usually Chapter 10 of the Texas Civil Practice and Remedies Code provides the best remedy. Chapter 9 does not apply in any proceeding where Chapter 10 or Rule 13 would apply. Rule 13 provides a narrower remedy with a greater burden of proof on the party seeking the sanctions.

Under Civil Practice and Remedies Code § 10.001, the signing of a pleading or motion represents the following:

a. The matters in the pleading are not presented for an improper purpose including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

b. Each claim defense or other legal contention is warranted by existing law or by non-frivolous argument for the extension, modification, or reversal of existing law, or the establishment of new law.

c. Each allegation or factual contention has evidentiary support or for a specifically identified allegation or factual contention is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

d. Each denial in the pleading of a factual contention is warranted on the evidence or for a specifically identified denial is reasonably based on a lack of information or belief.

Tex. Civ. Prac. & Rem. Code § 10.001 (1- 4). Sanctions permitted include ordering the party to perform or refrain from performing an act, ordering a monetary penalty, and ordering the party to pay the other party for the reasonable expenses it incurred because of the filing of the frivolous pleading, including reasonable attorneys fees.

Under § 9.011, the signing of a pleading or motion constitutes a certificate by the signatory that to the best of the signatories information and knowledge information and belief formed after reasonable inquiry the pleading is not groundless and was not brought in bad faith for the purpose of harassment or any improper purpose such as to cause unnecessary delay or needless increase in the cost of litigation. Tex. Civ. Prac. & Rem. Code § 9.011. Sanctions available under Chapter 9 include striking the offending pleading, dismissing the party, or ordering the party to pay the other party the amount of reasonable expenses, including attorneys fees, incurred because of the frivolous pleadings.

Under Rule 13, the parties and attorneys certify by their signatures that they have read the document and to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and was not brought in bad faith or for the purpose of harassment. Tex. R. Civ. P. 13. Sanctions permitted under Rule 13 include any sanction available to the trial court under Rule 215.2(b).

3. Failure to serve pleadings

The court can impose sanctions upon a party that fails to serve on or deliver to other parties copies of pleadings, motions, or other papers as required by Rule 21 and 21a of the Texas Rules of Civil Procedure. The sanctions available include any appropriate sanction under Rule 215.2(b) of the Texas Rules of Civil Procedure.

4. Affidavits made in bad faith

In a summary judgment proceeding, if a party relies on an affidavit made in bad faith or for the

purpose of delay, the court must award the other party reasonable expenses cause by the affidavit, including attorneys fees, and may hold the offending party in contempt. Tex. R. Civ. P. 166a(h).

5. Violations of limine order

Violation of an order on a motion in limine constitutes sanctionable conduct. A court may impose a fine, hold the witness or a party in contempt of court, or ultimately strike the pleadings of the offending party if the circumstances warrant harsh sanctions. *Onstad v. Wright*, 54 S.W.3d 799, 802 (Tex. App. – Texarkana 2001, pet denied).

D. Appellate review

Sanctions are reviewed by the appellate courts for abuse of discretion. *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583 (Tex. 2006). The appellate court should make an independent review of the entire record to determine whether the trial court abused its discretion. *Id.*

A party is entitled to challenge sanctions on appeal after final judgment is rendered in the case, even if the case is settled or dismissed by nonsuit. Tex. R. Civ. P. 215.1(d), 215.2(b), 215.3; *See also Felderhoff v. Knauf*, 819 S.W.2d 110, 111 (Tex. 1991; *Braden v. South Main Bank*, 837 S.W.2d 733, 741 (Tex. App. – Houston [14th Dist] 1992, writ denied).

Sanctions are usually not reviewable by mandamus because the party has an adequate remedy by appeal. *Street v. Second Court of Appeals*, 715 S.W.2d 638, 639 (Tex. 1986). However, where the sanction effectively precludes a decision on the merits of the party's claim, appellate review may be inadequate and mandamus appropriate. *In re Carnival Corp*. 193 S.W.3d 229, 233 (Tex. App. – Houston [1st Dist.] 2006, orig. proceeding). Also, where the trial court imposes a monetary sanction that threatens the party's ability or willingness to continue with the litigation so that an eventual appeal would not provide an adequate remedy, mandamus is appropriate. *In re Ford Motor Co.*, 988 s.W.2d 714, 723 (Tex. 1998). Lastly, where the trial court orders a sanction that requires a party to perform some act prior to the entry of final judgment, such as performance of community service, mandamus may be appropriate. *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991).

IX. WINNING WITH PRETRIAL APPELLATE REMEDIES

Certain pretrial appellate remedies may be available in limited circumstances to secure review of a trial court's rulings.

A. Mandamus

A writ of mandamus is an original writ issued by a higher court to command a lower court to do or refrain from doing some act. *See Seagraves v. Green*, 288 S.W. 417, 424-25 (Tex. 1930). The word "mandamus" is Latin for "we command". *Black's Law Dictionary* 980 (8th ed. 2004). A mandamus proceeding is not an "appeal".

The parties in a mandamus proceeding are designated as the "relator", which is the party filing the petition for writ of mandamus, the "respondent", which is the trial court judge whose actions form the basis of the request for relief, and the "real party in interest", which is the person whose interest is directly affected by the relief sought and who is a party to the underlying case. Tex. R. App. P. 52.2.

The proceeding is commenced by filing a petition with the clerk of the appellate court. Tex. R. App. P. 52.1. Although the courts of appeals and the Texas Supreme Court have concurrent jurisdiction over the trial courts in original proceedings, the relator must first file the proceeding in the court of appeals unless there is a compelling reason to present it directly to the Texas Supreme Court. Tex. R. App. P. 52.3(e); *In re State Bar of Tex.*, 113 S.W.3d 730, 732 (Tex. 2003). Once the court of appeals issues a final order, the relator may file its petition for an

original proceeding in the Texas Supreme Court. Tex. R. App. P. 52.3(e).

There is no deadline to file a petition for writ of mandamus; however, the appellate courts will look less favorably upon cases that have delayed in pursuing their rights. In fact, an appellate court may deny relief on the grounds that the relator S.W.2d 366, 367 (Tex 1993). Also, the Tyler court of appeals denied petition for mandamus when the relator did not seek relief until after 10 years of unsuccessful attempts to withdraw deemed admissions. *In re East Tex. Salt Water Disposal Co.*, 72 S.W.3d 445, 449 (Tex. App. – Tyler 2002, orig. proceeding). On the other hand, including in the briefing the reasons for delay can encourage the court of appeals to overlook it. *In re Hinterlong*, 109 S.W.3d 611, 620-21 (Tex. App. – Fort Worth, 2003, orig. proceeding).

1. *Walker* standard

In *Walker v. Packer*, the Texas Supreme Court attempted to re-instate mandamus as an "extraordinary remedy, available only in limited circumstances." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). The Court's analysis focused on reaffirming two basic requirements: there must be a clear abuse of discretion committed by the trial court in applying the law and there must be no adequate remedy by appeal. *Id.* at 840.

The Walkers were parents of a child born with brain damage at St. Paul Hospital in 1983. *Id.* at 836. In 1985, they brought a medical malpractice lawsuit against the hospital, the obstetrician, and nurse attending their child's delivery. *Id.* The trial court denied the Walker's two pre-trial discovery requests, which prompted their petition for a writ of mandamus to the Texas Supreme Court. *Id.* The Court denied the first discovery request because it found "no sufficient evidence to prove that the trial court had clearly abused its discretion." *Id.* The Court also denied the second discovery request, because the Walkers had an adequate remedy by appeal. *Id.* The Walker Court analyzed the two prongs in detail:

waited too long before filing the petition, even if the real party in interest does not assert any grounds of lack of diligence. *See In re Users Sys. Servs.*, 22 S.W.3d 331, 337 (Tex. 1999). For example, in *Rivercenter Associates*, the Texas Supreme Court denied a petition when the relator waited four months before seeking relief. *Rivercenter Assocs. v. Rivera*, 858

> "A clear abuse of discretion occurs when the trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." In reviewing a factual issue or a matter committed to the trial court's discretion, the superior court cannot substitute its judgment for that of the trial court; however, a failure "to analyze or apply the law correctly will constitute an abuse of discretion." *Id.* at 839-40.

Once a clear abuse of discretion is established, the reviewing court will then determine whether an adequate remedy by appeal exists.

As a "fundamental tenet of mandamus practice, the party seeking mandamus must demonstrate that the remedy offered by an ordinary appeal is inadequate." *Id.* at 840. "Expense or delay does not make a remedy inadequate," but rather, "only when parties stand to lose their substantial rights is interference through mandamus justified." *Id.* at 842.

2. Mandamus after *Prudential*

The two-prong analysis and language expressed in *Walker* demonstrates the Court's intent to tighten the mandamus standard; however, the application by reviewing courts since has been far from standard. See David M. Johnston, Comment, *In re Prudential*, 41 Tex. J. Bus. L. 91, 97 (2005) (observing that Walker's two-part test "offered too many chances for mandamus review to be incorrectly applied"). Moreover, *In re Prudential's* attempt to clarify *Walker's* second-prong requirement of "no adequate remedy by appeal," established a clear departure. *In re Prudential*, 148 S.W.3d 124, 136 (Tex. 2004).

In *Prudential*, restaurateurs Francesco and Jane Secchi leased space for a restaurant in a Dallas shopping center, October of 2000. *Id.* at 127. They actively negotiated the lease agreement over a six-month period with the landlord, The Prudential Insurance Co. of America ("Prudential"), and its agent. *Id.* The lease contained a clause stating that both tenant and landlord "waive a trial by jury of any or all issues arising . . . under or connected with this Lease." *Id.*

The Secchis sued Prudential nine months after they executed the lease, claiming that a "persistent odor of sewage" made it "impossible to do business on the premises." *Id.* After the trial court notified the parties that it had set a date for a non-jury trial, the Secchis filed a jury demand and fee. *Id.* Prudential subsequently moved to quash the jury demand based on the waiver in the lease agreement. *Id.* at 128. The trial court denied Prudential's motion to quash the jury demand and Prudential promptly petitioned the court of appeals for a writ of mandamus. *Id.* at 129. The court of appeals denied relief, stating only that Prudential "had not shown it was entitled to the relief requested." *Id.* The Texas Supreme Court granted Prudential mandamus relief. *Id.*

The Court concluded that the contractual waiver provision was enforceable, and thus, the trial court's refusal to enforce the provision was a clear abuse of discretion." *Id.* at 135-36. Continuing in its analysis of whether Prudential had an adequate remedy by appeal, the Court began the departure from Walker. *Id.* at 136. The Court emphasized that "adequate" has no fixed definition and "is simply a proxy for the careful balance of jurisprudential considerations."…. "When the detriments of mandamus review outweigh its benefits, an appellate remedy is adequate; however, when the benefits of mandamus review outweigh the detriments, the appellate court must then determine "whether the appellate remedy is adequate." *Id.* Significantly, the Court rejected the "rigid rules as inconsistent with the flexibility that is the remedy's principle virtue." *Id.*

Ultimately the Court determined Prudential would not have an adequate remedy by appeal if its jury waiver was not enforced. *Id.* at 138. If Prudential received a favorable jury verdict, it could not appeal and would lose its contractual right forever. *Id.* On the other hand, if it suffered an unfavorable verdict, "Prudential could not obtain reversal for the incorrect denial of its contractual right unless the court of appeals concludes that the error complained of caused the rendition of an improper judgment." *Id.* Moreover, even if Prudential did "obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive." *Id.*

The Prudential Court attempted to clarify the mandamus standard articulated in Walker by replacing "adequate" with a "careful balance of jurisprudential considerations." *Id.* at 136. In addition to whether remedy by appeal is adequate, a reviewing court should consider if Mandamus will: (1) preserve important substantive and procedural rights from impairment or loss, (2) allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and (3) spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. *Id.* (emphasis added). If so, Mandamus review is appropriate. This balancing test - which significantly departed from Walker's second-prong - is reflected by the majority of mandamus holdings since 2004.

3. Clarification by *McAllen*

In this case, 224 patients filed a class action lawsuit against a hospital for negligent credentialing of a doctor. *In re McAllen Medical Center, Inc.*, 275 S.W.3d 458 (Tex. 2008). The hospital filed a motion to dismiss the case based on the inadequacy of the plaintiff's expert reports. Because the case was filed prior to the 2003 addition of the remedy of interlocutory appeal to review issues pertaining to expert witness reports in health care liability cases, the court was required to determine whether mandamus review

was available or whether the hospital had to appeal at the conclusion of the case.

To begin the analysis of whether mandamus is available to review issues of adequacy of expert witness reports in pre-2003 cases, the Court cited to the general standard from *Walker* and *Prudential* that the mandamus petitioner must show that the trial court clearly abused its discretion and that there is no adequate remedy by appeal. *Id.* at 462 (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) and *In re Prudential Ins. Co. Of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004)). As to the clear abuse of discretion prong, the Court found that the expert witness reports were defective because the credentials of the expert witness were inadequate.

The Court looked at the second prong of the analysis, saying, "whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review." *Id.* at 464. The place in a government of separated powers required the Court, in its opinion, to consider the priorities of the other branches of government, including the Legislature's findings that the traditional rules of litigation are creating "an ongoing crisis" in the cost and availability of medical care. The Court pointed to the Legislative history in the 2003 amendments to the law. Therein, the Legislature found that the relevant cost of conducting a trial with an inadequate expert witness was affecting the availability and affordability of health care. Further, the Court worried that public complaints about the justice system and the appearance that the courts "don't know what they are doing" is exacerbated by holding a wasted trial simply so it that it can be reversed and tried all over again.

As a result, remedy by appeal was inadequate:

> Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pretrial mistake. But, we cannot afford to ignore them all either. Like 'instant replay' review now so common in major sports, some calls are so important – and so likely to change a contest's outcome – that the inevitable delay of interim review is nevertheless worth the wait.

4. Use of mandamus in family law context

a. Mandamus is Available to Review the Interlocutory Granting of Bill of Review Order in a Paternity Suit Where Genetic Testing is Ordered*: In re Att'y Gen. of Tex.*, 276 S.W.3d 611 (Tex.App.)Houston [1st Dist.] 2008, no pet.).

The Texas Office of Attorney General (OAG) filed a SAPCR to establish paternity between an alleged father "Phillips" and K.D.P., a child born to Beverly Duncan. Phillips admitted to receiving notice of the hearing set for November 17, 2007, but failed to appear. The trial court entered a default judgment and ordered Phillips to pay retroactive and prospective child support. Phillips received notice that his wages were being garnished on December 3, 2007. Phillips did not file a motion for a new trial or appeal the default judgment, but rather, administered a DNA test to himself and K.D.P. on December 21, 2007, which test results excluded him as the father. The report, however, was not in admissible form and did not comply with the Texas Family Codes substantive requirements. Tex. Fam. Code Ann §160.503(a).

On March 25, 2007, Phillips filed a petition for bill of review to set aside the default judgment and to vacate the wage-withholding order, and attached the test and a supporting affidavit alleging several reasons why he was unable to attend the original SAPCR hearing and failure of the OAG to not respond to his calls for rescheduling. On May 1, 2008, The trial court denied the bill of review, and dismissed the case, concluding that Phillips "had not met the prima facie evidence establishing a meritorious defense." Phillips appealed the associate judge's report requesting a hearing before the referring court, which trial judge orally adopted the associate judge's order and sustained the OAG's motion to dismiss.

On June 18, 2008, Phillips moved for a new trial. The trial judge granted the new trial and

ordered paternity testing, which the OAG moved for reconsideration and to stay genetic testing. Due to procedural events during this hearing, the trial judge's order granting new trial actually became an order granting the bill of review. The trial judge vacated the default judgment, found that Phillips did in fact made a prima facie showing of a meritorious defense, and ordered a new trial be set for adjudication of paternity and a separate order for genetic testing to be completed before August 8, 2008. The OAG petitioned for writ of mandamus complaining of these two orders.

In considering whether there was abuse of discretion, the appeals court discusses the standard for granting a Bill of Review.* The court finds the record showed Phillips had failed to meet the requirements necessary to grant a Bill of Review, and further, evidence irrefutably showed that his own negligence contributed to the default judgment. The court found that at that time Phillips had the option for a motion to reinstate, motion for new trial or to take a direct appeal, rather than, pursue a Bill of Review. Thus, the trial court clearly abused its discretion.

However, the order granting the bill of review was interlocutory because it vacated the prior judgment as to Phillips' paternity and reinstated this original cause (establishing paternity). The court notes that there has been a split of authority on the issue, whether mandamus will lie to review the interlocutory granting of a bill of review, but the court does not propose to resolve this issue at present; however, specific to paternity suits where genetic testing is ordered, "it is now clear that mandamus is available to review an order for paternity testing that is erroneously ordered before a parentage determination has been set aside. Two reasons support such review: 1) the ordering of a paternity testing is a discovery order to which no adequate remedy by appeal exists (for production of unauthorized discovery because once it's produced, its effects cannot be undone), and 2) revealing the results of genetic testing may cause permanent, irreparable harm to the child.

Moreover, and specific to this case, granting the bill of review set aside the parentage determination. Without the parentage established, an order for paternity testing would be precluded, unless and until the bill-of-review order had been reviewed, found to be erroneous and set aside accordingly. Had the appeals court not granted OAG's interlocutory bill of review order, the paternity testing would have gone forward without an established order on paternity and before the appeals court could even have determined if the default judgment should have been set aside and the case retried. Thus, the OAG did not have an adequate remedy by appeal.

b. Mandamus Review Denied in Paternity Testing Case on Different Issues; trial court did not abuse its discretion.: *In re C.S.*, Relator, 277 S.W.3d 82 (Tex.App.)Amarillo 2009, no pet.).

A child, Z., was born to C.S. in May 2007. The following day, she and M.T. signed an acknowledgment of paternity for recording with the bureau of vital statistics declaring under penalty of perjury that M.T. was the biological father of Z. The mother, C.S., subsequently filed for divorce from M.T. alleging they were married "on or about July 7, 2007." M.T. filed an amended answer May 14, 2008, which challenged the acknowledgment of paternity on the ground of fraud, duress, or material mistake of fact. After an evidentiary hearing the trial court signed an order that M.T. did in fact sign the acknowledgment of paternity under a material mistake and set the acknowledgment aside accordingly. The trial court further ordered genetic testing for Z., C.S. and M.T. C.S. sought writ of mandamus on both orders.

The court looks to the statute on acknowledgment of paternity §160.304 of the Texas Family Code, which provides in all pertinent parts that a signatory may rescind before the earlier of: (1) the 60th day after the effective date of the acknowledgment…; or (2) the date of the first hearing in a proceeding to which the signatory is a party before a court to adjudicate an issue relating to the child, including child support. See Tex. Fam. Code Ann. §160.30. Alternatively, following the expiration of the period for rescission, a signatory may initiate a proceeding

challenging the acknowledgment of paternity on the ground of fraud, duress or material mistake of fact. See Tex. Fam. Code Ann. §160.308(a). An adult signatory must initiate a proceeding challenging the acknowledgment before the fourth anniversary of the date the acknowledgment is filed with the bureau of vital statistics. "Proof by genetic testing of the male signatory's non-paternity constitutes a material mistake of fact...". See Tex. Fam. Code Ann. §160.308 (d).

First, a petitioner for mandamus must show that the trial court abused its discretion in setting aside the acknowledgment of paternity on the basis of fraud or mistake by demonstrating that the evidence of the record did not support there was any fraud or mistake. On the contrary, the appeals court found the evidence showed C.S. told M.T., on numerous occasions, that he was the father. This and other evidence of the record as a whole supported that M.T. executed the acknowledgment under a material mistake, thus, the trial court did not abuse its discretion in setting aside the acknowledgment.

Second, petitioner requested that the order for paternity genetic testing be vacated in that irreparable harm [would] result if genetic testing proceeds. She relied on prior paternity cases which held that a trial court abused its discretion by ordering genetic testing when a child's paternity has been legally established and a determination of parentage had not been set aside. However, in these cases parentage had not been set aside and the court finds here that no such legal impediments exist. As such, the trial court did not abuse its discretion and petitioner's writ for mandamus is denied.

The court concluded that since the trial court had correctly set aside the acknowledgment of paternity per the statute and supported evidence, its order for genetic testing was in accordance with the law. This is different from the numerous cases where an order establishing paternity had not been decided either way and was still at issue.

c. Mandamus granted where Petitioner would stand to lose her right to put on essential expert testimony at trial by trial court's denial of her motion for a continuance: In re Oliver, No. 10-05-00213-CV, 2005 WL 1531712 *2 (Tex.App.)Waco, June 29, 2005, no pet.)

In this original action for increased child support, a mother, Charlotte, asserted that the father Gary, wrongfully sheltered and under-reported income. She retained Caryn Thompson, a certified public accountant and auditor, as an expert witness to review Gary's and the business' financial records; however, on April 19, 2005, two weeks before trial, Charlotte received notification from Thompson that she was withdrawing without explanation and refusing to testify. On April 27, 2005, Charlotte filed a motion for continuance of the May 2, 2005 trial setting based on her expert's withdrawal and her need to retain a new expert. The motion was unopposed, however, the trial court denied the continuance and Charlotte petitioned for writ of mandamus.

The appeals court recognized that grant or denial of a motion for continuance is within the sound discretion of the court, but that an abuse of discretion can occur in such a denial, for example, when a party must attend a trial or hearing and is unable to submit critical evidence.

At the continuance hearing Charlotte asserted that without an expert witness, she could not establish Gary's true net resources to prove her claim for an increase in child support. She put on sufficient evidence of the expert's, Thompson's, withdrawal and refusal to testify two weeks before the trial date, and also, further showed that her motion for continuance was not opposed and actually approved of by Gary's counsel. The appeals court found that the evidence of the record established it was essential Charlotte be able to put forth expert testimony in order to make her claim for increased child support; thus, the trial court abused its discretion by denying Charlotte's motion for continuance.

In whether Charlotte lacked an adequate remedy by appeal, the appeals court cites to *Prudential's* balance test. *Id.* at *3. Under these principals of *In re Prudential*, the court found that Charlotte's claim for increased child support

without a necessary expert would be an irreversible waste of private and public resources.

The appeals court elaborated on the waste of public and private resources further in stating, "[n]o sound principle or practicality that we can fathom would be served by requiring Charlotte to try her claim for increased child support now without a necessary expert, and thus, likely not prevail, and then appeal and try the case a second time on remand--when the child whose support is at issue will probably have reached majority--because the trial court should have granted her motion for continuance before the first trial. In this last statement it is clear the appeals court also considered that the time and delay in finalizing the child support order would deprive the child of needed support.

d. Case analyzes the second prong based on expense or delay but does not grant mandamus: *In re Rowe*, 182 S.W.3d 424 (Tex. App.—Eastland 2005, no pet.).

Wife filed divorce in Midland County before she was a resident for at least 90 days per the residency requirement under Texas Family Code. Husband files his divorce suit two days later in Collin County and subsequently filed a motion to dismiss for lack of Jurisdiction and a Plea in Abatement in the Midland County case. Upon an evidentiary hearing the Midland trial court denied husband's motions. Husband filed for mandamus arguing that wife will be a resident by the time the divorce proceeding began, rendering his claim moot, thus, he would lose his chance to appeal. The appellate court denied mandamus holding that husband has an adequate remedy by appeal.

Because the plain language of the statute requires a petitioner to establish residency before filing suit, as opposed to before receiving a divorce, husband could effectively raise the issue on appeal. *Id.* at 426. The fact that time will pass during the pendency of the trial proceeding did not deprive husband of the opportunity to appeal the trial court's decision to deny his plea in abatement.

The appeals court next considered whether the appeal of a venue ruling would provide husband with an adequate remedy at law. It then concluded that a wrongful venue determination is not subject to harmless error analysis, but rather reversible error per statute. The Texas Supreme Court consistently held that reversible error alone is insufficient to warrant mandamus relief, and that venue decisions in two-party suits, except for suits affecting the parent child relationship, are incidental trial rulings correctable by appeal. Thus, husband had an adequate remedy by appeal.

e. Mandamus granted based on financial hardship and operating constraints: *In re Gray Law,* L.L.P., 2006 WL No. 1030206, (Tex. App.—Ft. Worth, 2006, no pet.).

Trial court ordered proceeds from the sale of Gray Law's real property to be deposited into the court's registry. The proceeds were deposited as a result of a Rule 11 divorce agreement between one of the firm's partners, Jay Gray and his wife. In doing so, the trial court ignored Mr. Gray's claim that Gray Law needed the proceeds from the sale of the property "to continue to operate and to pay its debt" and "without those funds, it could no longer operate."

The trial court abused its discretion in placing partnership property that was not part of the community estate into the registry of the court; the order would inevitably deprive the law firm of its viability to operate. Gray Law is left with no operating funds to locate and lease a new office or to prosecute any cases; consequently, he has no means to earn money to support his child. In this situation, no legal remedy other than mandamus is available to relieve Gray Law from the monetary constraints imposed by the trial court's order that Gray Law contends have led to its inability to satisfy the financial requirements of operating its business.

f. Mandamus granted based on the trial court's complete lack of authority and abuse of discretion but skips over whether there was an inadequate review by appeal*: In re Brunin*, 2005 WL 839531 (Tex. App.--San Antonio 2005, no pet.).

The divorce decree was entered in 2000 which provided for spousal maintenance "to extend until: the expiration of 2 yrs on or about May 31, 2002, at which time wife may request continuation and/or modification of support upon her own motion." Wife filed for modification in 2002 and the court granted a continuance until further order of the court. In 2004, husband filed a Motion to Dissolve the Prior Order Containing Alimony and a partial summary judgment on the motion, declaring that the order to continue the maintenance was void (because the original decree did not contain a finding based on an incapacitating physical or mental disability). The court granted the partial motion and wife petitioned for writ of mandamus.

The appeals court initially ruled that the wife did have an adequate remedy by appeal if the trial court provided severance; however, her motion for a severance was denied. The San Antonio Court of Appeals then conditionally granted mandamus.

The appeals court ruled that trial court abused its discretion by ordering the prior "suit to continue spousal maintenance" void rather than voidable, reasoning that when a court's action is merely contrary to a statute or rule, the action is erroneous or voidable, rather than vo*Id.*

In analyzing the second prong, however, the appeals court does not actually state the reasons the wife had no adequate remedy on appeal, but rather cites the broad interpretation of "adequate" in *Prudential*. The court then concludes, "Under the circumstances presented in this case, we conclude that an appellate remedy is not adequate.

g. Mandamus granted due to financial hardship: *In re General Motors Fabricating Corp., 2006 WL 3316877 (Tex. App. – Houston [1st Dist.] 2006, no pet.).*

Houston's First District Court of Appeals granted mandamus relief when the denial of same would result in a significant financial burden to General Motors. *In re General Motors Fabricating Corp*., 2006 WL 3316877 (Tex. App. – Houston [1st Dist.] 2006, no pet.). The court held that the trial court abused its discretion in failing to abate the final judgment and in severing a breach of settlement agreement claim apart from the claim on the substantive merits. *Id.* at *4. Although relator could appeal the trial court's actions, the court held "[i]t would be pointless to for the appellate court and parties to expend resources on an appeal until the trial court first determines the enforcement [of a settlement agreement] issue." *Id.* at *2.

B. Interlocutory Appeal

Most orders entered during the pendency of the case are not appealable. However, certain orders entered while a case remains pending in a trial court may be appealed before final judgment. *See* Tex. Fam. Code §6.507; *see also* Tex. Civ. Prac. & Rem Code §51.014. In some circumstances, the commencement of trial is stayed pending interlocutory appeal. Parties may also agree, under certain circumstances, to pursue an interlocutory appeal, even when statutory interlocutory appeal is not available. Tex. Civ. Prac. & Rem. Code §51.014 (d).

1. Statutory Interlocutory Appeals

Certain interlocutory orders can be appealed prior to the end of the case.

a. Family law related interlocutory appeals

(1) Receiver or trustee

Certain orders appointing a receiver or trustee or overruling a motion to vacate an order appointing a receiver or trustee are appealable interlocutory orders. An order appointing a receiver in a family law case may be challenged via interlocutory appeal. Tex. Fam. Code §6.507; *see also Ahmad v. Ahmed*, 199 S.W.3d 573, 575 (Tex. App. – Houston [1st Dist.] 2006, no pet.); *Krumnow v. Krumnow*, 174 S.W.3d 820, 826 (Tex. App. – Waco 2005, pet. denied).

Further, an order appointing a receiver to liquidate a corporation may be challenged via interlocutory appeal. *Mueller v. Beamallow, Inc.*, 994 S.W.2d 855, 857 (Tex. App. – Houston [1st

Dist.] 1999, no pet.). An order denying a motion to vacate that is filed within 20 days of the original order appointing the receiver may be the subject of interlocutory appeal. *Sclafani v. Sclafani*, 870 S.W.2d 608, 613 (Tex. App – Houston [1st Dist.] 1993, writ denied). Likewise, an order denying the release of receivership property and awarding the receiver fees resolved discrete issues in the receivership, making such order challengeable by interlocutory appeal. *Chase Manhattan Bank v. Bowles*, 52 S.W.3d 871, 878 (Tex. App. – Waco 2001, no pet.).

On the other hand, an order dissolving a receivership cannot be challenged by interlocutory appeal. *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App. – Houston [14th Dist.] 2002, no pet.). An order appointing an auditor to review accounts cannot be challenged by interlocutory appeal. *Diana Rivera & Assocs. v. Calvillo*, 986 S.W.2d 795, 796 (Tex. App. – Corpus Christi 1999, pet. denied). Further, an order appointing a successor to a permanent receiver is not eligible for interlocutory appeal. *Swate v. Johnston*, 981 S.W.2d 923, 925 (Tex. App. – Houston [1st Dist.] 1998, no pet.).

An order denying the appointment of a receiver cannot be challenged by interlocutory appeal. *Holman v. Stephen F. Austin Hotel*, 599 S.W.2d 679 (Tex. App. – Austin 1980, writ dism'd). However, an order denying receivership may be considered final and appealable by direct appeal where appointment of receivership is the only issue in the case. *Balias v. Balias, Inc.*, 748 S.W.2d 253, 255 (Tex. App. – Houston [14th Dist.] 1988, writ denied).

(2) Temporary injunctive relief

Certain orders for temporary injunctive relief may be challenged through interlocutory appeal; however, temporary injunctions entered under the Texas Family Code are not eligible for interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code 51.014; *see contra* Tex. Fam. Code §§6.507; 105.001(e)

A temporary injunction may be entered under the Texas Rules of Civil Procedure 680 and 684. In civil cases, the most common statutory grounds for injunctive relief are found in §65.011 of the Texas Civil Practice and Remedies Code, but such relief is also authorized under §§15.51 and 24.008 of the Texas Business and Commerce Code, and §21.064 of the Texas Property Code. Such a request must include a pleading for permanent relief, as opposed to just a temporary injunction; that the applicant has a probable right to the relief it seeks; and that there is a probable injury – that the harm is imminent, irreparable and there is no other adequate legal remedy.

Under the Texas Family Code, a party is entitled to certain temporary restraining orders and/or temporary injunctions for the preservation of the property and protection of the parties. Tex. Fam. Code §§6.01, 6.502, 105.001. As long as the restraining order and/or injunction is one that is delineated in the Family Code, the application is exempt from the stringent pleading and proof requirements of TRCP 680 and 684 and no bond is required.

(3) Special appearance

A party may appeal interlocutorily an order that grants or denies the special appearance of a defendant under Rule 120a, *except in a suit brought under the Family Code*. Tex. Civ. Prac. & Rem. Code 51.014(a)(7). A special appearance under the family code might or might not be reviewable by mandamus based on the new *Prudential* and *McAllen* standards for mandamus review.

(4) Arbitration orders.

Certain orders relating to arbitration are permitted to be challenged via interlocutory appeal. Tex. Civ. Prac. & Rem. Code §171.098. Note that orders entered under the Texas Arbitration Act are appealable by interlocutory appeals, but orders entered under the Federal Arbitration Act are not appealable.

(1) An order denying an application to compel arbitration under Texas law. Tex. Civ. Prac. & Rem. Code §171.098(a)(1); *Chambers v. Quinn*, 242 S.W.3d 30, 31 (Tex. 2007).

(2) An order granting an application to stay arbitration; Tex. Civ. Prac. & Rem. Code §171.098(a)(2); *L & L Kempwoods Assocs. v. Omega Builders, Inc.*, 972 S.W.2d 819, 821 (Tex. App. – Corpus Christi 1998, pet. dism'd).

(3) An order confirming or denying confirmation of an arbitration award; Tex. Civ. Prac. & Rem. Code §171.098 (a(3); *Werline v. East Tex. Salt Water Disposal Co.*, 209 S.W.3d 888, 893 (Tex. App. – Texarkana 2006, pet. granted).

(4) An order vacating an arbitration award without directing a rehearing. Tex. Civ. Prac. & Rem. Code §171.098(a)(5); *J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 840 (Tex. App. – Fort Worth 2002, pet. denied).

Interlocutory appeal is not permitted for other types of arbitration orders. Orders compelling arbitration and abating the case are not appealable. *Materials Evolution Dev. USA, Inc. v. Jablonowski*, 949 S.W.2d 31, 33 (Tex. App. – San Antonio 1997, no writ). Likewise, an order confirming in part and vacating in part an arbitration award is not subject to an interlocutory appeal. *Bison Blgd. Materials Ltd v. Aldridge*,263 S.W.3d 69 (Tex. App. – Houston [1st Dist.] 2006, pet. granted). An order denying a motion to confirm an arbitration award, vacating an award, and directing a rehearing is not appealable. *Thrivent Fin. For Lutherans v. Brock*, 251 S.W.3d 621, 622 (Tex. App. – Houston [1st Dist.] 2007, no pet.).

b. Non-family law related interlocutory appeals

(1) Class action certification

Orders certifying a class, fundamentally changing the nature of a class, or denying class certification may be challenged by interlocutory appeal.

(2) Denial of official immunity summary judgment

A party may appeal an order that denies a motion for summary judgment based on an assertion of immunity by an officer or employee of the State or political subdivision of the State. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5).

(3) Denial of free-speech summary judgment

A defendant may appeal an order that denies a motion for summary judgment based in whole or in part on a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication was published by the electronic or print media, arising under the free-speech or free-press clause of the First Amendment of the United States Constitution. Tex. Civ. Prac. & Rem. Code §51.014(a)(6). The statute does not permit the plaintiff to appeal the denial of such a summary judgment. *Rogers v. Cassidy*, 946 S.W.2d 439, 443 (Tex. App. – Corpus Christi 1997, no writ).

(4) Government's plea to the jurisdiction

A party may appeal an order that grants or denies a plea to the jurisdiction filed by a governmental unit as defined in Texas Civil Practice and Remedies Code §101.001. Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). This includes an appeal of a plea to the jurisdiction brought by state officials and individual employees of a governmental unit. *Tex. Parks & Wildlife Dept. v. E.E. Lowry Realty, Ltd.*, 235 S.W.3d 692, 694 (Tex. 2007). Further, it is the substance of the pleading that is dispositive of whether appeal is available, not the technical name of the pleading. *Del Valle Independent School Dist. v. Lopez*, 845 S.W.2d 808 (Tex. 1992). Thus, an appeal may be taken from a refusal to dismiss for want of jurisdiction, whether the argument is presented by a pleading called plea to the jurisdiction or some other instrument.

2. Permissive Interlocutory Appeals

Even where an interlocutory order is not specifically appealable, a party may still appeal it by agreement. Tex. Civ. Prac. & Rem. Code §51.014 (d). A party wanting to seek interlocutory appeal under such circumstances should file an agreed motion for a written order for interlocutory appeal with the trial court. The motion should state that the order to be appealed involves a controlling question of law about which there is a substantial ground for difference of opinion, an immediate appeal from the order may materially advance the ultimate termination of the litigation, and the parties agree to the order permitting the interlocutory appeal. *Id.* The trial court then has to approve the order permitting interlocutory appeal. A permissive interlocutory appeal does not stay the commencement of the trial pending the appeal. Tex. Civ. Prac. & Rem. Code §51.014(e). The parties must agree to and request a stay.

3. Procedure for an Interlocutory Appeal

To perfect interlocutory appeal, the party must file a notice of appeal within 20 days after the date the interlocutory order was signed. Tex. R. App. P. 26.1(b). To perfect a permissive interlocutory appeal, a party must file a notice of appeal with the trial court clerk within 20 days after the signing of the written order granting permission to appeal. Tex. R. App. P. 28.2(a). A party may file a motion for extension as with other motions within 15 days.