Family Law Appellate Cases for May 2013

by Greg Enos

This father did not have a prayer! Ordering a father to give up a few hours on every one of his Sunday mornings so that the mother can take the children to religious education does not violate the Establishment Clause of the First Amendment. The San Antonio Court of Appeals found that giving the father a few extra hours on Sunday evenings made interrupting his weekends for the mom's religious preferences acceptable. Stop and think about this -- the father cannot ever leave town over a weekend because the mother gets three hours of possession of the kids every Sunday morning. Why? To accommodate one parent's religious beliefs! How can that not be giving one parent's religious beliefs priority over the other parent's beliefs? What if Dad has a church he wants to take the kids to on Sunday mornings or what if he is an athiest? Rosenstein v. Rosenstein, No. 02-09-00272 (Tex. App. - Fort Worth, 8/11/2011)(mem. op.) should have decided this case but it was distinguished because the father here gets to keep the children until 9 pm on Sundays. This decision does not even address Knighton v. Knighton, 723 S.W.2d 274 (Tex. App. - Amarillo 1987, no writ). In Knighton, it was held:

> These constitutional provisions mandate a zealous protection of an individual's untrammeled right to religious belief so long as the teachings and practice of that religious belief are neither illegal or immoral. Accordingly, the courts of this state would have no more power to, directly or indirectly, attempt to effectuate by decree a conformance to, or condemnation of, certain religious teachings or practices, than would the Legislature or the Congress have the power to establish a state religion by law. As relevant here, that means that one's religious beliefs, teachings, and practices, per se, are not grounds for depriving a parent of his or her children unless the teachings and practice of such beliefs are illegal or immoral. Thus, it is beyond the power of a court, in awarding the custody of a child or children to prefer the religious views or teachings of either parent, even though the beliefs and practices of one parent might be more "normal" or more in accord with majority religious views or practices. Therefore, as this Court earlier stated in the first appeal of this case, it is a fundamental principle that the State cannot prefer the religious views of one parent over the other in deciding the best interest of a child. This principle, we believe, must also be subject to the qualification that if the religious doctrines and practices of an applicant for custody do in fact seriously threaten the physical or mental well-being of the child, or would lead the custodian to neglect such a child, this might be a basis for favoring a different custodian.

For what it is worth, Article I, section 6 of the Texas Constitution, in pertinent part, provides:

> No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.

This is what the San Antonio Court of Appeals said in upholding the preference given the mother's religious beliefs over the father's:

> Just as the court has discretion to mold the decree to accommodate activities such as soccer games and music lessons if it finds them in the child's best interest, it may accommodate a parent's desire for the children's religious education, provided that it does not favor one parent's religion over another or over a preference for no religion. Martin has not directed us to, nor have we located, any evidence in the record that the court's decreed visitation schedule, accommodating, *inter alia*, the children's current religious education, in any way favors Margaret's religion. Both parents are given the right to direct the children's religious education. Martin has additional time on Sundays to compensate for the time the children spend in religious studies on Sundays during his possession period. Therefore, the court did not abuse its discretion in crafting this visitation schedule and did not run afoul of the Constitution. Accordingly, we affirm the trial court's inclusion of the religious instruction clause.

I certainly hope this case is taken up to the Texas or U.S. Supreme Court. Interestingly, another aspect of this opinion upholds the trial court imposing a "morality clause" injunction on the father but not the church-going mother.
Roberts v. Roberts, No. 04-11-00554-CV (Tex. App. - San Antonio 5/1/2013)

Land acquired with wife's separate property but deeded to husband and wife was not a gift of a 50% interest to the husband. This case shows how to overcome the presumption that when a spouse uses separate property to acquire land during the marriage and takes title to the land in the names of both the husband and wife, it is presumed that the interest given the non-purchasing spouse is a gift. Here, a trust was established in favor of three sisters, one of whom was the wife in the divorce case. The 23 acres was conveyed from the trust to the wife and husband and the husband claimed he owned a one half separate interest in the land. Each sister was deeded land from the trust and each deed recited that the sisters were giving up their separate interests in those properties. The trial court awarded it all to wife as her separate property. The court of appeals affirmed the trial court's ruling and held: (1) the husband had the burden to prove he owned one half of the land as his separate property [it is not clear why the wife did not have the burden to prove it was all her separate property]; (2) the trial court properly allowed parol evidence from the wife and her sisters and brother-in-law that no gift was intended; (3) the transfer of the land was not a gift since each sister gave up her separate property interest in the others' land; meaning there was separate property consideration for the transfers. The court of appeals stated:

> The taking of title in both names does not change the result of tracing, but creates a presumption of a gift of one half of the separate property. This presumption can be rebutted b evidence clearly establishing there was no intent to make a gift. To accomplish this, parol evidence is allowed. Thus, the trial court did not err in admitting the testimony and affidavits of [the wife's sisters or her brother-in-law].

Moncey v. Moncey, No. 06-12-00054-CV (Tex. App. – Texarkana 5/17/2013)

Detailed discussion of the acceptance-of-benefits doctrine which commonly arises in divorce cases when a former spouse accepts certain assets awarded in the judgment but then tries to appeal the remainder of the judgment. An appellee bears the burden of proving that an appellant is estopped from challenging the judgment by appeal under the acceptance-of-benefits doctrine. When the doctrine applies, an appeal is rendered moot and the appeal should be dismissed. The doctrine does not apply when (1) acceptance of the benefits is because of financial duress or other economic circumstances, or (2) the reversal of the judgment on the grounds appealed cannot possibly affect an appellant's right to the benefits accepted under the judgment. The appellant bears the burden to prove an exception applies. Here, the wife was awarded the 2005 Lexus and the husband was ordered to pay the car note on the Lexus. The wife tried to appeal the division of community property but during the appeal she sued her ex-husband in justice of the peace court claiming he had "sold her the car" but failed to pay for it. The wife's appeal was dismissed because of the acceptance-of-benefits doctrine after very detailed discussion of whether she had proven economic necessity.
F.M.G.W. v. D.S.W., 08-11-00365-CV (Tex. App. – El Paso 5/22/2-13)

Interesting example of how a court can divide assets that were not awarded in the original divorce. The parties were divorced in 2002 and the court's property division then was 63% to the wife. Eight years later, the wife filed a petition seeking post-divorce division of two pieces of land and some mineral rights that had not been awarded in the divorce decree. This time, the trial court made an overall 50-50 division of the property including what was originally awarded and the undivided assets. The wife on appeal complained that she should have been awarded 63% of the newly discovered assets. The court of appeals held that the trial court was not bound by the property division ratio it used in the original divorce and the trial court did not err in using the 2002 values for the land instead of the 2011 values.
Harton v. Wade, No. 12-12-00158-CV (Tex. App. - Tyler 5/22/2013).

Mystery payment to husband from his business can be considered an asset in calculating community property division. This lengthy case addresses many diverse issues, including divorce jurisdiction over Mexican citizens who own a home in San Antonio and whose son attends school there and includes numerous examples of how not to object or preserve error regarding jury questions or evidence. However, this case also provides another example of a trial court pretending a spouse has a phantom asset when a large cash payment cannot be explained. The husband owned a business along with a friend. The friend invested $195,737.23 and the husband soon thereafter withdrew $195,000 and even the company's accountant could not explain the transaction. The trial court valued the husband's interest in the business as if the unexplained withdrawal had not happened and included the $195,000 as a separate asset for the husband. The court of appeals held that the trial court did not abuse its discretion in doing so.
Nieto v. Nieto, No. 04-11-00807-Cv (Tex. App. - San Antonio 5/1/2013).

It is error for a court to issue a wage withholding order for contractual alimony unless the parties agreed to wage witholding per Tex. Fam. Code Sec. 8.101(b)(1). Sec. 8.101(b)(2) that allows wage withholding "if the alimony payments are not timely made under the

terms of the contract" does not mean what it seems to clearly say, in part because the Texas Constitution only allows wage withholding for child support and court ordered spousal maintenance, not agreed contractual alimony. Note: Sec. 8.101(a-1) has been added by the last legislature effective 9/1/2013 that specifically allows wage withholding for contractual alimony. This decision might mean that new law is unconstitutional.
Pappolla v. Simovich, No. 14-12-00418-CV (Tex. App. - Houston [14th Dist.] 5/21/2013).

Divorce court cannot award reimbursement to a spouse's separate estate if the spouse did not trace her separate property. Here, the wife's separate estate was awarded a $41,000 reimbursement claim against the community estate which the trial court used to reach a 60/40 property split. The court of appeals held that the wife failed to prove $32,000 of that amount was her separate property and this required a reversal of the entire property division since the $32,000 represented about 20% of the entire net community estate.
Roberts v. Roberts, No. 04-11-00554-CV (Tex. App. - San Antonio 5/1/2013).

A divorce decree cannot order a party who wants to file a modification to pay the other parent $25,000 on the date the modification is filed or face dismissal. Unbelievably, the trial court followed this provision and dismissed the wife's modification suit. The San Antonio Court of Appeals did not reach the issue on whether this provision is void as against public policy and instead held that the provision violates Family Code Sec. 154.124(c) which says agreements concerning child support are not enforceable as a contract. Since this provision limited the mother's ability to seek modification of child support, it was not enforceable and the case should not have been dismissed.
In re I.R.H. and Z.T.H., No. 04-12-00366-CV (Tex. App. - San Antonio 5/1/2013).

When an agreement incident to divorce is approved by the court and incorporated into the divorce decree, the agreement constitutes part of a valid and binding final judgment and is enforceable as part of the decree. The agreement in this case included very large alimony payments to the wife and an agreement for the husband to pay the children's college expenses. The trial court awarded a judgment of $1,128,000 against the ex-husband and awarded $102,475 in attorney's fees. The few adjustments made to the judgment by the court of appeals did not reduce the ex-husband's judgment and he almost certainly considers it a total loss.
Castro v. Castro, No. 14-11-01087-CV (Tex. App. - Houston [14th Dist.] 5/9/2013).

When a case is transferred from one county to another, the attorney must make sure the clerk copies and sends all important documents. Here, a court in Montgomery County entered a paternity order in 2005. In 2005, the mother's ex-husband filed a modification suit seeking custody. The mother was served and the father signed an affidavit of relinquishment of parental rights. The case was transferred to Brazoria County and a default order was entered against the mother. The mother filed a restricted appeal and got the order reversed because the clerk's record from Brazoria County did not include the return of service on the mother. The court of appeals said it could not consider the certified copy of the return from Montgomery County attached to the appellee's brief.
In the Interest of K.M., No. 14-12-00871-CV (Tex. App. - Houston [14th dist.] 5/16/2013).

Grandparents win "move away" modification case over only living parent who moved from Dallas to Washington because he had rejoined the military.
In the Interest of Z.R.P. and D.A.P., No. 05-12-00134-CV (Tex. App. - Dallas 5/20/2013)

Dallas Court of Appeals allows a trial judge to deny a late filed motion to recuse and then proceed with trial before the administrative judge hears the motion to recuse. Here, after switching attorneys three times and getting two continuances, the wife's third request for a continuance was denied. The wife's new attorney told opposing counsel not to work over the weekend because he was going to file a motion to recuse. Trial was set for 9:00 a.m. and wife and her attorney did not appear in the courtroom, But, the wife at 9:08 a.m. filed a motion to recuse. The trial judge denied the motion and started the trial. At some point, the wife's attorney appeared in the courtroom and he did not object to the trial going forward or ask for the evidence to be reopened for his client to present her case. The administrative judge denied the motion to recuse two days later without a hearing. The Dallas Court of Appeals acknowledged the general rule that a trial judge faced with a motion to recuse may only recuse or deny the motion and must refer the motion and get a ruling before proceeding on anything involving the case. However, an exception is carved out here to the "recuse or refer" rule based on TRCP 18a(d) which says a ,"trial judge shall make no further orders "[e]xcept for good cause stated in the order in which further action is taken".
Litman v. Litman, No. 05-11-00903-CV (Tex. App - Dallas 5/15/2013).

Modification default reversed because mother failed to present any evidence of changed circumstances. This case shows that even in a default situation, counsel must still put on some minimal evidence that supports the requested modification.
In the Interest of A.T.A.L., No. 05-11-01666-Cv (Tex. app. - Dallas 5/8/2013).

Fishy facts support denial of mother's motion for enforcement for failure to pay child support. A 2004 paternity order required the father to pay $500 a month child support through the SDU and he clearly had made no payments to the SDU prior to April 2010. So, how did the mother lose this enforcement suit? The father testified that his signature on the "agreed" paternity order was forged and he testified he did not know he was ordered to pay through the SDU. The father testified that the mother had agreed for him to pay support through direct deposit into her bank account or by use of his debit card. The father introduced evidence of these deposits. The mother should count herself lucky she was not sanctioned for bringing this enforcement action.
In the Interest of K.S.H.U., No. 05-12-00448-Cv (Tex. App. - Dallas 5/21/2013).