

THOSE OTHER TEXAS CODES:

**THINGS THE FAMILY LAWYER
NEEDS TO KNOW ABOUT
CODIFICATIONS OUTSIDE
THE FAMILY CODE**

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State Bar of Texas

30TH ANNUAL ADVANCED FAMILY LAW COURSE

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CURRICULUM VITAE OF RICHARD R. ORSINGER

- Education:** Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)
- Licensed:** Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)
- Certified:** Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

Organizations and Committees:

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-present); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-present)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member 1994-1997, 1999-2001, 2003-2006) and Civil Appellate Law Exam Committee (1990-present; Chair 1991-1995)
Tx. Bd. of Legal Specialization, Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

Professional Activities and Honors:

Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1995, June 1996, & June 1997
Listed in the BEST LAWYERS IN AMERICA (1987-to date)

Continuing Legal Education and Administration:

Course Director, State Bar of Texas Practice Before the Supreme Court of Texas Course (2002, 2003)
Co-Course Director, State Bar of Texas *Enron, The Legal Issues* (March, 2002) [Won national ACLEA Award]
Course Director, State Bar of Texas Advanced Expert Witness Course (2001, 2002, 2003, 2004)
Course Director, State Bar of Texas 1999 Impact of the New Rules of Discovery
Course Director, State Bar of Texas 1998 Advanced Civil Appellate Practice Course
Course Director, State Bar of Texas 1991 Advanced Evidence and Discovery Course
Director, Computer Workshop at Advanced Family Law Course (1990-94)
and Advanced Civil Trial Course (1990-91)

Course Director, State Bar of Texas 1987 Advanced Family Law Course
Course Director, Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada (1987)

Books and Journal Articles:

---Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
---Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)
---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE SPEECHES AND ARTICLES

State Bar of Texas' [SBOT] Advanced Family Law Course: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003)

SBOT's Marriage Dissolution Course: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's Advanced Evidence & Discovery Course: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence

Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's Advanced Civil Appellate Practice Course: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003)

SBOT's Annual Meeting: Objections (1991); Evidentiary Predicates and Objections (1992-93); Predicates for Documentary & Demonstrative Evidence (1994); "Don't Drink That! That's My Computer!" (1997); The Lawyer as Master of Technology: Communication With Automation (1997); Technology Positioning (1999); Objections Checklist (2000); Evidence from Soup to Nuts (2000)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991); Offering and Excluding Evidence (1995); New Appellate Rules (1997); The Communications Revolution: Portability, The Internet and the Practice of Law (1998); Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000); Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003)

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by
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I. INTRODUCTION. Someone once observed that an expert is a person who knows more and more about less and less. A family lawyer is a person who, by necessity, must know more and more about more and more. This article discusses Texas Codes, outside the Family Code, that family lawyers should know.

II. THE TEXAS CONSTITUTION. The Texas Supreme Court once said:

We decline to limit the liberties of Texans to those found in the Federal Constitution when this court is responsible for the preservation of Texas' own fundamental charter. When a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights.

Davenport v. Garcia, 834 S.W.2d 4, 11-12 (Tex. 1992) (Doggett, J.). A stirring pronouncement by Justice Doggett, that was a sign of the times. As noted below, subsequent opinions of the Supreme Court recognize a greater influence from federal jurisprudence.

A. DUE COURSE OF LAW. Article I, § 13, of the Texas Constitution, entitled "Excessive bail or fines; cruel and unusual punishment; remedy by due course of law," provides:

Sec. 13. Excessive bail shall not be required, nor excessive fines imposed,

nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Article I, § 19, of the Texas Constitution, entitled "Deprivation of life, liberty, etc.; due course of law," provides:

Sec. 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

The United States Supreme Court, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293, 102 S.Ct. 1070, 1076-77, 71 L.Ed.2d 152 (1982), commented that "the language of the Texas constitutional provision is different from, and arguably significantly broader than, the language of the corresponding federal provisions." However, in *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995), the Texas Supreme Court said that, while the Texas Constitution is textually different from the United State's Constitution in that it refers to "due course" rather than "due process," the terms are without any meaningful distinction and that the Texas Supreme Court has traditionally considered contemporary federal due process interpretations of procedural due process issues to be persuasive authority. *Id.*

- B. EQUAL PROTECTION.** Texas Constitution, art. 1, §§ 3 & 3a contain equal protection clauses. In *In re McLean*, 725 S.W.2d 696 (Tex. 1987), the Supreme Court invalidated a Texas statute that conditioned a father's ability to establish paternity of a child born out of wedlock upon a finding that legitimization would be in the child's best interest. The Court held that the statute discriminated against the father as compared to the mother and was thus gender-based discrimination. In William W. Kilgarlin & Tarver Banks, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 Tex. L. Rev. 1545, 1553-54 (1990), former Texas Supreme Court Justice Kilgarlin noted:

Family Law.--In numerous family law cases in addition to Baby McLean and Baby Girl S., litigants have voiced ERA claims, most notably on issues involving unequal marital property division or unequal child support obligations. Reasoning that inequalities are based on factors other than sex, such as differing present and future economic prospects, Texas courts have uniformly rejected inequity claims in this context. Some courts have, however, relied on, or at least referred to, the ERA in affirming the notion that men and women should be treated equally with respect to all family law issues. Texas courts have eliminated gender bias in evaluating the duty to support children commensurate with ability to pay support, measuring loss of consortium, making a selection of domicile, awarding attorney's fees in child custody cases, and permitting the choice of name upon marriage. [Footnotes omitted]

- C. JURY.** Texas Constitution, art. 1, § 10, gives criminal defendants a right to jury trial. Section 15 provides a more general right to jury trial:

§ 15. Right of trial by jury

The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

- D. OPEN COURTS.** Texas Constitution art. I, § 13 contains a provision that “[a]ll courts shall be open. . . .” In *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983), the Supreme Court observed that “the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress.” To establish an open courts violation, a plaintiff must satisfy a two-part test: (1) he must establish that he has a well-recognized common law cause of action; (2) he must show that the restriction of his claim is unreasonable when balanced against the purpose of the statute. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.2d 887, 902-03 (Tex. 2000). Pursuant to a public vote on September 13, 2003, Article III, § 66 was adopted into the Texas Constitution, thereby permitting the Legislature to limit the liability of health care providers in medical malpractice claims. Section 66(c) also permits the Legislature, after January 1, 2005, to limit liability for non-economic damages for any causes of action.

E. HOMESTEAD.

- 1. Protection From Forced Sale.** For a discussion of homestead protection, see Section XV.B below regarding the Texas Property Code.

2. **Home Equity Loan & Reverse Mortgage.** Tex. Const. art. XVI, § 50(a)(6) recognizes two fairly new types of loans that can validly be secured by lien in homestead: home equity loans and reverse mortgages.

Home equity loans are loans secured by subordinate liens in the homestead. In order to be constitutionally valid, the home equity loan, when added to existing indebtedness secured by valid liens in the homestead, may not exceed 80 percent of the fair market value of the homestead on the date of the loan. The home equity loan must be without recourse to personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud. The lien can be foreclosed upon only by a court order. There are other conditions to the enforceability of a home equity loan. See § 50(a)(6).

A reverse mortgage can be made on a homestead property to persons 62 years or older, in return for advances to be made, and which may not come due until: (1) all borrowers have died; (2) the homestead property securing the loan is sold or otherwise transferred; (3) all borrowers cease occupying the homestead property for a period of longer than 12 consecutive months without prior written approval from the lender; or (4) the borrowers default on the duty to repair and maintain, pay taxes, or pay insurance, or commit fraud in connection with the loan, or fail to preserve the lien's priority and fail to cure. The loan must be without recourse to personal liability.

- F. **SEPARATE AND COMMUNITY PROPERTY.** The basic law regarding separate and community property in Texas is set out in Tex. Const. art. XVI, § 15. It defines separate property, and provides for premarital and post-marital partition, for agreements between spouses that income arising from separate property will be separate, the presumption that interspousal gifts include a gift of future income on the gifted property, for spouses to hold community property with a right of survivorship, and for agree-

ments to convert separate property into community property.

- G. **DISQUALIFICATION OF JUDGES.** See Section IX.F below.

III. ADMINISTRATIVE CODE.

- A. **LICENSING OF REAL ESTATE APPRAISERS.** In Texas, a real property appraiser can be, but is not required to be, licensed or certified by the Texas Appraiser Licensing and Certification Board. See Texas Appraiser Licensing and Certification Act, Tex.Admin. Code ch. 153. The federal Financial Institution Reform and Recovery Act (FIRREA) requires an appraiser to be certified by the state if the transaction is subject to federal jurisdiction. But it is only when the appraisal is connected with a "federally related transaction" that the appraiser is required to be certified by the Board. *Smith v. Levine*, 911 S.W.2d 427, 433 (Tex. App.--San Antonio 1995, writ denied). In Texas, only certified or licensed appraisers can do "certified appraisals" or "licensed appraisals." These kinds of appraisals must conform to USPAP. See TEX. ADMIN. CODE ANN. § 155.1, "Standards of Practice." "USPAP" are the Uniform Standards of Professional Appraisal Practice, issued by the Appraisal Standards Board of the Appraisal Foundation on January 30, 1989.

IV. BUSINESS AND COMMERCE CODE.

- A. **FRAUDULENT TRANSFERS.** Chapter 24 of the Tex. Business & Commerce Code is the Uniform Fraudulent Transfer Act. This Act can be used by creditors to set aside transfers in fraud of the creditors' rights. A spouse is considered to be a creditor. *Id.* § 24.002(4). A transfer (or obligation incurred) is fraudulent as to a creditor whose claim arose before the transfer, or within a reasonable time thereafter, where the transaction was done "with actual intent to hinder, delay, or defraud any creditor of the debtor." The statute prescribes a list of factors to consider in determining actual intent, including whether the recipient was an insider, whether the transferor retained control,

whether the transfer included most of the debtor's assets, and the like. A transfer (or obligation incurred) is also fraudulent as to a creditor whose claim arose before the transfer or obligation arose if (a) the debtor was insolvent, at the time or as a result of the transaction, and the debtor did not receive a reasonably equivalent value in exchange for the transaction, or (b) the transfer was by an insolvent creditor to an insider in discharge of an antecedent debt, where the insider had reasonable cause to suspect involvency. *Id.* § 24.006. A creditor who succeeds in a fraudulent transfer suit can set aside the transfer, obtain an injunction, have a receiver appointed, and more. *Id.* § 24.008.

A spouse, minor, or ward has a special limitation period. An action under Section 24.005 (intent to hinder, delay or defraud) or 24.006(a) (transfer by insolvent debtor) must be brought within two years after the cause of action accrues, or if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant. An action under Section 24.006(b) (transfer by insolvent debtor to insider for antecedent debt) must be brought within one year after the date the transfer was made. *Id.* § 24.010.

See Jackson Law Office v. Chappell, 37 S.W.3d 15 (Tex. App.—Tyler 2000, pet. denied) (transfers by debtor to mother and former lover were fraudulent); *Putman Pension Plan v. Stephenson*, 805 S.W.2d 16 (Tex. App.—Dallas 1991, no writ) (debtor's transfer of community property to his own pension plan was fraudulent).

- B. SECURED TRANSACTIONS. Chapter 9 of the Texas Business and Commerce Code governs the use of personal property as security for indebtedness. Section 9.109 describes the scope of Chapter 9, and includes “a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract . . .” Perfection of a security interest in chattel paper, deposit accounts, documents, and goods covered by documents, instruments, investment property, letter-of-credit rights, and money; perfection by permissive filing; temporary perfection without filing or transfer of

possession are governed by §9.312, and require control of the collateral. Under Section 9.104, a deposit account is under control of the secured party if, among other things, the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor.

- C. STATUTE OF FRAUDS. Tex. Bus. & Com. Code § 26.01 provides that “[a] promise or agreement described in Subsection (b) is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.” Subsection (b) includes, among other things: a promise by one person to answer for the debt, default, or mis-carriage of another person; an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation; a contract for the sale of real estate; a lease of real estate for a term longer than one year; an agreement which is not to be performed within one year from the date of making the agreement; a promise or agreement to pay a commission for the sale or purchase of: an oil or gas mining lease; an oil or gas royalty; minerals; or a mineral interest; etc.

V. CIVIL PRACTICE AND REMEDIES CODE.

- A. ARBITRATION. The arbitration statutes likely to arise in a family law case are: federal statutes 9 U.S.C. §1-ff, the Texas Civil Practice & Remedies Code [TCP& RC] ch. 54 & 171, and the Texas Family Code §6.601 (husband and wife) and § 153.071 (parent-child).

1. Federal Arbitration Statute. The federal statute applies whenever the U.S. Constitution's commerce clause is implicated. *See In re FirstMerit Bank*, N.A., 52 S.W.3d 749, 754 (Tex. 2001). The case of *Verlander Family Ltd. Partnership v. Verlander*, 2003 WL 304098 (Tex. App.—El Paso Feb. 13, 2003, no pet.) (memorandum opinion),

involved a divorce proceeding where the wife alleged that the husband was an alter ego of the Verlander Family Limited Partnership. The partnership agreement, signed by the wife and under which she was a limited partner, provided that disputes must be arbitrated. The trial court refused to refer the matter to arbitration, holding that the alter ego claim was not subject to arbitration. Although the partnership agreement said it would be governed by the laws of Texas, the El Paso Court of Appeals dismissed an accelerated appeal from this order, on the ground that the partnership owned land in New Mexico as well as Texas, so that the Federal Arbitration Act and not Texas arbitration law applied, and under the Federal Act there is no right to interlocutory appellate review.

2. **Arbitration as ADR.** TCP&RC § 154.021 permits the court to refer a pending dispute to an alternate dispute resolution procedure, which includes arbitration. *See* TCP&RC § 154.027 (Arbitration). The statute says that the court *may* refer the case to arbitration, on its own motion or the motion of a party. Once the case is referred to arbitration for ADR, the parties can elect whether the arbitration is binding or non-binding. TCP&RC § 154.027(b).
3. **Binding Arbitration Agreements.** TCP&RC ch. 171 applies where the parties have entered into a contract providing that a future dispute will be resolved by arbitration. Chapter 171 is the Texas Arbitration Act.
4. **Arbitration Under the Family Code.** There are two Family Code provisions relating to arbitrating family law cases. Both refer to discretionary referral of a pending case to arbitration as an alternate dispute resolution mechanism. The statutory sections themselves do not say whether they apply to a pre-existing agreement to arbitrate, such as is contemplated in TCP & RC ch. 171, or only to an assignment to ADR after a lawsuit is filed. However, Section 6.601 is under Family Code Chapter 6, Subchapter G, “Alternative Dispute Resolution.” Section 153.0071 is itself titled “Alternate Dispute

Resolution Procedures.” This suggests that the Family Code provisions are akin to Chapter 154 of the Texas Civil Practice & Remedies Code, and reflect a post-filing referral of the case to an alternative dispute resolution process. Nevertheless, two Texas courts of appeals have said that, in a suit affecting the parent-child relationship, both the Family Code provision and the TAA apply. *See Kilroy v. Kilroy*, 2004 WL 1013357, *5 (Tex. App.--Houston [1 Dist.] 2004, orig. proceeding); *Stieren v. McBroom*, 103 S.W. 3d 602 (Tex. App.--San Antonio 2003, pet. denied).

- B. **ATTORNEYS’ FEES.** As a general rule, a litigant in Texas courts cannot recover attorneys’ fees for the lawsuit. However, numerous statutes permit the recovery of attorneys’ fees.

TCP&RC § 38.001 permits the recovery of attorneys’ fees in suits for services rendered, labor performed, material furnished, freight or express overcharges, lost or damaged freight or express, killed or injured stock, a sworn account, or an oral or written contract. When attorneys’ fees are sought under this provision, the litigant must be represented by an attorney, must present the claim to the opposing party, and payment must have not been tendered within 30 days after the claim is presented. TCP&RC § 38.002. There is a rebuttable presumption that the usual and customary attorneys’ fees are reasonable. TCP&RC § 38.003. Where the issue of attorneys’ fees is tried to the court and not a jury, the court may take judicial notice of the usual and customary fees and the contents of the case file without further evidence. TCP&RC § 38.004. This presumption, and power of judicial notice, are available only when attorneys’ fees are sought under TCP&RC § 38.001. *See Hasty, Inc. v. Inwood Buckhorn Joint Venture*, 908 S.W.2d 494, 503 (Tex. App.--Dallas 1995, writ denied). Fees sought under other provisions of law must be proved by independent evidence. *Sheldon Pollack Corp. v. Pioneer Concrete*, 765 S.W.2d 843, 847-48 (Tex. App.--Dallas 1989, writ denied). In *Geochem Tech Corp. v. Verseckes*, 929 S.W.2d 85 (Tex. App.--Eastland 1996, writ requested), appellees sought to recover attor-

neys' fees under the Declaratory Judgments Act (TCP& RC § 37.009). Appellees were represented by several law firms, including Bickel & Brewer. One of the appellees testified that he had received and paid Bickel & Brewer's bill, and was familiar with some of the work done. One of Appellees' other attorneys testified that the hourly rates were reasonable and customary. Appellant objected that the Bickel & Brewer bills were hearsay, and could not be authenticated by the testifying lawyer who was not a member of the firm and had no personal knowledge of the work done by Bickel & Brewer. The appellate court sustained the complaint, noting that the Bickel & Brewer bills were not offered as business records.

- C. **COURT COSTS.** TCP&RC § 31.007, "Parties Responsible for Accounting of Own Costs," provides that each party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, in the event that costs are taxed to another party in the judgment. A court can tax as court costs (1) filing fees and service of process fees; (2) court reporter fees for depositions; (3) fees of masters, interpreters, and guardians ad litem appointed pursuant to state rules and state statutes.

- D. **EXEMPLARY DAMAGES.** Under TCP&RC Sec. 41.003(a), exemplary damages can be awarded only upon a finding, by clear and convincing evidence, of fraud, malice, or gross negligence. In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which such conduct offends a public sense of justice and propriety; and (6) the net worth of the defendant. Sec. 41.011(a). Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial. Sec. 41.011(b). The exemplary damages cannot exceed an amount equal to the greater of (1) two times the amount of economic damages plus an

amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000. Sec. 41. A corporation is liable for exemplary damages if it authorizes or ratifies an agent's wilful act or omission or gross neglect or if it is grossly negligent in hiring an unfit agent. *Mobil Corp. v. Ellender*, 968 S.W. 2d 917, 921 (Tex. 1998).

- E. **LEGISLATIVE CONTINUANCE.** Legislative continuances are covered by TCP&RC § 30.003. Under this Section, a lawyer who is a legislator cannot be put to trial or hearing over objection for a period of 30 days before, during, and 30 days after a legislative session. However, in civil cases if the lawyer is hired on or after the 30th day before trial, the protection is discretionary with the court. In criminal cases, the protection becomes discretionary on or after the 15th day before trial. The attorney-legislator, in an affidavit attached to the motion for continuance, must swear that it is the attorney's intention to participate actively in the preparation or trial of the case.

- F. **REASONABLENESS OF SERVICES – PROOF BY AFFIDAVIT.** Ordinarily, expert testimony is required to establish the reasonableness and necessity of expenses, but Texas Civil Practice and Remedies Code §18.001 provides a limited exception to this general rule.

Under § 18.001, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary. The affidavit must be made by the person who provided the service, or the person in charge of records showing the service provided and charge made, and must include an itemized statement of the service and charge. The affidavit must be filed at least 30 days before the day on which evidence is first presented at the trial of the case. A party intending to controvert a claim reflected by the affidavit must file a counteraffidavit not later than 30 days after the day he receives a copy of the affidavit; and at least 14

days before the day on which evidence is first presented at the trial of the case; or (2) with leave of the court, at any time before the commencement of evidence at trial. The counteraffidavit must give reasonable notice of the basis on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit and must be taken before a person authorized to administer oaths. The counteraffidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit. *See* Tex.Civ.Prac. & Rem.Code Ann. § 18.001.

The Eastland Court of Appeals has stated that Section 18.001 is an evidentiary statute which accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and (3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit. *Beauchamp v. Hambrick*, 901 S.W. 2d 747, 749 (Tex. App.—Eastland 1995, no writ); *accord* *Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646, 654 (Tex. App.—El Paso 1998, no writ).

It should be noted that a non-expert witness, such as a custodian of records, may not be permitted to testify that medical bills are reasonable or necessary. *See Castillo v. American Garment Finishers Corporation*, 965 S.W.2d 646 (Tex. App.—El Paso 1998, no writ). “While the Legislature has chosen to provide for the admissibility of an uncontested affidavit of a non-expert custodian of records which establishes the reasonableness and necessity of medical expenses, it has not provided that a custodian of records is competent to offer live testimony of these same facts.” *Id.* at 654.

Section 18.001(f) requires a counteraffidavit to “give reasonable notice of the basis on which the party filing it intends to controvert the claim

reflected by the initial affidavit and be made by a person qualified to testify in contravention about matters contained in the initial affidavit.” *See* TCP&RC § 18.001(f); *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied). This is unlike Section 18.001(c)(2) (B), which permits charges to be proved by a non-expert custodian of records. Thus, a greater burden of proof is placed on counteraffidavits. The idea behind this burden is to discourage the misuse of counteraffidavits in “a manner that frustrates the intended savings.” *See Turner*, 50 S.W.3d at 747. In *Turner v. Peril*, Turner filed affidavits pursuant to Section 18.001. Peril filed counteraffidavits by Dr. Sibley. Every counteraffidavit was identical except for the named service provider. The court ultimately found that Dr. Sibley’s counteraffidavits were insufficient to controvert plaintiff’s affidavits as to reasonableness and necessity of medical expenses. Specifically, the court found that Dr. Sibley did not sufficiently show that he was “qualified ... to testify in contravention” of the matters in each of Turner’s affidavits by simply reciting his credentials as an orthopedic surgeon and stating that the counteraffidavits were based on his “education, training, and experience.” *See* TCP&RC §18.001(f). He may have been qualified to contravene some of Turner’s affidavits but, “his status as a licensed physician did not automatically qualify him as an expert on every medical question.” *See Turner*, 50 S.W.3d at 747; *see also Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). Further, the counteraffidavits did not address whether the charges for the various medical services were reasonable in terms of cost and made only a conclusory statement that the medical records failed to show any objective finding of a significant injury.

- G. **STATUTES OF LIMITATIONS.** TCP&RC §16.003 establishes a two-year limitations period for suits for: damage to property, conversion of personal property, personal injury and death, and forcible entry and detainer. Section 16.004 establishes a four-year limitations period on suits for: specific performance of a contract for the conveyance of real property; penalty or damages on the penal clause of a bond to convey

real property; debt; fraud; breach of fiduciary duty; suit on the bond of an executor, administrator, or guardian; settlement of partnership accounts brought against a partner; and an open or stated account. Section 16.0045 establishes a five-year limitations period for personal injury caused by sexual assault or aggravated sexual assault.

- H. **SUPERSEDEAS BONDS.** TCP&RC Chapter 52, together with Tex. R. App. P. 24, govern post-judgment supersedeas bonds. Chapter 52 was substantially revised in 2003 in House Bill 4. The House Bill 4 changes apply to judgments issued on or after September 1, 2003. Under the newly-enacted Section 52.006(a), the amount of security to be posted must equal “the amount of compensatory damages” plus “interest for the estimated duration of the appeal” and “costs awarded in the judgment.” Exemplary damages do not have to be superseded. Under the new Section 52.006(b), the amount of security to be posted cannot exceed $\frac{1}{2}$ of the judgment debtor’s current net worth or \$25 million, whichever is less. The court must lower the amount of the bond if the debtor shows “substantial economic harm.” TCP&RC § 52.006(c).

The Uniform Enforcement of Foreign Judgments Act, TCP&RC ch. 35, allows a creditor holding a judgment from a court of another state, or from a federal court, to enforce the judgment in a Texas state court without filing a new suit. Section 35.006 provides a procedure for staying enforcement of a foreign judgment, by posting a supersedeas bond or other security under Texas law, if the foreign judgment is on appeal, or the time for appealing has not expired, or enforcement has been stayed in the other state.

- I. **TURNOVER PROCEEDINGS.** TCP&RC §31.002 gives the court the power to assist collection of a judgment through court proceedings. This remedy is available where the property of the judgment debtor cannot readily be attached through ordinary legal process, and the property is not exempt. The exclusion of exempt property does not apply to enforcement

of a child support obligation. *Id.* § 31.002(f). The court can issue a turnover order, appoint a receiver to sell the property, and enforce by contempt a refusal to obey. The creditor can recover attorneys’ fees. *Id.* §31.002(e). Courts of appeals have disagreed whether a turnover order can be directed to third parties holding property for a judgment creditor. *Compare Parks v. Parker*, 957 S.W.2d 666, 668-69 (Tex. App.—Austin 1997, no pet.) (can’t issue order against third party); *Cross, Kieschnick & Co. v. Johnston*, 892 S.W.2d 435, 439 (Tex. App.—San Antonio 1994, no writ) (improper to issue turnover order against non-judgment debtor); *with Lozano v. Lozano*, 975 S.W.2d 63, 68 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (turnover statute allows a court to reach assets owned by and subject to control of a judgment debtor, even in the hands of a third party); *Dale v. Finance Am. Corp.*, 929 S.W.2d 495, 498 (Tex. App.—Fort Worth 1996, no writ) (turnover order can be issued to third party holding property under the control of the judgment debtor); *Plaza Court, Ltd. v. West*, 879 S.W.2d 271, 277 (Tex. App.—Houston [14th Dist.] 1994, no writ) (court, in dicta, said that turnover statute can be brought against a non-judgment creditor if the property is subject to the possession or control of the judgment debtor).

- J. **WAIVER OF CITATION.** Under TCP&RC §30.001, a person may not, by instrument executed before suit is filed, accept service, waive process, enter an appearance or confess a judgment. Family Code § 161.103(c) creates an exception for an affidavit of relinquishment in a suit to terminate the parent-child relationship. Section 30.0001 cannot be used to collaterally attack a final judgment. *Northcutt v. Jarrett*, 585 S.W.2d 874, 876 (Tex. App.—Amarillo), *writ ref’d n.r.e.*, 592 S.W.2d 930 (1979).

- K. **WIRETAPPING.**

1. **Statutes.** Both federal and Texas statutes prohibit the electronic interception of a voice communication unless at least one party to the communication knows of and consents to the interception at the time of interception. 18 U.S.C.A. §§ 2510 et seq.; TCP&RC § 16.02.

Both the federal statute and TCP&RC § 123.001 ("Interception of Communication") recognize a cause of action for such illegal behavior, with statutory damages of (i) up to \$100 per day for a maximum of \$10,000 (federal) or (ii) \$10,000 (Texas law) damages per incident, plus actual damages in excess of \$10,000, etc. The application of the federal and state statutes was exhaustively examined in *Peavy v. WFAA-TV, Inc.*, 221 F.2d 158 (5th Cir. 2000). Among other things, *Peavy* indicates that a client's disclosure of the content of illegally-made tapes to an attorney is prohibited by the statute. An exception is recognized for attorney-client discussions that occur in the context of a suit or prosecution over the tapes in question.

2. Admissibility. An issue arises as to whether an illegally-intercepted communication can be used in a civil court proceeding. In *Turner v. P.V. Int'l. Corp.*, 765 S.W.2d 455, 469-70 (Tex. App.--Dallas 1988), writ denied, 778 S.W.2d 865 (Tex. 1989) (per curiam), the court of appeals held that the Federal anti-wiretapping statute precludes admission of tapes of telephone conversations that were recorded in violation of the statute. In that case the Supreme Court, by per curiam opinion, stated that it was reserving its judgment regarding the illegality and admissibility of wiretap tapes. See *Fabian v. Fabian*, 765 S.W.2d 516, 518 (Tex. App.--Austin 1989, no writ) ("fruit of the poisonous tree" argument rejected because information came from sources other than wiretap); *Kortla v. Kortla*, 718 S.W.2d 853, 855 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.) ("tape recordings, even if obtained without the consent of a party to it, are admissible if the proper predicate is laid"). In *Collins v. Collins*, 904 S.W.2d 792 (Tex. App.--Houston [1st Dist.] 1995), writ denied, 923 S.W.2d 569 (Tex. 1996) (per curiam), the First Court of Appeals sitting en banc reversed a divorce and custody case in which the court-appointed mental health expert had listened to tape-recordings of conversations that the court of appeals believed had been illegally recorded. The Court held that illegally-taped recordings cannot be used in a civil proceeding.

3. Exception for Family Home? There is disagreement among the courts as to whether the federal statute prohibits one spouse from surreptitiously tape-recording the other spouse in the family home. The Fifth Circuit Court of Appeals said no, in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), cert. denied, 419 U.S. 897 (1974), and the Second Circuit Court of Appeals agreed. See *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977). Other courts disagree, and say that the behavior is illegal as between spouses in the family home. See *Pritchard v. Pritchard*, 732 F.2d 372 (4th Cir. 1984); *U.S. v. Jones*, 542 F.2d 661 (6th Cir. 1976). The El Paso Court of Appeals, in *Duffy v. State*, 33 S.W.3d 17, 24 (Tex. App.--El Paso 2000, no pet.), affirmed a conviction where a divorcing husband connected a tape recorder to the telephone in his own home, and recorded his wife talking on the telephone. The Court of Appeals rejected the husband's argument that placing of a device on one's own telephone, even if the device records the telephone conversations of the person's spouse, should not be a violation of the Texas statute. Thus, the *Simpson* exception was not recognized for the state statute.

L. WITNESSES.

1. Fees. Under TCP&RC § 22.001, a witness is entitled to a fee of \$10.00 for each day he attends court. The first day's fee must be paid when the subpoena is served. Witness fees are to be taxed as costs of court. Attorney General Opinion No. DM-342 (4-7-95) says the fee must be paid for a subpoena to testify anywhere, not just the courthouse. Tex. R. Civ. P. 176.7 provides that a court may order that a witness subject to a subpoena be compensated for "undue hardship."
2. Subpoena Distance. Under TCP&RC § 22.002, subpoena power extends 150 miles "from a county in which a suit is pending." Tex. R. Civ. P. 176.3 (a) has the same 150-mile limitation. However, if the subpoena is in connection with a deposition, the 150-mile limitation does not apply to a party, or a witness "retained by, employed by, or otherwise subject to the control

of” a party. *See* Tex. R. Civ. P. 176.3(a) & 199.3.

3. **Document Production Fee.** Under TCP&RC §22.004, a custodian of the records who receives a request to produce or certify a record under subpoena, request for production, or other process, is entitled to a fee of \$1.00, to be paid at the time the subpoena or request is served. This cost is to be taxed as costs. The fee is independent of any other fee required by law. Tex. R. Civ. P. 105.3(f) provides that a non-party is entitled to be reimbursed “the nonparty’s reasonable costs of production” of records required by a subpoena or request for production.

M. MISCELLANEOUS PROVISIONS.

- * TCP&RC § 30.011 permits litigants to request, by electronic means, the issuance of a subpoena.
- * TCP&RC § 30.012 permits courts, by agreement of the parties, to conduct part of a court proceeding through electronic means, including satellite transmission, closed-circuit television, etc. However, witness testimony can be conducted in this manner only if the witness is deposed prior to trial.
- * TCP&RC § 30.016 provides for the imposition of attorneys’ fees where a “tertiary recusal motion” to recuse or disqualify a judge is denied.
- * TCP&RC § 30.017 provides that, if a litigant files a lawsuit against the judge presiding over a pending case, the claim must be made under oath, and cannot be premised solely on court rulings in the case. The claim is automatically severed and will be assigned to another judge to hear.
- * TCP&RC § 31.001 says that a judgment can pass title to land or personalty without additional action by the party who lost the judgment.

- * TCP&RC § 81.002 creates a cause of action for “sexual exploitation,” saying that “[a] mental health services provider is liable to a patient or former patient of the mental health services provider for damages for sexual exploitation if the patient or former patient suffers, directly or indirectly, a physical, mental, or emotional injury caused by, resulting from, or arising out of: (1) sexual contact between the patient or former patient and the mental health services provider; (2) sexual exploitation of the patient or former patient by the mental health services provider; or (3) therapeutic deception of the patient or former patient by the mental health services provider.

VI. CORPORATIONS AND LLCs.

- A. **BUSINESS CORPORATION ACT.** The Texas Business Corporation Act (TBCA) governs Texas corporations. Service of process can be effected through the president, any vice-president, and the registered agent of the corporation. TBCA art. 2.11. The issuance of shares is governed by Article 2.12. Stock options are authorized in art. 2.14-1. Consideration for issuance of shares is as prescribed by the board of directors, but consideration must be in the form of cash July 20, 2004, promissory notes, services performed, contracts for services to be performed, other securities of the corporation, or securities of any other corporation, domestic or foreign, or other entity, and can be issued pursuant to a plan of conversion or plan of merger. TBCA art. 2.16. “Shares may not be issued until the full amount of the consideration, fixed as provided by law, has been paid or delivered as required in connection with the authorization of the shares.” TBCA art. 2.16. There is no requirement that \$1,000 in capital be paid in prior to starting into business but, in the event it is not, directors who assent are jointly and severally liable for the corporation’s required capital contributions. TBCA art. 2.41(A)(2). Restrictions on transfer of corporate stock are governed by TBCA art. 2.21. Mergers are governed by Part 5 of the TBCA. Conversion from a domestic corporation into a foreign corporation or other entity is governed by TBCA § 5.17-ff.

B. LIMITED LIABILITY COMPANIES. In 1991,

Texas adopted a statute recognizing limited liability companies. *See* the Texas Limited Liability Company Act, Tex. Rev. Civ. Stat. Art. 1528n. According to SMU Law School Professor Alan Bromberg, that “statute [was] patterned partly on the [Texas Business Corporation Act] and otherwise on [Texas Revised Limited Partnership Act]’s limited partnership features designed to achieve taxation as a partnership rather than a corporation.” Alan R. Bromberg, *Texas Business Organization and Commercial Law—Two Centuries of Development*, 55 SMU L. Rev. 83, 124 (2002).

C. MISCELLANEOUS CORPORATE LAWS. According to Miscellaneous Corporation Law Act (MCLA), married women can be shareholders, officers and directors of a corporation and may sign corporate instruments without the joinder of their husbands. MCLA art. 1302-2.01.

D. PROFESSIONAL ASSOCIATION ACT. Professionals can incorporate under the Professional Association Act (PAA). All members must be licensed in the field. PAA art. 1528f, §2(B). Shares or units are transferrable to persons similarly-licensed. PAA art. 1528f, § 10.

VII. ELECTION CODE.

Tex. Elec. Code § 253.155 (b) sets out limits on contributions to judicial candidates. Under Tex. Elec. Code § 253.155(a), a judicial candidate or officeholder may not knowingly accept political contributions from a person that in the aggregate exceed the limits prescribed by Subsection (b). Subsection (b) sets the contribution limits at: (1) \$5,000 for a statewide judicial office; or for (2) for any other judicial office, (A) \$1,000, if the population of the judicial district is less than 250,000; (B) \$2,500, if the population of the judicial district is 250,000 to one million; or (C) \$5,000, if the population of the judicial district is more than one million. For purposes of this section, a contribution by a law firm whose members are each members of a second law firm is considered to be a contribution by the

law firm that has members other than the members the firms have in common.

The foregoing restriction does not apply to a political contribution made by a general-purpose committee. *Id.*, subsection (c). A “general-purpose committee” means a political committee that has among its principal purposes: (A) supporting or opposing (i) two or more candidates who are unidentified or are seeking offices that are unknown; or (ii) one or more measures that are unidentified; or (B) assisting two or more officeholders who are unidentified. Tex. Elec. Code §251.001(14) (“Definitions”).

Tex. Elec. Code § 253.157 sets out limits on contributions by a law firm or member or general-purpose committee of a law firm. Under § 253.157, a judicial candidate or officeholder or a specific-purpose committee for supporting or opposing a judicial candidate may not accept a political contribution in excess of \$50 from a person if: (1) the person is a law firm, a member of a law firm, or a general-purpose committee established or controlled by a law firm; and (2) the contribution when aggregated with all political contributions accepted by the candidate, officeholder, or committee from the law firm, other members of the law firm, or a general-purpose committee established or controlled by the law firm in connection with the election would exceed six times the applicable contribution limit under Section 253.155. A candidate receives a political contribution that violates Subsection (a) must return the contribution to the contributor not later than the later of: (1) the last day of the reporting period in which the contribution is received; or (2) the fifth day after the date the contribution is received. If the political contribution is not returned as required by Subsection (b), the candidate is liable for a civil penalty not to exceed three times the total amount of political contributions accepted from the law firm, members of the law firm, or general-purpose committees established or controlled by the law firm in connection with the election.

Tex. Elec. Code § 253.157 has an aggregation rule for law firms and PACs of law firms. Each

contribution is aggregated with all political contributions accepted by the candidate, officeholder, or committee from the law firm, other members of the law firm, or a general-purpose committee established or controlled by the law firm in connection with the election, and the statute is violated when the aggregate total exceeds six times the applicable contribution limit under Section 253.155.

VIII. FINANCE CODE.

A. PRE- AND POST-JUDGMENT INTEREST.

1. **Pre-Judgment Interest on Contracts.** In case of a contract, where the parties have not agreed on a rate of interest, the creditor may charge six percent a year on the principal amount of the credit extended, beginning on the 30th day after the date on which the amount is due. Tex. Finance Code §302.002. The statute applies when the contract (1) provides the conditions on which liability depends and also (2) fixes a measure that can be used to ascertain the sum payable with reasonable certainty. *See Great Am. Ins. Co. v. North Austin Mun. Util. Dist.*, 950 S.W.2d 371, 372-73 (Tex. 1997). The *Great American* case also held that section 302.002 may apply “even if extrinsic evidence is needed to quantify contract damages . . .” *Id.* at 373.
2. **Pre-Judgment Interest On Common Law Claims.** The Texas Finance Code prescribes prejudgment interest for claims of wrongful death, personal injury, property damage, and condemnation. See Tex. Fin. Code §§ 304.102, 304.201. The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment. *Id.* § 304.103. Prejudgment interest accrues on the amount of a judgment “during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered.” Prejudgment interest is computed as simple interest and does not compound. *Id.* § 304.104. Prejudgment interest may not be assessed or recovered on an award of future damages. *Id.* § 304.1045. If the judgment ultimately is less than or equal to the

amount of defendant’s settlement offer, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted. If the judgment obtained is more than the amount of the defendant’s settlement offer, prejudgment interest does not accrue on the amount of the settlement offer during the period that the offer may be accepted. *Id.* § 304.105.

Prejudgment interest for other tort claims is governed by the common law. In *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 531 (Tex. 1998), the Court held that “under the common law, prejudgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed.” The interest is simple interest, not compound interest. *Id.*

3. **Post-Judgment Interest on Judgments.** In contract cases, where the contract specifies the rate of interest, then the postjudgment interest rate will be the lesser of the rate specified in the contract or 18 percent per year. Tex. Fin. Code. § 304.002. Where the contract fails to specify the interest rate, and in tort cases, Finance Code § 304.003 provides that the postjudgment interest rate is set on the 15th day of the month by the Texas Consumer Credit Commissioner, fixed at the prime rate of the Federal Reserve Bank of New York, but with a minimum of 5 percent and a maximum of 15 percent, compounded annually. *See* Tex. Fin. Code § 304.006 (re: compounded annually). That rate is to be published in the Texas Register. *Id.* § 304.004. Interest does not accrue during a period when the claimant in the trial court has secured an extension of the deadline to file an appellate brief. *Id.* § 3.04.005(b).
- B. **BANK RECORDS.** According to TCP&RC §30.007, civil discovery of customer records maintained by a financial institution is governed by Section 59.006 of the Finance Code. Under Section 59.006, a litigant seeking records of a customer of a bank, S&L, federal S&L, or trust company, must serve the institution with a record request at least 24 days before the pro-

duction deadline, and must pay the institution's reasonable costs (reproduction, postage, research, delivery and attorney's fees) of complying with the record request. The institution is free to produce the documents unless, prior to the production deadline, the customer seeks an appropriate remedy such as a motion to quash or motion for protective order, and serves a copy of such motion upon the institution and the requesting party. If the customer is not a party to the lawsuit giving rise to the document request, additional steps are necessary: the customer must give a written consent to the institution, or the requesting party must secure a court order for in camera inspection of the records. In such an event, the court may redact part of the information, and must issue a protective order prohibiting further disclosure of the records beyond what is required for litigation.

A different statute relates to credit unions. Finance Code § 125.402 provides, among other things, that a credit union, without the consent of the member, cannot produce records in connection with private litigation without a subpoena or court order.

- C. **JOINT SAVINGS ACCOUNTS.** Section 65.103 of the Texas Finance Code authorizes joint tenancy community property savings accounts between spouses. The agreement under Subsection (a) must be in writing and signed by both spouses but is not required to be acknowledged.

IX. GOVERNMENT CODE.

- A. **STATUTORY CONSTRUCTION.** When construing a statute, the court seeks to determine the Legislature's intent. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89 (Tex. 2001). There are common law rules of statutory construction, and statutory rules of statutory construction.

Common law rules of statutory construction include without limitation the following: construe statutes as written and, if possible, ascertain legislative intent from the statute's language; even for an unambiguous statute, con-

sider other factors to determine the Legislature's intent, such as the object sought to be obtained; the circumstances of the statute's enactment, the legislative history, the common law or former statutory provisions, including laws on the same or similar subjects, the consequences of a particular construction, administrative construction of the statute, and the title, preamble, and emergency provision. Always consider the statute as a whole rather than its isolated provisions. Do not give one provision a meaning out of harmony or inconsistent with other provisions. Presume that the Legislature intends an entire statute to be effective and that a just and reasonable result is intended. *Marcus Cable Assocs. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002).

Statutory rules of statutory construction are set out in Tex. Gov't Code ch. 311, the Code Construction Act. The Act applies to codes adopted or amended by the 60th and subsequent legislatures. The Act is intended as a guide to statutory interpretation. Gov't Code § 311.003. The Code contains rules of construction such as: "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage"; or "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Id.* § 311.011. Or that "[i]n enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest." *Id.* § 311.021.

- B. **CONSANGUINITY AND AFFINITY.** Consanguinity and affinity can affect a number of things in litigation. For example, a judge cannot sit in a case involving a litigant related within the third degree of consanguinity or affinity. Tex. Gov't. Code § 21.005.

The way to calculate first, second and third degrees of consanguinity is set out in Gov't Code § 573.023(a). An individual's relatives

within the third degree by consanguinity are the individual's (1) parent or child (relatives in the first degree); (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree). *Id.* §573.023(b).

The definition of affinity is set out in Gov't Code § 573.024(a). Two individuals are related to each other by affinity if (1) they are married to each other; or (2) the spouse of one of the individuals is related by consanguinity to the other individual. *Id.* The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives. *Id.* § 573.024(b).

- C. **CONTEMPT OF COURT.** Tex. Gov't Code §21.002 sets out the power of a court to punish for contempt of court. The maximum punishment for one act of contempt of a county or district court is a fine of not more than \$500 or confinement in the county jail for not more than six months, or both. A lawyer held in contempt by a trial court, upon proper motion, must be released on his own personal cognizance. The presiding administrative district judge must assign another judge to hear the guilt or innocence of the cited lawyer. This restriction only applies to criminal contempt, not to coercive contempt to force compliance with a court order. The Family Code chapter on enforcement applies where the contempt is for non-payment of child support. Except for failure to pay child support, a person may not be confined for (1) criminal contempt of court for longer than 18 months for contempt arising out of the same matter; or (2) for civil contempt of court for more than the lesser of 18 months or until the person complies with the court order that was the basis of the finding of contempt.

- D. **COURTS.** Tex. Gov't Code § 24.007 provides that the district court has the jurisdiction provided by Article V, Section 8, of the Texas Constitution. Art. V, § 8 provides:

Sec. 8. District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

Gov't Code § 24.008 provides:

The district court may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.

In *Jordan v. Crudgington*, 231 S.W.2d 641 (Tex. 1950), the Supreme Court held that Tex. Const. art. V, § 1 permits the legislature to establish nondistrict courts with authority over divorce cases concurrent with that of the district courts.

Tex. Gov't Code § 25.0003 gives statutory county courts jurisdiction over all causes and proceedings, civil and criminal, original and appellate, prescribed by law for county courts. A statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in civil cases in which the matter in controversy exceeds \$500 but does not exceed \$100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition. In counties where there is a statutory probate court, the statutory county court cannot exercise probate jurisdiction.

Chapter 25 of the Government Code, Subchapter C, contains provisions for jurisdiction of specific county courts at law in specific

counties. Many but not all county courts at law are given concurrent jurisdiction with the district courts in "family law cases and proceedings." The term "family law cases and proceedings" is defined to include "cases and proceedings involving adoptions, birth records, or removal of disability of minority or coverture; change of names of persons; child welfare, custody, support and reciprocal support, dependency, neglect, or delinquency; paternity; termination of parental rights; divorce and marriage annulment, including the adjustment of property rights, custody and support of minor children involved therein, temporary support pending final hearing, and every other matter incident to divorce or annulment proceedings; independent actions involving child support, custody of minors, and wife or child desertion; and independent actions involving controversies between parent and child, between parents, and between spouses." Tex. Gov't Code § 25.002.

- E. **FINANCIAL STATEMENTS OF PUBLIC OFFICIALS.** Gov't Code § 572.001 says that "[i]t is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest."

The statute applies to: members of the legislature; judges of the Texas Supreme Court, Court of Criminal Appeals, Court of Appeals, and district court. Section 572.032 (Public Access to Statements), provides that such financial statements are public records to be made accessible to the public. The Ethics Commission must keep for that first year the name and address of an individual requesting a financial statement within one year of its being filed. *Id.*

F. JUDGES.

1. **Judicial Disqualification.** Texas Const. art. V, §11, provides:

No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case.

To be "interested" in a case so as to be constitutionally disqualified, "the judge must have so direct an interest in the cause or matter that the result must necessarily affect him or her to his personal or pecuniary loss or gain." *Sears v. Olivarez*, 28 S.W.3d 611, 614 (Tex. App.—Corpus Christi 2000, no pet.). "Connected within such a degree as may be prescribed by law" means within the third degree by affinity (marriage) or consanguinity (blood). Tex. Gov't Code § 21.005.

These three constitutional grounds for disqualification are jurisdictional, cannot be waived, and may be raised for the first time after judgment. *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221-22 (1947). A judge who is disqualified under the constitution is without jurisdiction to rule in the case, and any judgment rendered by him or her is void. *Fry v. Tucker*, 202 S.W.2d 218, 221 (Tex. 1947). "If a judge is disqualified under the Constitution, he is absolutely without jurisdiction in the case, and any judgment rendered by him is void, without effect, and subject to collateral attack." *Zarate v. Sun Operating Ltd., Inc.*, 40 S.W.3d 617, 621 (Tex. App.—San Antonio 2001, pet. denied).

Tex. Gov't Code § 21.005 provides:

A judge or a justice of the peace may not sit in a case if either of the parties is related to him by affinity or consanguinity within the third degree, as determined under Chapter 573.

You can get good background information on disqualification in the article written by former Texas Supreme Court Justice William Wayne Kilgarlin & Jennifer Bruch, *Disqualification*

and Recusal of Judges, 17 ST. MARY'S L. J. 599 (1986).

2. **Code of Judicial Conduct.** The Texas Code of Judicial Conduct is set out in Gov't Code Title 2, Subtitle G(B).
3. **Assignment of Active, Former, Retired, or Senior Judges; Objection.** Gov't Code §§ 74.052 & 74.0544 permit a presiding administrative district judge to appoint to hear a case a judge who is: (1) an active district, constitutional county, or statutory county court judge in this state; (2) a senior judge who has consented to be subject to assignment and who is on the list maintained by the presiding judge under this chapter; (3) a former district or appellate judge, retired or former statutory probate court judge, or retired or former statutory county court judge who certifies to the presiding judge a willingness to serve and who is on the list maintained by the presiding judge as required by this chapter; (4) retired former and active appellate justices. Gov't Code § 75.001 defines "senior judge" as a judicial retiree who files, within 90 days of retirement, an election to be a judicial officer.

Under Gov't Code § 74.055, the presiding regional administrative judge must maintain a list of retired and former judges divided into specialties of criminal, civil, or domestic relation. A retired or former judge may only be assigned to a case in the judge's area of specialty. To be eligible to be named on the list, a retired or former judge must have served at least 96 months in a district, statutory probate, statutory county, or appellate court, developed substantial experience in the judge's area of specialty, and not have been driven from the bench by the Judicial Conduct Commission.

Gov't Code § 74.053 (Objection to Judge Assigned to a Trial Court) provides that the order of assignment under Chapter 74 must state whether the judge is an active, former, retired, or senior judge, and give notice, if possible, of the assignment to each attorney representing a party to the case that is to be heard in whole or part by the assigned judge. Within 7 days after

receiving actual notice of the appointment, or before the date the first hearing or trial commences, any party can object to the assignment, in which event the judge shall not hear the case. Each party to the case is entitled to only one objection under this section, except that the "one strike" rule does not apply to a defeated judge (i.e., lost his or her last primary or general election). The right to object does not apply where an active judge is assigned to the case. Notice and objection can be given by email.

- G. **JURORS.** The Government Code specifies when a juror is disqualified from sitting on a case:

§ 62.105. Disqualification for Particular Jury

A person is disqualified to serve as a petit juror in a particular case if he:

- (1) is a witness in the case;
- (2) is interested, directly or indirectly, in the subject matter of the case;
- (3) is related by consanguinity or affinity within the third degree, as determined under Chapter 573, to a party in the case;
- (4) has a bias or prejudice in favor of or against a party in the case; or
- (5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.

- H. **STATE QDROS.** Chapter 804 of the Texas Government Code provides for qualified domestic relations orders for state retirement benefits, to collect property settlement, child support or alimony. The statute parallels federal law, with its special terms.

Under § 804.001, a "domestic relations order" is a judgment or order pertaining to child support, alimony, or marital property rights, made pursuant to a domestic relations law. The DRO is "qualified" when it

related to an alternate payee's rights to receive a portion of retirement benefits. An "alternate payee" is a spouse, former spouse or child recognized by a DRO as having a right to receive a portion of the retirement benefits. The parallels to the federal concepts of QDROS are obvious.

I. CONCEALED WEAPONS. Under Gov't Code § 411.172, a person is eligible for a license to carry a concealed handgun if the person: (1) is a legal resident of this state for the six-month period preceding the date of application under this subchapter or is otherwise eligible for a license under Section 411.173(a); (2) is at least 21 years of age; (3) has not been convicted of a felony; (4) is not charged with the commission of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code, or of a felony under an information or indictment; (5) is not a fugitive from justice for a felony or a Class A or Class B misdemeanor; (6) is not a chemically dependent person; (7) is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun; (8) has not, in the five years preceding the date of application, been convicted of a Class A or Class B misdemeanor or an offense under Section 42.01, Penal Code; (9) is fully qualified under applicable federal and state law to purchase a handgun; (10) has not been finally determined to be delinquent in making a child support payment administered or collected by the attorney general; (11) has not been finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state; (12) has not been finally determined to be in default on a loan made under Chapter 57, Education Code; (13) is not currently restricted under a court protective order or subject to a restraining order affecting the spousal relationship, other than a restraining order solely affecting property interests; (14) has not, in the 10 years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony; and (15) has not made any material misrepresentation, or failed to disclose any material fact, in an application submitted pur-

suant to Section 411.174 or in a request for application submitted pursuant to Section 411.175.

X. HEALTH AND SAFETY CODE. Tex. Health & Safety Code Ann. § 611.002(a) provides that communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential, and may be disclosed only in accordance with Sections 611.004 or 611.0045. Section 611.004 permits disclosure to a person who has the written consent of the patient, or a parent if the patient is a minor, or a guardian if the patient has been adjudicated as incompetent. Section 611.0045 permits a patient to have access to the content of his/her own records, except to the extent that the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health. A denial of access must be in writing and explain the decision. The records must be released to a new professional treating the patient. Limitations on any claims, to which the records are relevant, is tolled while access is denied. Under Section 611.004(d), a person who receives information from confidential communications or records may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the person first obtained the information. Section 611.0045(b) says that a "professional may deny access to any portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health."

In *Abrams v. Jones*, 35 S.W.3d 620, 625-26 (Tex. 2000), the Supreme Court rejected the argument that Texas law gives a "parent totally unfettered access to a child's mental health records irrespective of the child's circumstances or the parent's motivation." *Id.* at 626. The Court held that "a mental health professional is not required to provide access to a child's confidential records if a parent who requests them is not acting 'on behalf of' the child." The professional must believe that the request for the records is being made for the benefit of the

child. In particular, the Supreme Court noted that “parents embroiled in a divorce or other suit affecting the parent/child relationship may have motives of their own for seeking the mental health records of the child and may not be acting “on the patient's [child's] behalf.” *Id.* at 625. The Supreme Court went on to rule that—even when a parent is acting for the benefit of a child—“a professional may nevertheless deny access to a portion of a child's records if their release would be harmful to the patient's physical, mental, or emotional health.” *Id.* at 625. The professional denying access must allow examination and copying of the record by another professional selected by the parent acting on behalf of the patient to treat the patient for the same or a related condition. Section 611.0045(e). A parent denied access to a child's records has judicial recourse. Section 611.005(a).

XI. INSURANCE CODE. The Insurance Code provides for the continuity of homeowner's insurance, despite divorce.

Art. 5.35-1. Coverages for Spouses and Former Spouses

A homeowner's policy or fire policy promulgated under Article 5.35 of this code or filed and in effect as provided by Article 5.145 of this code may not be delivered, issued for delivery, or renewed in this state unless the policy contains the following language: “It is understood and agreed that this policy, subject to all other terms and conditions contained in this policy, when covering residential community property, as defined by state law, shall remain in full force and effect as to the interest of each spouse covered, irrespective of divorce or change of ownership between the spouses unless excluded by endorsement attached to this policy until the expiration of the policy or until canceled in accordance with the terms and conditions of this policy.”

XII. OCCUPATIONS CODE. The State of Texas licenses marriage and family therapists (MFT), professional counselors (LPC), psychologists, social workers, licensed

professional counselors (LPC), medical doctors (MD), and other health care professionals.

A. MARRIAGE AND FAMILY THERAPISTS.

Chapter 502 of the Occupation Code governs marriage and family therapy, which means “providing professional therapy services to individuals, families, or married couples, alone or in groups, that involve applying family systems theories and techniques. The term includes the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems.” Occupation Code § 502.002. A “licensed marriage and family therapist” is a person who offers marriage and family therapy for compensation. A “licensed marriage and family therapist associate” means an individual who offers to provide marriage and family therapy for compensation under the supervision of a board- approved supervisor.

B. PROFESSIONAL COUNSELOR. Chapter 503 of the Occupation Code, the “Licensed Professional Counselor Act, governs the licensing of LPCs. Section 503.003 defines the “practice of professional counseling” to mean “the application of mental health, psychotherapeutic, and human development principles to: (1) facilitate human development and adjustment throughout life; (2) prevent, assess, evaluate, and treat mental, emotional, or behavioral disorders and associated distresses that interfere with mental health; (3) conduct assessments and evaluations to establish treatment goals and objectives; and (4) plan, implement, and evaluate treatment plans using counseling treatment interventions that include: (A) counseling; (B) assessment; (C) consulting; and (D) referral. The terms in this definition are themselves given a special meaning in the statute. “The term [assessment] does not include the use of standardized projective techniques or permit the diagnosis of a physical condition or disorder.” Occupation Code §503.003(b)(1). Thus, LPCs can administer the MMPI, but not the Rorschach, the Thematic Apperception Test, or a sentence completion test.

C. **PSYCHOLOGISTS.** The licensing of psychologists is governed by Chapter 501 of the Texas Occupations Code. According to Section 501.003, the practice of psychology (1) encompasses providing or offering to provide services to an individual or group, including providing computerized procedures, that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior; (2) addresses normal behavior and involves evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals or groups, as well as the psychological disorders that accompany medical problems, organizational structures, stress, and health; (3) includes: (A) using projective techniques, neuropsychological testing, counseling, career counseling, psychotherapy, hypnosis for health care purposes, hypnotherapy, and bio-feedback; and (B) evaluating and treating mental or emotional disorders and disabilities by psychological techniques and procedures; and (4) is based on: (A) a systematic body of knowledge and principles acquired in an organized program of graduate study; and (B) the standards of ethics established by the profession. As distinguished from LPCs, psychologists can administer both objective and subjective psychological tests. A psychological associate (PA) is a licensed practitioner who holds a master's degree from an accredited university or college in a program that is primarily psychological in nature. *Id.* § 501.259. A PA must practice under the supervision of a licensed psychologist.

D. **SOCIAL WORKERS.** Chapter 505 of the Occupations Code governs social workers. According to Section 505.0025, “the practice of social work is the application of social work theory, knowledge, methods, ethics, and the professional use of self to restore or enhance social, psychosocial, or biopsychosocial functioning of individuals, couples, families, groups, organizations, or communities.” The practice of social work “may include the provision of individual, conjoint, family, and group psychotherapy using the Diagnostic and Statistical Manual of Mental Disorders, the International

Classification of Diseases, and other diagnostic classification systems in assessment, diagnosis, treatment, and other activities by a person licensed under this chapter.” Under the statute, “social worker” means a person who holds any license issued by the board under Chapter 505, and includes a: “licensed baccalaureate social worker”; “licensed clinical social worker”; “licensed master social worker”; and “licensed social worker.” Tex. Occupation Code § 505.002.

E. **MEDICAL DOCTORS.** Medical Doctors are governed by Chapters 151-160 of the Occupations Code. Section 155.003 requires American-educated medical licensees to complete 60 hours of undergraduate education acceptable to the University of Texas toward a BA or BS degree, plus medical school. (Applicants educated in other countries have other requirements.) Section 159.002, “Confidential Communications,” provides that a communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, and any record of the identity, diagnosis, evaluation, or treatment of a patient, are confidential and privileged and may not be disclosed except as provided by Chapter 159. Exceptions are set out in Section 159.003, including a malpractice or license revocation proceeding brought by the patient against the doctor, a suit to collect charges for medical services, upon a signed release from the patient, etc. Section 159.005 requires a release to specify: (1) the billing records, medical records, or other information to be covered by the release; (2) the reasons or purposes for the release; and (3) the person to whom the information is to be released. The patient is entitled to withdraw the consent to the release of any information but the withdrawal of consent does not affect any information disclosed before the written notice of the withdrawal. A person receiving such information may disclose the information only to the extent consistent with the authorized purposes for which consent to release the information is obtained.. *Id.* If the physician determines that access to the information would be harmful to the physical, mental, or emotional health of the patient, s/he may

document that in the patient's file, refuse to produce the injurious portion of the records, and give the patient a written statement to that effect. Section 159.006. However, the records must be provided to a subsequent consulting physician. There are many, many more provisions governing doctors and medical practice in Texas.

XIII. PENAL CODE. The following provisions of the Texas Penal Code may be of interest to Family Lawyers.

- Force Against Child—Parent-Child (§ 9.61), says that the use of non-deadly force against a child younger than 18 years is justified if the force is used by a parent or step-parent or other person acting in loco parentis (e.g., grandparent, guardian, court-authorized guardian, or adult with express or implied parental consent), and occurs when and to the degree the actor reasonably believes is necessary to discipline or safeguard the child, or promote its welfare.
- Punishments—Sections 12.21–12.35 set out punishments, which range from Capital Felony (execution or life in prison); First Degree Felony (5-99 yrs or life in prison and fine up to \$10,000); Second Degree Felony (2-20 yrs in prison and fine up to \$10,000); Third Degree Felony (2-10 yrs in prison and fine up to \$10,000); State Jail Felony (6 mos.-2yrs in county jail and fine up to \$10,000) (unless enhanced by use of deadly weapon or prior felony conviction); Class A Misdemeanor (up to 1 yr in jail and fine up to \$4,000); Class B Misdemeanor (up to 6 mos in jail and fine up to \$2,000); Class C Misdemeanor (fine up to \$500).
- Criminal Interception—Unlawful Interception of Communications (§ 16.02, Second Degree Felony, except that manufacture of device or impeding government wiretapping is State Jail Felony) (illegal to intercept or attempt to intercept a wire, oral or other electronic communication, or to disclose such information, or knowingly or recklessly use such information; “intercept” is defined in the Code of Criminal Procedure § 18.20-1 to mean “the aural or other acquisition of the contents of a wire, oral, or electronic communication through the use of an electronic, mechanical, or other device;” “Oral communication means an oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying that expectation.” *Id.* *Duffy v. State*, 33 S.W.3d 17, 24 (Tex. App.—El Paso 2000, no pet.), held that there is no exception under Section 16.02 for interspousal wiretaps.
- Sexual Offenses—Improper Relationship Between Educator and Student (§ 21.12, Second Degree Felony) (illegal for an employee of a public or private primary or secondary school to engage in sexual relations with a student of that school) (new in 2003); Improper Photography or Visual Recording (§ 21.15, State Jail Felony) (illegal to photograph or videotape or by other electronic means visually record another, without the other person's consent, and with intent to arouse or gratify the sexual desire of any person) (new in 2003)
- Offenses Against the Family—Bigamy (§25.02 Class Misd.); Prohibited Sexual Conduct (§ 25.02, 3rd Degree Felony) (i.e., incest); interference with child custody (§ 25.03, State Jail Felony) (illegal to take or retain a child in violation of court order, or to take the child out of the district (or county for county court) when a custody suit is pending, with the intent to deprive the court of jurisdiction); Agreement to Abduct From Custody (§ 25.031, State Jail Felony) (illegal to snatch a child for a fee); Enticing a Child (§ 25.04, Class B misdemeanor, except if done with intent to commit felony against the child in which case Third Degree Felony) (illegal to entice, persuade, or take child from custodian), Criminal Nonsupport (§ 25.05, State Jail Felony) (intentionally or knowingly failing to provide support for child; inability to pay is a defense); Harboring Runaway Child (§ 25.06, State Jail Felony); Violation of Protective Order (§ 25.07, Class A Misdemeanor unless enhanced by two prior convictions in which event Third Degree Felony); Violation of hate crime order (§ 25.071, Class A Misdemeanor unless two prior violations of protective order, in which event Third Degree Felony);

Sale or Purchase of Child (§25.08, Third Degree Felony); Advertising for Placement of Child (§ 25.09, Class A Misdemeanor, unless prior conviction in which event Third Degree Felony) (illegal to advertise in public media that a person will place or provide a child for adoption).

- Offenses Against Property—Criminal Mischief (§28.03); Reckless Damage or Destruction (§28.04, Class C Misdemeanor) (illegal to recklessly damage or destroy property without the effective consent of the owner); Actor's Interest in Property (§ 28.05) (no defense that actor has in interest in the property if another has an interest the actor is not entitled to infringe).
- Theft—Theft § 31.03, ranges from First Degree Felony to Class C Misdemeanor, depending on value of property); "unlawful appropriation of property with the intent to deprive the owner of property; Unauthorized Use of Vehicle (§ 31.04, state jail felony) (illegal to operate another's boat, airplane, car without the effective consent of the owner); Actor's Interest in Property (§ 31.10) (no defense that actor has in interest in the property if another has the right of exclusive possession).
- Fraud—Forgery (§ 32.21, State Jail Felony to Class A Misdemeanor, depending on document) (illegal to forge a writing with intent to defraud or harm another); credit card abuse (§ 32.31, State Jail Felony); False Statement to Obtain Property or Credit (§ 32.32, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal to make a false or misleading written statement to obtain property or credit); Hindering Secured Creditor (§ 32.33, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal for person who has signed a security agreement or deed of trust to destroy, remove, conceal, encumber or otherwise reduce the value of the collateral with intent to hinder enforcement of the security interest or lien); Issuance of Bad Check (§32.41, Class C Misdemeanor unless for court-ordered child support, in which event Class B Misdemeanor) (illegal to issue a check knowing that there are not sufficient funds on

deposit for payment of that and all other outstanding checks); Misapplication of Fiduciary Property (§ 32.45, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal for fiduciary to misapply property he holds as a fiduciary); Securing Execution of Document by Deception (§ 32.46, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal by deception with intent to defraud to cause another to sign document affecting property or pecuniary interest); Fraudulent Destruction, Removal or Concealment of Writing (§ 32.47, Class A Misdemeanor unless a will, deed, mortgage, etc., in which event a State Jail Felony) (illegal, with intent to defraud or harm another, to destroy, remove, conceal, alter, substitute, or impair legibility of a writing, other than a governmental record).

- Computer Crimes—Breach of Computer Security (§ 33.02, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal to knowingly access a computer or computer network without the effective consent of the owner).
- Money Laundering—Money Laundering (§ 34.02, First to Third Degree Felony, depending on value) (illegal to possess, transfer, invest, etc. proceeds of illegal activity).
- Insurance Fraud—Insurance Fraud (§ 35.02, ranges from First Degree Felony to Class C Misdemeanor, depending on amount) (illegal to present false claim to insurance company).
- Offenses Against Public Administration—Tampering With a Witness (§ 36.05, State Jail Felony) (illegal to offer, confer, or agree to give a benefit to a witness in an official proceeding to, or coerce a witness to, testify falsely, withhold information, elude process, absent himself, or abstain from or discontinue criminal prosecution); Obstruction or Retaliation (§ 36.06, Third Degree Felony, except if actual harm occurred then Second Degree Felony) (harming or threatening to harm by an unlawful act in retaliation for serving as witness, informant).

- Perjury and Other Falsification—Perjury (§ 37.02, Class A Misdemeanor) (illegal to testify falsely or swear to false affidavit); Aggravated Perjury (§ 37.03, Third Degree Felony) (perjury in connection with an official proceeding, involving a material matter); Materiality (§ 37.04) (statement that could have affected the outcome of the proceeding, regardless of admissibility); Retraction (§ 37.05) (defense to Aggravated Perjury that actor retracted false statement before completion of testimony and before falsity became manifest); False Report to Police Officer (§ 37.08, Class B Misdemeanor) (illegal to knowingly make false statement material to a criminal investigation to a peace officer or employee of a law enforcement agency); False Report of Missing Child (§ 37.081, Class C Misdemeanor) (illegal to file a false report of missing child or missing person with law enforcement personnel, or to make a false statement thereof); Tampering With or Fabricating Physical Evidence (§ 37.09, Third Degree Felony or Class A Misdemeanor) (illegal to alter, destroy, conceal or fabricate a record, knowing that an investigation is pending); Tampering With Governmental Record (§ 37.10, Second or Third Degree Felony or Class B Misdemeanor) (illegal to make false entry or alternation in government record, or use false record, or destroy or conceal a government record); Fraudulent Filing of Financing Statement (§ 37.101, from Second Degree Felony to Class A Misdemeanor) (illegal to file a forged, false or groundless financing statement).
 - Obstructing Governmental Operation—Failure to Stop or Report Aggravated Sexual Assault of Child (§ 38.17, Class A Misdemeanor) (illegal to fail to assist child or immediately report aggravated assault of a child).
 - Disorderly Conduct—Disorderly Conduct (§ 42.01, Class B or C Misdemeanor) (illegal to use abusive, indecent, profane, or vulgar language, or make an offensive gesture, in public place in manner to incite an immediate breach of the peace; unreasonable noise, discharge firearm or expose genitals in public place); stalking (§ 42.072, Third Degree Felony, unless prior conviction in which event Second Degree Felony) (illegal on more than one occasion and pursuant to course of conduct directed specifically at another person to engage in conduct that the victim will regard as threatening bodily injury or death, damage to property).
 - Public Indecency—Possession or Promotion of Child Pornography (§ 43.26, Second Degree Felony) (illegal to possess or promote visual material that depict child under age 18 engaging in sexual conduct).
 - Weapons—Unlawfully Carrying Weapons (§ 46.02, Third Degree Felony if on premises that serves alcohol, otherwise Class A Misdemeanor) (illegal to carry a handgun, illegal knife or club); Unlawfully Carrying of Handgun by License Holder (§ 46.035, Third Degree Felony or Class B Misdemeanor) (illegal for license holder to fail to conceal handgun).
 - Intoxication and Alcoholic Beverages—Driving While Intoxicated with Child Passenger (§ 49.045, State Jail Felony) (illegal to drive while intoxicated with a passenger who is younger than 15 years of age) (new in 2003).
- XIV. PROBATE CODE.**
- A. INTESTATE SUCCESSION.** Texas law of intestate succession of separate property, when an unmarried person dies without a will, is set out in Probate Code §38. Under Section 38, when an unmarried person dies, his/her separate property (real and personal) descends to children, or if none, to parents, except that if only one parent survives, that parent inherits half and surviving siblings share the other half. If one parent survives and no siblings or their heirs survive, the sole surviving parent takes all. If no parent survives, then the siblings or their heirs take all. If no parents or siblings survive, then an analogous-division occurs among grandparents and their heirs.
- Under Section 38, when the decedent leaves a surviving spouse and child or children, the spouse inherits one-third of the separate personal property and the child or children the other two-thirds. The surviving spouse receives

a life estate in one-third of the separate real property, and the rest goes to the child or children. If there are no surviving children, the surviving spouse takes all separate property personalty, and one-half of the real estate. The remaining real estate passes to parents or their descendants as outlined above.

Probate Code Section 45 sets out Texas law of intestate succession of community property when a married person dies without a will. The surviving spouse takes all the community property, unless the decedent has a surviving child or children, with another parent. In that event, the surviving spouse takes only half of the community property, and the child or children who are not descendants of the surviving spouse take the other half. The descendants shall inherit only such portion of the property to which they would be entitled under Section 43 (per capita vs. per stirpes).

- B. **JURISDICTION.** Tex. Probate Code § 5B permits a judge of a statutory probate court to transfer to itself from another county court or district court a cause of action "appertaining to or incident to an estate pending in the statutory probate court." *In re Swept, L.P.*, 85 S.W.3d 800, 801 (Tex. 2002); see *In re Ramsey*, 28 S.W.3d 58, 62-63 (Tex. App.--Texarkana 2000, orig. proceeding) ("Section 5B's purpose is to allow consolidation of all causes of action incident to an estate in the statutory probate court in order to promote efficient administration of estates and judicial economy").
- C. **REQUISITES OF A WILL.** Under Probate Code § 59, a last will and testament must be "in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two or more credible witnesses above the age of fourteen years who shall subscribe their names thereto in their own handwriting in the presence of the testator." Section 59 provides for "self proving affidavits."
- D. **JOINT AND MUTUAL WILLS.** Probate Code § 59(a) provides that a contract to make a will

or devise can be established only by provisions in a will stating that the contract exists and the material provisions of the contract. The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

- E. **WILL IS NOT EFFECTIVE UNTIL PROBATED.** Probate Code § 94 provides that title doesn't pass to the heirs under a will until the will is probated. Consequently, if relying on documents to prove up an inheritance, obtain not only the will but also the order admitting the will to probate.
- F. **FAMILY ALLOWANCE.** The Texas Probate Code provides for a family allowance, in appropriate cases, for the support of the surviving spouse and minor children of the deceased during the first year after the deceased's death. Tex. Prob. Code §286. The amount of the allowance is addressed to the trial court's discretion. *San Angelo Nat. Bank v. Wright*, 66 S.W.2d 804, 805 (Tex. Civ. App.--Austin 1934, writ ref'd). "The allowance shall be fixed with regard to the facts or circumstances then existing and those anticipated to exist during the first year after such death." Tex. Prob. Code § 287. "No such allowance shall be made for the surviving spouse when the survivor has separate property adequate to the survivor's maintenance; nor shall such allowance be made for the minor children when they have property in their own right adequate to their maintenance." Tex. Prob. Code §288.
- G. **HOMESTEAD RIGHTS OF SURVIVING SPOUSE.** In Texas, a surviving spouse may occupy the homestead during the spouse's lifetime without it being partitioned to the heirs of the deceased spouse until the survivor's death. Tex. Const. art. XVI § 52; Tex. Prob. Code § 272 & 284.
- H. **PARTITION OF COMMUNITY PROPERTY AFTER DEATH.** Probate Code Section 385 governs the partitioning of community property in a decedent's estate. Under § 385, upon the death of a spouse and after letters testamentary have issued and an inventory filed, the surviving

spouse can apply to the court for partition of community property. If the applicant posts a bond for the value of one half of the survivor's interest in the community property, and for the benefit of creditors, then "the court shall proceed to make a partition of said community property into two equal moieties, one to be delivered to the survivor and the other to the executor or administrator of the deceased." A lien arises to secure the payment of the bond.

I. SURVIVORSHIP RIGHTS IN COMMUNITY PROPERTY.

1. Applicable law. Survivorship rights in community property are governed by the Texas Probate Code § 451 et seq. However, savings accounts are covered in the Texas Finance Code § 65.103.

2. Statutory Provisions.

- a. **Joint Tenancies.** Under Probate Code §36, "Joint Tenancies," a dying person's interest in jointly-held property, passes to the dying owner's heirs unless by written agreement a survivorship right is created. The statute provides that this section does not apply to agreements between spouses for survivorship rights in community property. Those agreements are governed by Probate Code ch. XI.
- b. **Community Property Survivorship Rights.** Under Probate Code § 451, Right of Survivorship, "[a]t any time, spouses may agree between themselves that all or part of their community property, then existing or to be acquired, becomes the property of the surviving spouse on the death of a spouse." Such an agreement must be in writing and signed by both spouses, Id. §452. Section 452 lists "magic language" that signifies survivorship including: (1) "with right of survivorship"; (2) "will become the property of the survivor"; (3) "will vest in and belong to the surviving spouse" or (4)"shall pass to the surviving spouse." However, other words can suffice to signify

survivorship. Under § 453 (Ownership and Management During Marriage), a survivorship agreement does not affect the rights of the spouses concerning management, control, and disposition of the property unless the agreement provides otherwise. Under § 454 (Transfers Nontestamentary), passing of ownership upon death is not a testamentary transfer. Under § 455 (Revocation), a community property survivorship agreement can be revoked in accordance with the terms of the agreement. If the agreement does not provide a method for revocation, the agreement may be revoked by a written instrument signed by both spouses or by a written instrument signed by one spouse and delivered to the other spouse. Disposing of an asset revokes the survivorship rights unless the agreement or applicable law provide otherwise. Sections 456 - 459 tell how and where to obtain judicial recognition of a community property survivorship agreement, and to demonstrate the effect of the agreement to third parties. Section 460 describes the effect of notice and lack of notice of an agreement or third parties.

In contrast to premarital agreement, spousal partition agreements, and spousal separate property income agreements, there are no stated statutory defenses to community property survivorship agreements. The proponent can enforce the agreement upon proof of death, etc., and by proving "that the agreement was executed with the formalities required by law." Tex. Prob. Code § 456(b). These "formalities" are a written agreement signed by both parties. See Tex. Prob. Code § 452.

Section § 462, "Coordination With Part 1 of Chapter XI," provides that the provisions of Part 1 of this chapter apply to multiple-party accounts held by spouses with a right of survivorship to the extent that such provisions are not inconsistent with the provisions of this part."

XV. PROPERTY CODE.

- A. TITLE EXAMINERS.** There is a helpful set of marital property rules in the Texas Property Code, Title 2 (Conveyances), Appendix, Ch. IV (Marital Interest). The rules are set out below. The rules are accompanied by comments, not set out below, discussing case law relating to the basic propositions of Texas marital property law.

Standard 14.10. Community Property Presumption

Except as otherwise provided in this Chapter, an examiner must presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses.

Standard 14.20. Gifts, Devise And Descent

An examiner must consider property acquired during marriage by gift, devise or descent to be the acquiring spouse's separate property. Where the grantor's donative intent is clearly demonstrated on the face of the deed, an examiner may presume the property conveyed to be the grantee's separate property.

Standard 14.30. Conveyances Between Spouses

An examiner must consider property conveyed by one spouse to another to have become the grantee's separate property regardless of whether consideration is recited. However, effective January 1, 2000, a conveyance or agreement signed by both spouses may convert separate property to community property if such intention is specified.

Standard 14.40. Separate Property Consideration

If an examiner determines that the consideration for a conveyance came from a married grantee's separate estate, the com-

munity property presumption is rebutted, and the examiner should consider the property to be the grantee's separate property. For example, an examiner without knowledge of contrary evidence may rely on a recital in the deed (1) that the consideration was paid out of the grantee's separate property, or (2) that the property is conveyed to the grantee as separate property.

Standard 14.50. Community Property Presumption May Be Rebutted By Showing Of Domicile In Common Law Jurisdiction

An examiner may consider the community property presumption to be rebutted if it is shown the acquiring spouse was domiciled in a common law jurisdiction at the time of acquisition and if there is no indication that community funds or credit were used in the purchase.

Standard 14.60. Necessity For Joinder When Community Property Is In Name Of Both Spouses

If property is acquired during marriage by a deed naming both spouses as grantees, an examiner may not give effect to a subsequent conveyance of the property unless (1) it is joined by both spouses or (2) it was made by the husband before January 1, 1968, and did not convey homestead property.

Subject to Standard 14.90, where community property has been acquired in the name of only one spouse, an examiner may rely on the grantee's authority to execute a subsequent conveyance as grantor, without joinder of the other spouse; however, the examiner should not pass a conveyance of community property held in the name of the wife made before January 1, 1968, without the husband's joinder or consent.

Standard 14.70. Necessity For Joinder When Community Property Is In Name Of Only One Spouse

Where the examiner is not aware that the grantor was married at the time of acquisition, the examiner need not inquire into the possible existence of a spouse's community property interest. The examiner should not infer that the grantor was married at the time of acquisition merely from a recital that the grantor is a widow or a widower.

Standard 14.80. No Presumption Of Marriage

If the property conveyed is or may be the homestead of married persons, whether community property or separate property, an examiner must require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.

Standard 14.90. Homestead

Absent a conveyance or agreement between the parties providing otherwise or a judicial decree imposing an equitable lien, the examiner must treat the separate property of each spouse as unaffected by a divorce or annulment. The examiner must examine the judgment of dissolution and any accompanying property settlement agreement for their effect on community property. Community property not divided by the court or by the spouses is owned equally by the former spouses as tenants in common.

Standard 14.100. Divorce Or Annulment

An examiner should identify all liens, both contractual and statutory, relevant to the interests under examination and advise the client regarding any actions that are appropriate to the purpose of the examination. An examiner need not identify a lien that is barred by limitations or is otherwise unenforceable.

- B. HOMESTEAD.** Prop. Code § 41.001(a) provides that “A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead

property.” Proper liens include: purchase money mortgage; ad valorem taxes on the property; liens for work and material used in constructing improvements on the property if contracted for in writing as required by law; an owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding; a lien securing the refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead is a family homestead, or from the tax debt of the owner; a proper home equity loan; or a reverse mortgage meeting constitutional requirements. *See* Tex. Const. art. XVI, § 50.

Under Prop. Code § 41.002, an “urban homestead” consists of up to 10 acres of land, which need not be in contiguous lots. A “rural homestead” is up to 200 acres, which need not be in one parcel. Both homestead include all improvements thereon. A homestead is urban if, at the time the designation is made, the property is (1) located within the limits of a municipality or its extraterritorial jurisdiction or a platted subdivision; and (2) served by police protection, paid or volunteer fire protection, and at least three utility services. *See* Tex. Const. art. XVI, § 51.

Prop. Code Ch. 41 also contains provisions relating to temporary renting of a homestead, abandonment of a homestead, voluntary designation of homestead, disclaimer and disclosure required, certain sales of homestead, and home improvement contracts.

- C. EXEMPT PERSONAL PROPERTY.** Prop. Code § 42.001 exempts from creditor's claims personal property for a family up to an aggregate fair market value of \$60,000, exclusive of the amount of any liens, security interests, or other charges encumbering the property; or \$30,000 for a single adult. Additionally, the following assets are exempt, and are not included in the \$30,000 and \$ 60,000 caps just discussed: current wages for personal services

(except for the enforcement of court-ordered child support payments); professionally prescribed health aids of a debtor or a dependent of a debtor; and alimony, support, or separate maintenance received or to be received by the debtor for the support of the debtor or a dependent of the debtor; unpaid commissions for personal services not to exceed 25% of the aggregate limitations. These exemptions do not apply to creditors with valid liens in the property.

Prop. Code § 42.002 lists the personal property protected under Section 42.001. The list includes: home furnishings; provisions for consumption; farming or ranching vehicles and implements; tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession; wearing apparel; jewelry not to exceed 25 percent of the aggregate limitations prescribed by Section 42.001(a); two firearms; athletic and sporting equipment, including bicycles; one motor vehicle for each member of a family; etc.

Prop. Code § 42.0021 ("Additional Exemption for Retirement Plan), exempts from creditors' claims any assets held by, or the right to receive payments from, a stock bonus plan, pension plan, profit-sharing plan, retirement plan for self-employed individuals, or under an annuity purchased with assets distributed from such a plan, and IRA, an individual retirement annuity, SEP, etc. However, excess contributions to an IRA (other than a Roth IRA), and the earnings thereon, are not exempt. Distributions from such plans that qualify for non-taxable rollover are exempt from creditors' claims for 60 days. *Lozano v. Lozano*, 975 S.W.2d 63, 67 (Tex. App.--Houston [14th Dist.] 1998, pet. denied) ("[E]vidence that an account is an individual retirement annuity is sufficient to establish that it is exempt unless evidence is presented that the IRA does not qualify for such treatment under the IRC"). Prop. Code § 42.0022, creates an exemption for Texas College Savings Plans. Prop. Code § 42.005 provides that the exemptions do not apply to child support liens.

D. LIS PENDENS.

1. **Filing and Cancelling Notice of Lis Pendens.** Prop. Code § 12.007 provides for lis pendens. At common law, the mere pendency of a law suit affecting title to land resulted in all transactions in the land being subject to the outcome of the suit. The Legislature supplanted that rule with the lis pendens statute. *Fannin Bank v. Blystone*, 417 S.W.2d 502, 503 (Tex. Civ. App.--Waco, 1967), *writ ref'd n.r.e.*, 424 S.W.2d 626 (Tex. 1968). Under Prop. Code § 12.007, a party seeking affirmative relief in an action involving title to real property can file with the county clerk a lis pendens notice, identifying the suit and the property in question. This notice gives constructive notice to all persons who thereafter acquire an interest in the land, making their interest subject to the outcome of the law suit. Prop. Code § 13.004; *Cherokee Water Co. v. Advance Oil & Gas Co.*, 843 S.W.2d 132, 135 (Tex. App.--Texarkana 1992, writ denied) ("The rule effectively prevents a grantee from being an innocent purchaser"); *Gene Hill Equip. Co. v. Merryman*, 771 S.W.2d 207, 209 (Tex. App.--Austin 1989, no writ) (the underlying purpose of a lis pendens is to put those interested in a particular tract of land on inquiry as to the facts and issues involved the suit or action concerned). Under Prop. Code § 12.008, the lis pendens can be cancelled by filing a motion in the court hearing the action. The cancellation may be predicated on depositing money in court, in the amount of the judgment sought, plus interest, plus costs. If a bond is given, it must be in twice the amount of the judgment sought, and have two acceptable sureties.
2. **Is Divorce a Special Case?** In *Fannin Bank v. Blystone*, 417 S.W.2d 502, 503 (Tex. Civ. App.--Waco, 1967), *writ ref'd n.r.e.*, 424 S.W.2d 626 (Tex. 1968), the court of appeals stated that, even in the absence of a notice of lis pendens under the lis pendens statute, the Family Code provision relating to fraudulent transfers during a divorce gave lis pendens effect to the mere pendency of a divorce, so that persons who purchased property at a foreclosure sale under a deed of trust given by the husband on community property, were on notice of the divorce and

were not protected from the wife's claim of fraud that nullified the deed of trust. The Supreme Court denied review, with a per curiam opinion noting evidence sufficient to support a finding that the purchaser at the foreclosure sale had actual notice of the wife's interest in the real estate which was in litigation, and that "[i]t is therefore unnecessary in this case to determine whether the mere pendency of a divorce action renders compliance with article 6640 unnecessary." Thus, the court of appeals' language on that point is dictum. The court in *First Southern Prop., Inc. v. Gregory*, 538 S.W.2d 454, 458 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ), held that the mere pendency of a divorce action was not constructive notice of wife's rights.

3. **Management Rights and Presumptions.** If no lis pendens is filed when a divorce is filed, and a spouse alienates community property, whether the alienation is subject to the divorce depends on management rights to the property. In general, community property is subject to the "joint management, control and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement." *Jean v. Tyson-Jean*, 118 S.W.3d 1, 9 (Tex. App.--Houston [14th Dist.] 2003, pet. denied). According to *Jean v. Tyson-Jean*, "[t]o effectuate a valid conveyance, both spouses must necessarily be joined in a transaction." *Id.* at 5 (citing *Cooper v. Texas Gulf Indus., Inc.*, 513 S.W.2d 200, 202 (Tex. 1974)). Under Family Code § 3.104, community property titled in the name of one spouse is presumed to be under that spouse's sole management and control. If the property is not subject to title, then exclusive possession gives rise to the presumption. A third person dealing with that spouse can rely on the presumption unless they are party to a fraud or have actual or constructive notice of the spouse's lack of authority.
4. **Family Code Fraudulent Conveyance Provision.** Family Code § 6.707 provides that transfers of property or incurring of debt during the pendency of divorce is void with respect to the other spouse if done with the intent to injure the rights of the other spouse. This rule does not

apply if the person dealing with the transferor or debtor spouse did not have notice of the intent to injure the other spouse. The burden of proof is on the spouse seeking to set aside a transaction to prove the third party's notice.

- E. **ABSTRACTS OF JUDGMENT.** An abstract of judgment is designed to create a lien against the judgment debtor's property and to provide notice to subsequent purchasers and encumbrancers of the existence of the judgment and the lien. *Citicorp Real Estate, Inc. v. Banque Arabe Internationale D'Investissement*, 747 S.W.2d 926, 929 (Tex. App.--Dallas 1988, writ denied). Tex. Prop. Code § 52.003 requires an abstract of judgment to contain the following seven elements: (1) the names of the plaintiff and defendant; (2) the birth date and driver's license number of the defendant if available to the clerk or justice; (3) the number of the suit in which the judgment was rendered; (4) the defendant's address, or if the address is not shown in the suit, the nature of citation and the date and place of service of citation; (5) the date on which the judgment was rendered; (6) the amount for which the judgment was rendered and the balance due; and (7) the rate of interest specified in the judgment. It is the judgment creditor's responsibility to insure that the clerk abstracts the judgment properly. *Texas American Bank/ Fort Worth, N.A. v. Southern Union Exploration Co.*, 714 S.W.2d 105, 107 (Tex. App.--Eastland 1986, writ ref'd n.r.e.). Substantial compliance with the statutory requirements is mandatory before a judgment creditor's lien will attach. *Reynolds v. Kessler*, 669 S.W.2d 801, 804-05 (Tex. App.--El Paso 1984, no writ).

Compliance with the statutory requirements is mandatory before a judgment creditor's lien attaches. *Caruso v. Shropshire*, 954 S.W.2d 115, 116 (Tex. App.--San Antonio 1997, no pet.). Section 52.002 provides for the clerk of the court to prepare the abstract upon request, and permits the attorney for the judgment creditor to prepare the abstract himself or herself, as long as it is verified.

- F. **FILING JUDGMENT IN DEED RECORDS OFFICE.** Prop. Code § 12.013 permits a certi-

fied copy of a judgment to be filed with the deed record office. The issuing court can be of this state, or another state subject to the full faith and credit clause of the U.S. Constitution, or of a foreign country subject to an act of Congress or a treaty. A judgment properly recorded in the proper county is "notice to all persons of the existence of the instrument." Prop. Code 13.002.

- G. **STATUTE OF FRAUDS.** Tex. Prop. Code §5.021 requires that "[a] conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing."

H. TRUSTS.

1. **Applicable Statutes.** An express trust comes into existence by the execution of an intention to create it by one having legal and equitable dominion over the property made subject to the trust. *Mills v. Gray*, 147 Tex. 33, 210 S.W.2d 985, 987-88 (1948). Express trusts were controlled by the common law in Texas, until April 19, 1943. On that date, the Texas Trust Act went into effect. See TEX. REV. CIV. STAT. ANN. art. 7425a *et seq.* (Vernon 1960); *Land v. Marshall*, 426 S.W.2d 841, 845 (Tex. 1968). The Texas Trust Act controlled express trusts until its repeal, effective December 31, 1983. On January 1, 1984, the Texas Trust Code went into effect. See Tex. Prop. Code chs. 111-115. The old Texas Trust Act still controls the validity of trusts created while the Act was in effect, and actions taken relating to express trusts while the Act was in effect. The newer Texas Trust Code applies to trusts created on or after January 1, 1984, and to transactions relating to prior trusts, but which occur on or after January 1, 1984.
2. **Requirement of a Writing.** The Texas Trust Code provides that an express trust containing real or personal property is unenforceable unless it is created by a written instrument, signed by the settlor, containing the terms of the trust. Tex. Prop. Code § 112.004. The mere

designation of a party as "trustee" on an instrument does not alone create a trust. *Nolana Development Ass'n v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1985). Property Code § 112.004 set out two exceptions to this rule, for trusts which involve only personalty:

(1) **Personalty Transferred to Another With Intent Expressed.** Where the trust includes only personalty, the trust is enforceable if the personalty is transferred to a trustee who is not a beneficiary or settlor, and the settlor expresses the intention to create a trust, either before or at the time of the transfer. In such a situation, written evidence of the trust is not required.

(2) **Personalty Retained by Settlor With Writing Reflecting Trust.** A trust of personalty is also enforceable where an owner of personalty states *in writing* that certain personalty is held by that person as trustee for another, as beneficiary, or for himself and another, as beneficiaries. This exception applies to funds which the party has deposited in a financial institution, where the account reflects the party as "trustee" for another. See *Jameson v. Bain*, 693 S.W.2d 676 (Tex. App.--San Antonio 1985, no writ). This exception also applies to stocks, bonds, CD's, etc., carried in the name of the party "as trustee" for another. See *Citizens Nat. Bank of Breckenridge v. Allen*, 575 S.W.2d 654, 658 (Tex. Civ. App.--Eastland 1979, writ ref'd n.r.e.).

3. **Intent of Settlor.** Before there can be a trust, the settlor must intend the creation of the trust. See Tex. Prop. Code § 112.002 ("A trust is created only if the settlor manifests an intention to create a trust"); *Gonzalez v. Gonzalez*, 457 S.W.2d 440 (Tex. Civ. App.--Corpus Christi 1970, writ ref'd n.r.e.); *Tolle v. Sawtelle*, 246 S.W.2d 916, 918 (Tex. Civ. App.--Eastland 1952, writ ref'd).
4. **Merger of Legal and Beneficial Title.** The essence of an express trust is the separation of the legal title from the equitable title in property, with the trustee holding legal title and the

beneficiary holding equitable title. *Jameson v. Bain*, 693 S.W.2d 676, 680 (Tex. App.--San Antonio 1985, no writ). Whenever legal title and equitable title to trust property are joined in the same person, the two interests merge, and the property no longer in trust. The doctrine of merger is expressly set out in Tex. Prop. Code § 112.034:

[I]f a settlor transfers both the legal title and all equitable interests in property to the same person or retains both the legal title and all equitable interests in property in himself as both the sole trustee and the sole beneficiary, a trust is not created and the transferee holds the property as his own Except as provided by subsection (c) of this section, a trust terminates if the legal title to the trust property and all equitable interests in the trust become united in one person.

Tex. Prop. Code § 112.034. Subsection (c) provides that merger cannot occur for the beneficiary (other than the settlor) of a spendthrift trust, and that if such occurs, the court must appoint a new trustee or co-trustee to administer the trust.

XVI. REVISED PARTNERSHIP ACT & REVISED LIMITED PARTNERSHIP ACT.

- A. **REVISED PARTNERSHIP ACT.** The Texas Revised Partnership Act (TRPA) became effective on September 1, 1994, and replaced the long-standing Texas Uniform Partnership Act (TUPA). Under TRPA, a partnership is an entity separate and apart from the partners. TRPA art. 6132-b-2.01 (Partnership as Entity). In all but a few areas, the partnership agreement controls the relations of the partners. TRPA art. 6132b-1.03(a) & (b) (e.g. can't unreasonably restrict partner's right to look at books and records, can't eliminate duty of loyalty, etc.). Where the partnership agreement is silent, the TRPA applies. TRPA art. 6132b-1.03(a). TRPA applies to limited partnerships to the extent the Texas Revised Limited Partnership Act does not apply. TRLPA art. 6132a-

1, §13.03(a). Conversions from general to limited partnerships, and mergers of partnerships, are discussed in TRLPA art. 6132-b, art. IX.

- B. **PARTNERSHIPS, COMMUNITY PROPERTY, AND DIVORCE.** A partnership interest can be community property, but specific assets of the partnership cannot, and the partner's right to participate in management cannot. TRPA art. 6132b, §§4.01, 5.02(a), 5.03(a)(4). *In re SWEPI, L.P.*, 85 S.W.3d 800, 807 (Tex. 2002) ("in the Texas Revised Partnership Act, which applies to all partnerships after December 31, 1998, a partner is not a co-owner of partnership property"). The court in a divorce cannot award a community property partnership interest to the non-partner spouse. *McKnight v. McKnight*, 543 S.W.2d 863, 868 (Tex. 1976) (see below). The court can, however, give the non-partner spouse a community property assignee's interest in the partnership. (See below) Even where the spouse's partnership interest is community property, the court in a divorce cannot award specific partnership assets to the non-partner spouse. (See below). Two recent cases say that you cannot "pierce the veil" of a partnership, like you can a corporation. *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*, 77 S.W.3d 487, 499-500 (Tex. App.--Texarkana 2002, pet. denied) (see below); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex. App.--San Antonio 2001, pet. denied) (see below). In proving the existence of a partnership, the mere fact of "co-ownership of property, whether in the form of joint tenancy, tenancy in common, tenancy by the entireties, joint property, community property, or part ownership, whether combined with sharing of profits from the property," by itself, does not indicate that a person is a partner in the business." TRPA art. 6132b-2.03.
- C. **LIMITED PARTNERSHIPS.** The Texas Revised Limited Partnership Act (TRLPA). Art. 6132a-1, became effective on September 1, 1997. A partner has no interest in specific partnership property. TRLPA art. 6132-b-7.01. A partner's interest in a limited partnership can be assigned. TRLPA art. 6132-b-7.02. An assignee

can become a limited partner (1) if the partnership agreement so provides, or (2) if all partners consent. TRLPA art. 6132-b-7.04(a). Permissible contributions to acquire an interest in a limited partnership including any tangible or intangible benefit to the limited partnership or other property of any kind or nature, including: cash; a promissory note; services performed; a contract for services to be performed; and interests in or securities of the limited partnership, or interests in or securities of any other limited partnership, domestic or foreign, or other entity. TRLPA art. 6132-b-5.01.

D. STATUTES AND CASE LAW.

1. Tex. Rev. Partnership Act art. 6132b-5.01. Partner's Interest in Partnership Property not Transferable

A partner is not a co-owner of partnership property and does not have an interest that can be transferred, either voluntarily or involuntarily, in partnership property.

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This section provides that a partner is not a co-owner of partnership property and has no interest in partnership property that can be transferred, either voluntarily or involuntarily. This abolishes the TUPA § 25(1)'s concept of tenants in partnership and reflects the adoption of the entity theory of partnership. Partnership property is owned by the entity and not by the individual partners. This is consistent with Section 2.04, which states that partnership property is not property of the partners. TRPA also deletes the references contained in TUPA §§ 24 to 25 to a partner's "right in specific partnership property." Although Section 5.01 uses significantly different language and concepts from

those of TUPA §§ 24 to 25, there is no significant substantive change from TUPA; the TRPA language primarily simplifies and clarifies the results under TUPA.

This section also has the effect of protecting partnership property from execution or other process by a partner's personal creditors. These creditors may seek to enforce any rights they may have against the partner's partnership interest, but not against partnership property.

A corollary of this section is that a partner's spouse has no community property right in partnership property, the same as in TUPA §28-A(1).

2. Art. 6132b-5.02. Nature of Partner's Partnership Interest

(a) **Personal Property.** A partner's partnership interest is personal property for all purposes. A partner's partnership interest may be community property under applicable law.

(b) **Certificate Evidencing Interest.** * *

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Subsection (a) states that a partner's partnership interest is personal property for all purposes (as in TUPA § 26) and retains the concept of TUPA § 28-A(2) that the partnership interest may be community property. The extent of a partner's partnership interest is defined in Section 1.01(12) and includes the partner's share of profits and losses, or similar items, and the right to receive distributions. A partner's partnership interest does not include the partner's right to partici-

pate in management of the partnership. It follows that a partner's right to participate in management is not community property, the same as in TUPA § 28-A(3)....

3. Art. 6132b-5.03. Transfer of Partner's Partnership Interest

(a) Act of Transfer. A transfer of a partner's partnership interest:

- (1) is permissible, in whole or in part;
- (2) is not an event of withdrawal;
- (3) does not by itself cause a winding up of the partnership business; and
- (4) does not, as against the other partners or the partnership, entitle the transferee, during the continuance of the partnership, to participate in the management or conduct of the partnership business.

(b) Basic Rights of Transferee. A transferee of a partner's partnership interest is entitled to receive, to the extent transferred, distributions to which the transferor otherwise would be entitled. After transfer, the transferor continues to have the rights and duties of a partner other than the interest transferred. Until a transferee becomes a partner, the transferee does not have liability as a partner solely as a result of the transfer. For a proper purpose the transferee may require reasonable information or an account of partnership transactions and make reasonable inspection of the partnership books.

(c) Rights of Transferee on Winding Up. If an event requires a winding up of partnership business under Section 8.01, a transferee is entitled to receive, to the extent transferred, the net amount otherwise distributable to the transferor. In a winding up a transferee may require an accounting only

from the date of the latest account agreed to by all of the partners.

(d) Notice to Partnership. Until receipt of notice of a transfer, a partnership does not have a duty to give effect to a transferee's rights under this section.

(e) No Effect if Prohibited. A partnership does not have a duty to give effect to a transfer, assignment, or grant of a security interest prohibited by a partnership agreement.

4. Tex. Rev. Partnership Act art. 6132b-5.04. Effect of Death or Divorce on Partnership Interest

(a) Divorce. On the divorce of a partner, the partner's spouse, to the extent of the spouse's partnership interest, shall be regarded for purposes of this Act as a transferee of the partnership interest from the partner.

(b) Death of Partner. On the death of a partner, the partner's surviving spouse, if any, and the partner's heirs, legatees, or personal representative, to the extent of their respective partnership interests, shall be regarded for purposes of this Act as transferees of the partnership interests from the partner.

(c) Death of Partner's Spouse. On the death of a partner's spouse, the spouse's heirs, legatees or personal representative, to the extent of their respective partnership interests, shall be regarded for purposes of this Act as transferees of the partnership interest from the partner.

(d) Event Involving Partner's Spouse not Withdrawal. An event of the type described in Section 6.01 occurring with respect to a partner's spouse is not an event of withdrawal.

(e) No Impairment of Purchase Rights. This Act does not impair an agreement for the purchase or sale of a partnership interest at the time of death of the owner of the partnership interest or at any other time.

5. *McKnight v. McKnight*, 543 S.W.2d 863, 868 (Tex. 1976):

The trial court detailed a division of the partnership cattle between the husband and wife and awarded the wife one-half of the partnership bank account. The court of civil appeals held the award violated the Act. . . . [W]e think the court of civil appeals was correct in its application of the Act . . .

6. *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*, 77 S.W.3d 487, 499-500 (Tex. App.--Texarkana 2002, pet. denied):

Pinebrook Properties, Ltd., a Texas limited partnership, owns the lake, dam, roadways, and recreational areas at issue in this case. Pinebrook Properties Management, L.L.C., a Texas limited liability company, is the general partner of Pinebrook Properties. Musgrave is the president and general managing partner of Pinebrook Management.

The trial court erred in its application of law. The theory of alter ego, or piercing the corporate veil, is inapplicable to partnerships. Under traditional general partnership law, each partner is liable jointly and severally for the liabilities of the partnership. The Texas Legislature has altered this general scheme and statutorily created limited partnerships which are governed by the Texas Revised Limited Partnership Act (TRLPA). Tex. Rev. Civ. Stat. Ann. art. 6132a 1, § 1.01, et seq. (Vernon Supp.2002). Under TRLPA, "a general partner of a limited partnership has the liabilities of a partner

in a partnership without limited partners to persons other than the partnership and the other partners." Tex. Rev. Civ. Stat. Ann. art. 6132a-1, § 4.03(b). Under the Texas Revised Partnership Act, "all partners are liable jointly and severally for all debts and obligations of the partnership...." Tex. Rev. Civ. Stat. Ann. art. 6132b-3.04 (Vernon Supp.2002). Therefore, in a limited partnership, the general partner is always liable for the debts and obligations of the partnership. Limited partners are not liable for the obligations of a limited partnership unless the limited partner is also a general partner or, in addition to the exercise of the limited partner's rights and powers as a limited partner, the limited partner participates in the control of the business. However, if the limited partner does participate in the control of the business, the limited partner is liable only to persons who transact business with the limited partnership reasonably believing, based on the limited partner's conduct, that the limited partner is a general partner. Tex. Rev. Civ. Stat. Ann. art. 6132a-1, §3.03(a).

Under corporation law, officers and shareholders are not liable for the actions of the corporation absent an independent duty. *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex.1996). Because officers and shareholders may not be held liable for the actions of the corporation, the theory of alter ego is used to pierce the corporate veil so the injured party might recover from an officer or shareholder who is otherwise protected by the corporate structure. Alter ego is inapplicable with regard to a partnership because there is no veil that needs piercing, even when dealing with a limited partnership, because the general partner is always liable for the debts and obligations of the partnership to third parties. The trial court

erred in finding Pinebrook Properties
is the alter ego of Musgrave.

7. *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex. App.—San Antonio 2001, pet. denied):

Liberty Properties Partnership argues piercing is not appropriate for a partnership. Under the Texas Revised Uniform Partnership Act, a trial court may not award specific partnership assets to the non-partner spouse in the event of a divorce. TEXAS REVISED PARTNERSHIP ACT, Tex.Rev.Civ. Stat. Ann., art. 6132b-5.01, -5.02, -5.03, -5.04 (Vernon Supp. 2001); *McKnight v. McKnight*, 543 S.W.2d 863, 867-68 (Tex.1976). The trial court may only award the spouse an interest in the partnership. Kymberly argues as a matter of policy that a partnership should be treated the same as a corporation. However, the comment of the bar committee to section 6132b-5.01 specifically notes the statute incorporates the limitation that "a partner's spouse has no community property right in partnership property." [FN6] Tex. Rev. Civ. Stat. Ann. art. 6132b-5.01 cmt. Because legislative intent is clear and the Texas Supreme Court has followed that dictate, we hold the trial court improperly pierced Liberty Properties Partnership.

FN6. The statute reads: "A partner is not a co-owner of partnership property and does not have an interest that can be transferred, either voluntarily or involuntarily, in partnership property." Tex.Rev. Civ. Stat. Ann., art. 6132b-5.01; see also Tex.Rev.Civ. Stat. Ann., art. 6132b-5.04 (in divorce, spouse is treated as transferee of partnership interest).