

**TEMPORARY TO FINAL:  
BASIC FAMILY LAW  
AFTER THE 2003 LEGISLATURE**

**ANATOMY OF A CIVIL TRIAL VIII  
San Antonio Bar Association**

May 27, 2004  
San Antonio, Texas

**THE HONORABLE JUDGE MARTHA TANNER**  
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*\*some forms downloaded w/permission from the State Bar of Texas, Family Law section; www.sbotfam.org;*

## **I. Introduction**

This paper is written to help the non-family lawyer recognize what is important and what is not important in trying a temporary orders hearing. It is a brief overview and not a complete guide.

## **II. Effective Preparation by Attorney Prior to the Temporary Orders Hearing**

Although the hearing comes very quickly in a temporary orders hearing, Petitioner having a maximum of fourteen days notice if a Temporary Restraining Order has been filed and Respondent sometimes having no more than three days the courts will still expect the attorneys to be prepared for the hearing. Therefore, good organization of helpful trial exhibits ahead of time will help in effective presentation.

A financial information statement should always be prepared if there will be any issue on support or payment of bills and debts during the proceeding. *See Appendix.*

Remember to have multiple copies of the financial information statement at the time of the hearing so that the court, the witness and opposing counsel can review them.

Make sure that you and your client have reviewed the financial information given on the financial information statement. It is not good to have over exaggerated or under exaggerated numbers when you are requesting support for your client. Additionally, on cross-examination it is likely that your client is going to be questioned as to how the numbers on the financial information statement were derived.

If support is an issue you will want to have copies of pay stubs to produce as exhibits. Again it is important that you have multiple copies that are clear and easy for everyone to read.

If you are requesting child support or if it is likely that your client will be responsible to pay child support you should prepare the calculations for child support prior to the time of the hearing.

Again your client should be familiar with the amounts set out for the child support at the time that they testify.

If you do not have copies of the opposing sides wage statements prior to the hearing you should contact the opposing attorney and see if you can not agree to exchanging these items prior to the hearing. If the opposing side is unwilling to exchange pay statements it may be a good time to review your request for attorney's fees.

Other exhibits that may be helpful are photographs for where your client proposes that the children reside during temporary orders. Additionally, you may want to bring photographs of the children spending time around friends and family of your client. Rarely in temporary orders will a court have time to review a videotape or listen to a complete audiotape however a few photographs may give them a much better picture of the surroundings of which your client is proposing the child to reside temporarily.

Additionally, you will want to prepare proposed Temporary Orders. You should review this with your client ahead of time. This should give you and your client a clear map of what you want to accomplish during a temporary orders hearing. Once the court has made the ruling it is easy to make any changes and have it immediately signed so that anything that you may want to later enforce has been already put into written form.

### **III. Efficiently Preparing Your Client for Temporary Orders Hearing**

The single most important thing that you will do is to quickly prepare your client for the temporary orders hearing. There are certain basic instructions for the temporary orders hearing. There are certain basic instructions that must be covered with your client prior to the temporary orders hearing they are as follows:

- The client must know the date and the time of the hearing and what time they need to show up and where they will be meeting their attorney. Additionally, you should give them instructions on whom to call if they get lost on the way to the courthouse.
- Explain the presiding court system to your client prior to them walking in. For a first time litigant the presiding court system can be overwhelming. Explain to them the time that their hearing is actually heard there will be only a few individuals present.
- Make it clear that any and all witnesses must also be present prior to the hearing and must meet you at the same place. It must be clear to the client that the attorney must know who the witnesses are and have time to prepare with them for the witnesses to be effective.
- Explain to them where they will sit in the courtroom.
- Explain to them that both attorneys will ask direct questions and/or cross-examination questions from them.
- Have them prepared to take the stand and face their spouse.
- Advise them on how to answer cross-examination questions tell them that they are not going to convince anyone of their story on cross-examination. That it is best to just answer the question and make a credible presentation of their case.
- If you do not have time to go over every question that you will be asking your client on the stand for temporary orders ask them the most important questions.
- If they are going through a child custody matter they must be prepared to present their plan. They must be prepared to show who has been the primary caregiver for the child prior to the lawsuit being filed. If they are asking for support they must explain why with their income and expenses support is needed. The very basis questions must be covered prior to walking into the courtroom.
- Make sure that they have reviewed the income and budget sheet that you have prepared prior to walking into the courtroom even if counsel and their assistant has gone over it to check for accuracy and believability it will not be credible if the client does not know what is on his or her own budget sheet.
- The client and the witnesses must be instructed to make sure that they always tell the truth. They must be advised to listen closely to the question to take their time and not to allow them to get rattled while on the stand. They should be instructed to make sure that they understand the question before they answer it. It is not uncommon for witnesses who are intimidated to try to answer questions that they did not understand in the first place. This should always be avoided. They should be instructed to ask the question asked of them and only the questions asked. Taking off on their own tangent will ruin the credibility and cause the judge's patience to grow short.

- Advise them that the court reporter will be taking everything down and that oral and distinct answers that are loud enough for everyone to hear are a necessity.
- Advise them not to guess when they are on the witness stand.
- Advise them on what to wear. Advise them that they should not look like they are going to the gym nor like they are going out for cocktails. They should dress in such a manner that gives respect to the court.
- Advise them that while in the courtroom that they must keep their attitude in check. They should use this opportunity to make a good impression and to be professional and courteous at all times. They should remember that they may never know when the judge is observing them.

#### **IV. Major Issues At Temporary Orders**

##### **A. Jurisdiction and Initial Pleading**

Jurisdiction is crucial at the initial filing of the divorce suit affecting the parent-child relationship. As such, a respondent must raise any challenge to the issue in his or her initial pleading. The intricacies of the various acts dealing with property and child custody and support issues are enormous and convoluted and a comprehensive approach is well beyond the scope of this paper. However, there is at the base level a dichotomy between the issues--that of dissolution of marriage (property issues) and that dealing with the child(ren) of the marriage (custody, visitation and child support). The threshold issue upon filing of a petition for divorce with children is whether or not there is jurisdiction over the respondent sufficient to allow the proceeding to go forward. This question is more complicated than it seems and deals with multiple sections of the Texas Family Code and related federal legislation. These issues only come up if the non-filing party does not reside in the State of Texas.

Although, as of September 1, 2003, with the repeal of Sections 6.404 and 102.0085, while it is no longer necessary to file a Statement on Alternative Dispute Resolution, Section 6.410 states

that at the time of the filing for divorce or annulment, the petitioner shall also file a completed report to comply with Section 194.002 of the Health and Safety Code.

### 1) **General Rule--Residency requirements**

The general rule is quasi-jurisdictional in that a suit for divorce may not be maintained in the state unless at the time the suit is filed either the petitioner or respondent has been domiciled in Texas for at least six (6) months and a resident of the county in which he or she filed for at least ninety (90) days. *TFC §6.301*

Section 6.301, although not itself jurisdictional is akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and is a mandatory requirement that the parties cannot waive." *Reynolds v. Reynolds*, 86 S.W.3d 272, 276 (Tex.App.—Austin 2002). The proper method of challenge this residency requirement would be a plea in abatement. A plea in abatement and dismissal is mandatory when divorce petitioner has not met durational county residency requirements. *Cook v. Mayfield*, 886 S.W.2d 840 (Tex.App.--Waco 1994, no writ). But, while residency requirements are not jurisdictional, they must be met *before* rendition of the divorce. *McCaskill v. McCaskill*, 761 S.W.2d 470 (Tex.App.--Corpus Christi 1998, writ denied).

*TFC §6.302* allows a nonresident spouse to file in whatever county in the State of Texas the resident spouse is living in so long as the resident spouse has been a domiciliary of this state for at least six months. This is an often overlooked provision, which allows a nonresident to file for suit without meeting the ninety (90) day requirement.

*TFC §6.304* allows armed service personnel stationed in Texas even though they may intend to return to another state for their domicile upon discharge. Although they may not be residents of the State of Texas if they are serving in the armed forces, have been in the state for six (6) months,

in the county that they are filing for at least ninety (90) days they are considered to be a Texas domiciliary for the purpose of a divorce.

*Practice Tip: As a matter of practicality, it can be argued that a divorce with children should proceed in the county in which the children reside, assuming the residency requirements can be fulfilled by the time of rendition. However, keep in mind that usually the "first-filed" divorce establishes the dominant jurisdiction, but "second-filed" Court may find an estoppel on facts, if you can demonstrate unreasonable delay in service of citation. Clawson v. Millard, 934 S.W.2d 899 (Tex.App.--Houston [1<sup>st</sup> Dist.] 1996, no writ).*

**B. Status Jurisdiction/Subject Matter Jurisdiction Divorce** -- The Texas Family Code further provides that the Court may make a "status adjudication," divorcing the parties per §6.301 of the Texas Family Code, even if the responding spouse is a non-resident of the State. The Court may exercise personal jurisdiction over a non-resident respondent, per §6.305 of the code if Texas is the last marital residence or there is any basis consistent with the constitutions of this state and of the United States, regarding such personal jurisdiction. A Court may exercise subject matter jurisdiction only for those portions of the suit for which it has authority, as limited by the required personal jurisdiction over a nonresident respondent, the required jurisdiction under the *Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)* or the required jurisdiction under the *Uniform Interstate Family Support Act (UIFSA)*. In all cases, the Court must have personal jurisdiction to render an Order for child support or divide property.

**C. Personal Jurisdiction--Property Division**

Acquiring status of subject matter jurisdiction in dealing with a nonresident respondent, however, may not provide complete relief to the spouse seeking a divorce from the non-resident defendant who has no minimum contacts with the State of Texas. While the Court may have the ability to adjudicate the parties' status and grant the divorce, it may not have jurisdiction to adjudicate the parties' rights and divide property if it is found that there is no personal jurisdiction or long-arm jurisdiction over the non-resident respondent. In order to challenge personal jurisdiction

over a non-resident respondent, as in any case, the respondent must file a special appearance prior to any general appearance. While a general appearance will of course waive any challenge to personal jurisdiction, if the Court sustains the Respondent-spouse's special appearance (ruling that the Court does not have personal jurisdiction, if the Court sustains the Respondent-spouse's special appearance (ruling that the Court does not have personal jurisdiction over the non-resident Respondent), the Court should not have jurisdiction to divide the marital estate. *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998); *Hoffman v. Hoffman*, 821 S.W.2d 3 (Tex App.-- Fort Worth 1992, no writ). The Court explains the rule in Texas as follows:

"Where the trial court in a divorce proceeding has no personal jurisdiction over the respondent, the trial court has the jurisdiction to grant the divorce, but not to determine the managing conservatorship of children or divide property outside the State of Texas." *Citing Comisky v. Comisky*, 597 S.W.2d 6, 8 (Tex.Civ.App.-- Beaumont 1980, no writ). It may also lack jurisdiction to divide property within the state. *See Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 2584 (1977).

*However, See Bloom v. Bloom*, 935 S.W.2d, 942, 948 (Tex.App.—San Antonio 1996, no writ; the Court held that once a trial court obtains subject matter jurisdiction under §3.26(a) [§6.305], it also acquires jurisdiction over the respondent in a SAPCR, including jurisdiction to make a child custody determination by initial decree...if...Texas...is the home state of the child on the date of commencement.

#### **D. Personal Jurisdiction--Custody**

According to Texas Family Code, §102.011, the Court can establish personal jurisdiction over the non-resident respondent or over that person's personal representative, if:

1. That person is personally served with citation in this state;
2. The person consents to this states jurisdiction;
3. The child resides in this state as a result of the acts or directives of the respondent;

4. The person resided with the child in this state;
5. The person resided in this state and provided expenses or support for the child.
6. The person had sexual relations (intercourse) in the state and the child may have been conceived by that act of intercourse;
7. The person is registered with the paternity registry of the state; or
8. There is any basis consistent with the constitutions of this state and the United States for exercise of personal jurisdiction.

**E. Personal Jurisdiction -- Child Support/Parentage**

The requirements to establish long-arm jurisdiction (over a non-resident Respondent) for the purposes of establishing child support or determining parentage are addressed in the Uniform Interstate Family Support Act (*UIFSA*) and tracks the possibilities listed in 1 through 8, above. *TFC §159.201*, except that number 5 reads the child resides in the state as a result of the acts or the directives of the individual.

. Child support is without a doubt a "rights" adjudication, which has ramifications regarding party's ability to pay, as well as the potential judgment for retroactive child support being assessed against the party. As such, and Order necessarily hinges on the Respondent's rights and therefore is contingent upon the Court's ability to exercise personal jurisdiction over that Respondent. This is in contrast to a "status" adjudication, such as the dissolution of the marriage. *See Dawson-Austin v. Austin*, 968 S.W.2d 319, 324 (Tex. 1998); *See also In the Interest of S.A.V.*, 837 S.W. 2d 80, 84 (Tex. 1992).

**F. Subject Matter Jurisdiction for Custody**

The Texas Family Code provides that the court may exercise subject matter jurisdiction (ostensibly to make a custody determination) as provided by the UCCJEA. Thus the requirements to establish long-arm jurisdiction for the purpose of establishing custody ( and visitation per the

definition of "custody determination" in Texas Family Code §152.102) are addressed in the UCCJEA and, except for Temporary Emergency Jurisdiction situations, provides jurisdiction as follows:

"Except for Temporary Emergency Jurisdiction situations, a court of this state has jurisdiction to make an initial child custody determination only if:

- (1) this state is the home of the child at the time the suit is filed, or was the home within the prior six (6) months and the child is absent from this state, but a parent or person acting as parent continues to live in the state;
- (2) a court of another jurisdiction under (1) above a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate form; and
  - (1) the child and the child's parent's, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence, and
  - (2) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;
- (3) all courts having jurisdiction have declined to exercise jurisdiction on the ground that this state is the more appropriate form to determine custody; or
- (4) no court of any other state would have jurisdiction under the criteria in 1, 2, or 3 above.

*See TFC § 152.201: UCCJEA*

The act further prioritizes the home state over all other bases of jurisdiction for child custody matters, so that if a party can establish this state as the home state, it then will have exclusive priority over all other possible jurisdictions, at least for the purposes of a custody determination. A Court can still establish emergency jurisdiction, in order to protect the child from mistreatment of abuse or the threat of mistreating or abuse, though this is a temporary measure.

## V. The Ruling by the Court and What It Means

### A. Conservatorship: Who's baby is it anyway?

The basic concepts and concerns have not changed much over the years with respect to conservatorship. In fact, the majority of issues that have been addressed by the legislature have focused on the trees rather than the forest, with conservatorship, most commonly associated with determining the residence of the child, being addressed with the codification of such concerns regarding domestic violence, jurisdictional normalization, and the nomenclative change of presumption of one sole managing conservator to joint managing conservators. The basic premise of the best interest of the child controls, regardless of the child's preference and unless there is a significant health or safety issue with evidence to back it up, the child(ren) more often than not will end up residing with their mother.

However, in an age where the 'hot' topics now include fathers' rights, grandparent rights, and relocation, the Jury verdict has been expanded (if perhaps only in perception), if not promoted in the hierarchy. Section 105.002 was amended, effective 9/1/03, to follow the holding in the Lenz case regarding the Jury's restrictive designation of primary residence, and vice versa as binding on the Court. The section currently reads as follows (changes in bold):

#### § 105.002. JURY.

- (a) Except as provided by Subsection (b), a party may demand a jury trial.
- (b) A party may not demand a jury trial in:
  - (1) a suit in which adoption is sought, including a trial on the issue of denial or revocation of consent to the adoption by the managing conservator; or
  - (2) a suit to adjudicate parentage under Chapter 160.
- (c) In a jury trial:
  - (1) a party is entitled to a verdict by the jury **and the court may not contravene a jury verdict on the issues of:**
    - (A) the appointment of a **sole** managing conservator;
    - (B) the appointment of joint managing

- conservators;
- (C) the appointment of a possessory conservator;
- (D) the determination of **which joint managing conservator has the exclusive right to designate the primary residence of the child;**
- (E) **the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and**
- (F) **if a restriction described by Paragraph (E) is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence; and**
- (2) **the court may not submit to the jury questions on the issues of:**
  - (A) support **under Chapter 154 or Chapter 159;**
  - (B) a specific term or condition of possession of or access to the child; or
  - (C) any right or duty of a conservator, other than the **determination of which joint managing conservator has the exclusive right to designate the primary residence of the child** under Subdivision (1)(D).

**B. JMC V. SMC** -- There is very little difference between the rights and duties assigned between a Joint Managing Conservator and a Sole Managing Conservator since the legislature shifted the presumption to Joint Managing Conservatorship in 1995. However, there appears to be a psychological aspect to a client's perception of "custody" in this realm. As such, the legislature has addressed this issue and absent any health and safety concerns, the presumption is usually followed.

*Practice Tip: If it's a close call on custody and the client can afford to proceed at the time of divorce, it's probably better to seek custody at that time, rather than agree to a Sole Managing Conservatorship arrangement, hoping to come back in the near future.*

### **C. Rights And Duties**

The rights and duties of the (Primary) JMC, which are exclusive and which should be included in the Temporary Order (and Final Order), are the right to ~~establish~~ **'designate'** (effective

9/1/03) the residence of the child; the right to receive child support; and potentially any of the remaining rights and duties of a parent as provided by *TFC §151.003*. These may include (possibly subject to consultation with the other parent) the right to consent to (non- emergency) medical, dental, and surgical treatment involving invasive procedures, and to consent to psychiatric and psychological treatment, the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child; the right to consent to marriage and to enlistment in the armed forces of the United States; the right to make decisions concerning the child's education; the right to the services and earnings of the child; and the right to act as an agent of the child regarding the child's estate if required by the government. The rights of both parents at all times include the following:

To receive information from **any** other conservator and to confer with the other parent to the extent possible on health, educational, welfare issues; of access to medical, dental, psychological and educational records; to consult with school officials or medical providers; to attend school activities and to be designated as a person to contact in case of emergency; to consent emergency medical treatment; and to manage the child's estate, as created by that parent. *TFC §153.073*.

*Practice Tip: Effective September 1, 1999 (and amended September 1, 1999) and regardless of the date the suit was filed, the Court, when rendering an Order providing for Joint Managing Conservatorship, shall designate which conservator has the exclusive right to ‘designate’ the primary residence of the child and either establish a geographic area within which the residence may be designated or state that the residence may be designated without regard to geographic location. In addition and generally speaking, the primary JMC will be given the exclusive rights and duties of an SMC, and should be made in the primary's favor in the event of future disagreements. This has the effect of mandating consultation but avoiding paralysis should there be a disagreement on one of the decisions. Compromise Language provides for reasonable consultation to the extent possible and is available to any parent appointed as a conservator. *TFC, §153.073*.*

**D. Choice of Conservator**

Currently and as minutely amended (again) in 2003, Section 153.008 provides that the child over twelve may choose the person who is to designate the primary residence, subject to the approval of the Court. The change changes the designation from the Managing Conservator to the person to designate the primary residence, for whatever its worth. Remaining unchanged is the premise that, on Motion of a party, the Court SHALL, in chambers, interview a child twelve or older, and MAY interview an child under 12 years of age. *TFC §153.009.*

**E. Possession and Access/Visitation**

Possession and access or visitation is governed by Texas Family Code §153.251 et seq. The statutory guidelines and specifically the Standard Possession Order are rebuttably presumed to apply to any child over three years of age. There are no guidelines for a child under three years of age, however the Court shall render an Order appropriate under the circumstances for possession of a child under three years of age and shall render a prospective Order to take effect on the child's third birthday, presumably be the Standard Possession Order (SPO). *TFC §153.254.*

**(1) Standard Possession Order (SPO)**

The SPO provides, among other things for visitation, depending on whether the conservators live within 100 miles of each other or farther than 100 miles of each other. The most typical example, of a non-possessory conservator (NPC) who lives within 100 miles, would allow visitation on the first, third and fifth weekends of each month, beginning on Fridays at either 6:00 p.m. or when school is dismissed, and ending on the following Sunday at 6:00 p.m, or when school resumes, In addition, major holidays are shared depending on whether it is an odd or even year. Furthermore, the SPO provides for **Thursday (effective 9/1/03)** visitation

either from 6:00 p.m. to 8:00 p.m. or overnight, if the (NPC) has taken this overnight election period at or before the rendition of the governing Order. Extended summer visitation is provided the NPC if notice is given no later than April 1 of the applicable year, and the managing conservator (MC) can *elect to* retain one weekend (*if they* reside within 100 miles) or 21 days (if they reside more than 100 miles apart), during which he or she can retain possession and access during that summer, so long as the CP gives notice *no* later than April 15 of the applicable year, However, the SPO also provides for weekend visitation by the managing conservator if this deadline is missed and the code should *be consulted if an* arrangement cannot be worked out. Of course, while the parties can agree to other visitation arrangements, and while it is always advisable to suggest that they work with each other in this regard, the standard visitation order usually means every other weekend to most clients and explaining the minutiae of the various detailed provisions is difficult and time consuming in most instances.

## **(2) Modified SPO -- Suggestions**

When modifying the SPO, remember that the more complicated you get, the more difficult it is to draft and make enforceable. In addition, when you depart from the norm, you will then need to worry about workability as well as public policy concerns if it should ever be challenged, either appeal, in future modification or enforcement. However, given this caveat, sometimes the easiest way to hang someone is to give them enough rope to accomplish this task for themselves. Often times the parent seeking more (or even standard) visitation believes him or herself more capable of performing than is really the case. This is when the attorney must realize that their client *may* not be able to handle such a restricted or modified arrangement and their only chance at standard is to fight for it then and there. Criminal defense attorneys are

analogously confronted with this situation when they must advise their client to choose between deferred adjudication, which is great if the client can satisfy the terms of their probation, but which carries the potential maximum punishment range available if they screw it up; and straight probation, which allows the conviction on the record, but limits the potential jail term if they *can't successfully* complete the probationary term. One such modified scenario would be a stair-step arrangement, whereas the NPC is provided with restricted and/or supervised visitation and if he or she is successful over a specified period of time, usually three to six months, then visitation could revert to standard. You can make this as simple or as complicated as possible, but where there is a borderline concern for a child's safety or welfare, or you have a situation where a parent all of a sudden (when an action is filed) wants to exercise standard visitation, this could be a good way to either hold him or her to it, or show that he or she really isn't interested in standard visitation,.

*Practice Tip:*

1) *Another minor way to protect against insincere visitation goals of a NCP, as well as making it easier for your clients [managing conservator] planning ability with regards to visitation would be a notice provision. You can either provide for notice of inability to exercise possession (more common) or notice of ability to exercise possession (less common but possibly used to provide for future modifications by adding a statement that failure to abide by these requirements may be considered in future modification of this Order).*

2) [www.ourfamilywizard.com](http://www.ourfamilywizard.com) is a new site that allows clients (especially in different states) to subscribe and coordinate different options such as visitation schedules to a message board for family members to an information bank/vault for important information regarding the children.

### **(3) Supervised/Restricted Visitation**

While the Texas Family Code provides for the best interest of the child to include not only the health and safety of the child, but also for the emotional and psychological well being of the child, very often the latter is overlooked when crafting orders for visitation. Notwithstanding this unfortunate but almost inevitable recurrence, the most extreme cases, and

usually the ones that draw a supervised visitation order, will typically involve some sort of physical threat to the child(ren). In this case, not only must the family lawyer look to the temporary orders to craft protection but, in the case of abuse, the lawyer is required to report such abuse within 48 hours after first suspecting it. *TFC §261.101*, This information is not protected, although the attorney who reports abuse may not be required to testify about the underlying communications with his or her client. *See Tex. Att'y Gen. DM-458*.

In such cases where there exists a threat to the health or safety of the child(ren), *supervised* visitation is well warranted. More and more, this can be attributed to the presence of third parties during visitation. Instances can occur when a party remarries or lives with another partner and the abusing third party can either be that other partner (very often a stepfather) or offspring from that other partner (very often older step-siblings). In addition, and due to the growing number of young parents, the NPC will often end up living with friends and/or multiple roommates. This provides a problem for the Judge who is then faced with the prospect of being unable to order or control a nonparty to the litigation. In such situations, and when the threat can be documented, supervised and/or restricted visitation may well be *in* the child's best interest. Very often it is the parent of the parent, or the grandparent, who is willing to take on this role and is more acceptable to all parties. Absent such agreement, supervised visitation is available at either S.A. Kid's Exchange (1818 San Pedro, S. Central San Antonio; 733-3349) or Family Services (4245 Center Gate; N.E. San Antonio; 946-8524), or some other appropriate exchange. In this case the cost of supervised visitation, while most often calculated on a sliding scale, may be a contested issue and very well may prevent the visitation from occurring, though this should never be the goal. Also note that in ordering the terms of possession of a child under an order other than a SPO, the court shall be guided not

only by the guidelines established by the SPO, but may also consider the age, developmental status, circumstances, needs, best interest of the child, circumstances of the managing conservator and of the parent named as a possessory conservatory, and any other relevant factor. *TFC §153.256*.

#### **F. Protective Order/Restraining Order**

If there is a history of family violence or the threat of family violence then it is important for the attorney to concurrently obtain a protective order in conjunction with the petition for divorce. In such an instance, an application for a protective order should be filed along with a request for a temporary orders hearing. If the Court finds, by the affidavit testimony of the applicant, that family violence has occurred and is likely to occur in the future, then it shall issue a Temporary Ex Parte Protective Order. Such an order is valid for the period specified in the Order, not to extend beyond 20 days, but may be extended for additional 20-day periods upon request of the applicant or upon the Court's own motion. This Order can prohibit *the* respondent from the laundry list of items listed in Texas Family Code sections 85.021 *and* 85.022. If, however, there is a suit pending, a represented party should always be noticed when a protective order is sought, absent true emergency circumstances. In addition and effective September 1, 1999, the Court may suspend a license to carry a concealed handgun that is held by a person found to have committed *family* violence. Furthermore and after hearing, a protective order can now be issued for a maximum of two years instead of one year. In order to exclude the respondent from a joint residence, the applicant must appear and give testimony to the Court, in addition to the affidavit requirement. A respondent in violation of the protective order will be immediately arrested.

If there is no danger of family violence, however, a Petitioner in a divorce action, can

still obtain an order restraining the same abusive and violent activities, as well as maintaining the status quo *of* the community estate, by prohibiting the respondent from committing any of the same acts listed above. In this case, as in the protective order scenario, the respondent is authorized only to spend money on reasonable and necessary living expenses, reasonable and necessary business expenses and attorneys fees. Such an order is most often designed to preserve the community estate so that a just and right division may be accomplished. A respondent found in violation of *this type* of order, after motion and notice, may be held in contempt of court.

*Practice Tip: Always notify opposing counsel regarding an (ex parte) protective order application if there is an ongoing suit. This is **an advisory extension of the local rule** implying a notice requirement for TRO's and the content requirement of the name and address of the opposing attorney in an application for a protective order. See Bexar County, Tex., Civ. Dist. Ct. R., 3.10, See TFC §82.041 (a) (10).*

#### **G. Child Support**

Unless the net resources of the party to pay child support (NPC) are above \$6,000.00 per month, or the NPC is self-employed, calculation of the amount of child support to be paid should not be very difficult. *Texas Family Code §154.001 et seq.* Whenever feasible, gross income should be calculated on an annual basis and then recalculated to determine average monthly gross income. *TFC §154.061.* Keep in mind that child support is calculated on one's earning capacity and if the NPC has recently changed/quit a job, the provision for intentional unemployment or underemployment may apply. *TFC §154.066.* Once the gross monthly earning capacity has been computed, the "net" monthly amount must be determined by using the Office of the Attorney General's Employed Persons 2004 Tax Chart, found in the Family Code. *TFC §154.132; See Appendix.* After arriving at the net amount, the attorney must calculate the appropriate percentage in order to know how much the NPC will have to pay. This is done depending on how many (if any) children the NCP has a duty to support. The

NCP will pay 20% for one child, assuming he has no other children that he is legally obligated to support. He will pay 5% for each additional child, assuming he has no other children to support outside of the cause of action pending before the Court. If he does have additional children to support, then he is entitled to a 2.5% reduction in the percentage applied for the calculation, at least for the first "other" child. For additional children, the reduction becomes less as the number of children increases. *ProCalc* from *ProDoc* makes the presumed child support calculation very easy and can be done either from your desktop computer or on the fly with a Palm Pilot using their software.

**TFC §154.002** was amended in 2003 to make it more clear that the Court may render a child support order past the age of eighteen *only if* the child is enrolled and seeking appropriate high school or secondary school completion and maintaining the minimum attendance requirements. Further, the legislature made it clear that the Order is to terminate if the Court finds that the child is over eighteen and has failed to comply the enrollment or attendance requirements.

The Legislature made mandatory an award for attorney's fees if the Court finds that a respondent failed to comply with the terms of an order for possession and access; and further made it more difficult for the Court to waive attorney's fees in child support enforcement cases over \$20,000.00. *TFC §157.167*.

*Practice Tip: If you represent the NPC, and his income is based on overtime, bonuses or sales commissions, you may want to go back for the previous two years to calculate an average, or obtain testimony from his boss as to what he is and what he is not guaranteed to be paid. Do not forget to deduct for the actual cost of providing health insurance or health insurance reimbursement to the CP, as this deduction is obviously not provided for in the chart.*

### **Multiple Family Adjusted Guidelines -- % Of Net Resources**

*Number Of Children Before The Court*

		1	2	3	4	5	6	7
<b>No.</b>	0	20.00%	25.00	30.00	35.00	40.00	40.00	40.00
<b>Of</b>	1	17.50	22.50	27.38	32.20	37.33	37.71	38.00
<b>Other</b>	2	16.00	20.63	25.20	30.33	35.43	36.00	36.44
<b>Ch.</b>	3	14.75	19.00	24.00	29.00	34.00	34.67	35.20
<b>Whom</b>	4	13.60	18.33	23.14	28.00	32.89	33.60	34.18
<b>Obligor</b>	5	13.33	17.86	22.50	27.22	32.00	32.73	33.33
<b>Must</b>	6	13.14	17.50	22.00	26.60	31.27	32.00	32.62
<b>Supp.</b>	7	13.00	17.22	21.60	26.09	30.67	31.38	32.00

**H. Property/Debts/Spousal Support**

The assignment of property or debts in Temporary Orders, more than any other issue, telegraphs any potential agreement in the Final Orders. It is important to note that, while a party may be ordered to maintain certain levels of coverage or pay certain debts in a temporary restraining order, subject to contempt, the order to pay such a debt in final orders would no longer be subject to contempt. The division of the assets necessarily follows what people are willing to concede is either separate property or with which they are willing to part. Very often this is based on the needs associated with maintaining a household and taking care of children. If

children are involved, a majority of the time, the marital residence will be allocated to the Sole Managing Conservator or primary parent. In addition, most of the necessary furniture and fixtures will be awarded to the party to remain in the marital residence.

The payment of debts is more often than not going to depend on several factors-- in whose name is the debt, for what purpose was it incurred, whether it was in existence at the initial time of the marriage, and the parties ability to pay the debt or maintain the status quo. This includes any debt associated with the marital residence.

However, in the case where there is a large disparity of earning power among the spouses, there will always be an issue of redistributing the wealth, one way or another. The Code provides that temporary spousal support may be awarded while a suit for divorce is pending, as deemed necessary and equitable, *TFC §6.502*. While this is only temporary, the Court may make provision for future, post-decree spousal support only if:

- (1) the spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence under Title 4 and the offense occurred within two years of the filing of the suit or while the suit was pending; or
- (2) the duration of the marriage was 10 years or longer, the spouse seeking maintenance lacks sufficient property, including property distributed to the spouse under this code, to provide for the spouse's minimum reasonable needs, as limited by Section 8.005, and the spouse seeking maintenance,
  - (1) is unable to support himself or herself through appropriate employment because of an incapacitating physical or mental disability;
  - (2) is the custodian of a child who requires substantial care and personal supervision because a physical or mental disability makes it necessary, taking into consideration the needs of the child, that the spouse not be employed outside the home; or

- (3) clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs, as limited by Section 8.005.

In addition, a court may enforce a garnishment order for spousal maintenance, as well as for the previously authorized child support. Furthermore, the factors that a Court may consider in determining maintenance can be found in *Texas Family Code §8.052*. Such maintenance shall be limited to \$2,500.00 or 20% of the paying spouse's average gross monthly income, whichever is less; and continue for the shortest reasonable period necessary or three years after the Order is rendered, whichever is least.

When spousal support is not available by statute, many creative (and aggressive) attorneys will seek other ways to either transfer more money to their client or to compensate for what one party may consider an unjust and unfair division, given what's leftover after so many years. Some examples of these independent torts include assault, intentional infliction of emotional distress and negligence. The Supreme Court has made it clear that there is no independent cause of action for fraud on the community or breach of fiduciary duty, reasoning that a wronged spouse has an adequate remedy through the "just and right" property division. *See Schlueter V. Schlueter, 975 S.W.2d 5S4 (Tex, 1998)*. In addition, reimbursement claims are equitable measures that many attorneys will utilize to get a bigger piece of the pie.

## **VI. Enforceability of the Temporary Order**

It is important to remember that for temporary orders to be enforceable, they must be ordered by the Judge. Many parties will enter into a rule 11 agreement for temporary or even final orders, without making sure they are enforceable. While the intricacies of obtaining this assurance are beyond the scope of this paper, it should be noted that the agreement

should include the term "*Order*" at the top; it should include sufficient specificity of material terms to be enforced in law as well as in contract (if it's an "Agreed Order"); and it should be "Ordered" by the Judge on the record after all signatures have been obtained by the parties and their respective attorneys. Such material terms include amount of child support/attorneys fees due, date payment(s) due, place payment(s) due, and any other terms necessary to avoid ambiguity in the order. Do not file a motion for contempt if a party violates a rule 11 agreement that has not been 'Rendered' or 'Ordered,' as they are not contemptible. The proper remedy is a motion for sanctions. It should be noted that while the award for attorney's fees on final orders will be a judgment, the award for interim attorney's fees are contemptible and should be explained on the record as such, regardless of which side you represent. If the agreement is ordered by the judge, the remedy to correct non-entry of the typed Order is a Motion To Sign or Motion To Enter. If you only obtained a rule 11 agreement (for final orders), you will need to start preparing your Motion For Summary Judgment.

## **VII. Things Not to Do at Temporary Orders Hearing**

1. Do not go to court without attempting to confer with opposing attorney or in some way attempting to narrow the issues.
2. Do not put five witnesses on the stand, which repeatedly say the exact same thing.
3. Do not assume the case is going to settle if it is your belief from what your client has told you and show up for a temporary orders hearing unprepared.
4. Do not bring up facts that are too remote to be relevant to the placement of the temporary orders.
5. Do not fail to focus on the issues before the court that day and do not focus on issues that are not before the court.
6. Do not argue over characterization problems or property division because

the court will be more concerned about the immediate status and welfare of the individuals involved on a temporary basis.

7. Do not go into court and request interim attorney's fees if you do not have an account for the court to award the interim attorney's fees. Additionally be well prepared to show exactly why and how much interim attorney's fees will be necessary.
8. Do not go into court and having your client confuse joint managing conservatorship and joint custody. It will be extremely embarrassing to ask for primary joint managing conservator and have your client testify that she wants joint custody.
9. Have your client and your witnesses prepared for a possible delay of the first temporary orders hearing. Do not request psychological evaluations with a clear and concise reason as to why you are asking for them. This may throw a wrench into what might otherwise be a highly contested issue.
10. Do not be rude or arrogant to the other attorney. Be an advocate for your client without being rude or unprofessional. This will not impress the judge.

### **VIII. Summary and Judicial Practice Tips**

The first caveat should be FIND your client's WARTS. Every prospective client has something you need to know before you get in the courtroom or before beginning negotiations. Ask your client for the very worst things his or her spouse is going to say about your client. Ask him or her questions you expect the other counsel to come in with and suggest HOW to answer and still tell the truth.

Make certain you have your client prepared and all potential witnesses on standby for a custody dispute. Never believe for a second that custody cannot become an issue. Custody is often the most important issue, and you can generally expect that whatever happens to your client in Temporary Orders will be the result in a hearing on the merits.

Know the client's income and living expenses. Be certain your client completes a sheet, preferably typed, regarding all living expenses and debts, with the minimum monthly payments.

Have copies for opposing counsel and the Court. Know the spouse's income. Be certain to ask about bonuses, commissions, auto allowances, cost of health insurance, etc. Type an exhibit showing the gross income, allowable deductions, net income and what you believe the guideline for child support should be. If you get the Judge working from your figures, you are in the winning seat. Remember, most attorneys think the Judge has time to compute the net income and the percentage of child support that should be paid. Most of the time, the Judge's calculator is on the blink--if they can even find it.

Try to calculate the amount of income your clients will reasonably have after considering child support, alimony *or spousal support* and THEN see what they can realistically afford.

Do NOT agree to ANYTHING on Temporary Orders that you do not want to live with on Final Orders. The sole exception to this might be a house that your client cannot afford, but for custody reasons, if it best to keep the child in the home with your client on a temporary basis.

Make sure your Original petition requests attorney's fees, reimbursement and separate property claims. Most of us forget to look at our live pleadings more than seven days prior to trial then get them amended. Don't get to trial only to find out your client had \$100,000.00 in a bank account when first married it's still there and you have no separate property pleadings. "MALPRACTICE MANOR" looms on the horizon.

DON'T assure your client that you will get interim fees and costs from their spouse unless you are certain that there is a fund from which the judge can assess these costs. Be sure you can show the Judge from whence these funds will come-- i.e. Stock account (*see tax ramifications*), checking, savings or money market account. No Judge is going to pull it out of income unless there is an abundance of money. Of course, there never is in the throes of separation. They are much more inclined to take care of the children than pay your fees or costs.

Normally, your client will not show up with the documents that you are going to need for the final agreement or trial. Make certain your client brings you the parties' tax returns for the past several years, W-2's, deeds, car titles, etc.. to the initial conference. If you cannot obtain these through your client and you need them for the Temporary Hearing, be certain to issue a Subpoena Duces Tecum to the other spouse and announce "Ready" subject to your subpoena. You should NEVER keep the originals. Make certain your staff makes copies and return the originals. Do this while the client waits. Your client will always swear that you kept the originals when they get lost in their move, so be certain you can show them the copies and show them a copy of your office policy in this regard. If you represent the Respondent in a Temporary Hearing, remember time is of the essence. As a matter of office practice, instruct your secretary to ask the client to bring all of these documents. Give your client the "Expense and Debit" sheet to complete and return to your secretary within 24 hours.

If you allege fault in the breakup of the marriage (i.e. adultery, cruelty, etc.), be sure that you can prove these allegations at trial. Nothing frustrates a Judge quite as much as anticipating a reason why he/she should make a disproportionate division or sock one of the parties for extra sums of money to get the other spouse through some counseling, only to find out your client was called a dirty name by the next-door neighbor and your client's spouse didn't go next door and demand satisfaction with dueling pistols at dawn.

If the estate of the parties is complicated, such as one involving a family business, immediately involve experts to assist with evaluations. Often income from a closely held business is difficult to determine, so run, don't walk, to a CPA who can explain to the Court the 'true' income of the other spouse. Remember "never on Sunday" is the best rule you can operate under. Never,

never give tax advice. Many divorces involve tax problems, and unless you have a special expertise in this area, demand your client consult with a CPA or tax attorney.

PLEASE do not ask the Judge to limit or deny visitation for a child over the age of three without bringing an expert to show why and how visitation should be limited. If your client's lifestyle and needs do not mesh with the Standard Possession Order, be ready to give the Judge an alternative. DO IT IN WRITING so that a Judge can follow it and make a ruling that does fit. If the child is under three years of age, expect the Judge to give frequent but short periods of visitation, absent abuse or danger.

If there is any possibility of physical violence, you should suggest supervised visitation at either S.A. Kid's Exchange (334 W. Mistletoe, S. Central San Antonio; 733-3349) to KidsShare (4245 Center Gate; N.E. San Antonio; 946-8524), or some other appropriate exchange. Both work on a sliding fee scale, according to income of the parties. This will also provide you with an independent witness so you don't have to leave the Judge to a swearing match trying to determine the true facts of how an alternation occurred.

Be certain to check the Spousal Support statute, as spousal maintenance is now eligible for withholding/garnishment. In addition don't forget to tell your client that he or she must apply for a job, otherwise, your client is OUT OF THE WATER under the statute. The most important advice you can give your client is to KEEP THEIR MOUTH SHUT!!! DO NOT VOLUNTEER ANYTHING!!! LISTEN TO THE QUESTION AND ANSWER ONLY WHAT IS ASKED UNLESS YOU ARE DOING THE ASKING.

If you and your client are conferring with the other counsel, tell your client his or her kneecaps are in mortal danger if they say ANYTHING to their spouse or to the other attorney without running it by you FIRST. Do NOT talk to the spouse about settlement terms.