

Chapter 3

Dissolution of the Marriage Relationship

Read Texas Family Code Chapter 6.

A. Introduction

Once a marriage is created, be it ceremonial or common law, it can only be terminated by divorce, annulment, or death. If a marriage is void from the inception, not merely voidable, a suit to declare the marriage void might be filed. Realize that in such situations a valid marriage never existed, so there is no marriage to be dissolved, only a marriage to be declared void.

Dissolution of marriage is governed by Chapter 6 of the Texas Family Code. The grounds for divorce are classified as either no-fault or fault. Insupportability, TEX. FAM. CODE § 6.001, is the no fault divorce ground in Texas. The vast majority of divorces granted in Texas are granted on the basis of insupportability; that is, the marriage has become insupportable and no fault is attributed to either spouse. In addition, living apart, TEX. FAM. CODE § 6.006, and confinement in a mental hospital, TEX. FAM. CODE § 6.007, are also considered no fault grounds, albeit with more proof necessitated proof than for insupportability.

No fault divorce based upon insupportability has recently come under attack by certain litigants and by a certain members of the legislature. In 2017, HB 93 was introduced and, as introduced, it would have ended no-fault divorce. As reported by Steve Bresnen, on behalf of the Texas Family Law Foundation, “by the time it was voted out of the House committee, it allowed no fault divorce *if both parties consented*.”¹ The house bill failed. To date no fault divorce based upon insupportability has not been derailed either by the legislature or by the judiciary, as is established by the first case in this Chapter, *Waite v. Waite*, 64 S.W.3d 217 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

One seeking a divorce in Texas is not limited to the no fault ground of insupportability as a basis for divorce. Fault grounds for divorce are also recognized in Texas and are also found in Chapter 6 of the Texas Family Code.

The fault based grounds for divorce are: cruelty, TEX. FAM. CODE § 6.002; adultery, TEX. FAM. CODE § 6.003; conviction of a felony, TEX. FAM. CODE § 6.004; and abandonment, TEX. FAM. CODE § 6.005.

Chapter 6 of the Texas Family Code encompasses more than the grounds for divorce and annulment. The 2017 legislative session resulted in several changes to Chapter 6 of the Texas Family Code. Consistent with the new amendments to Chapter 2, the legislature amended TEX. FAM. CODE § 6.205 to provide that “[a] marriage is void if either party to the marriage is younger than 18 years of age, unless a court order removing the disabilities of minority of the party for general purposes has been obtained in this state or in another state.”

There were also two amendments regarding temporary orders during the pendency of the divorce, requiring the following: (1) disclosure of existing protective orders involving a party or a child of a party in a suit for dissolution of marriage and inclusion of a copy of the relevant orders, TEX. FAM. CODE § 6.405(a), and (2) that “[n]ot later than the seventh day after the date a receiver

¹ Report from Texas Family Law Foundation entitled, *Family Law Bills that did Not Pass the 85th Texas Legislature* (2017) as received by email, dated Jul 31, 2017, from Steve Bresnen and Amy Bresnen on behalf of the Texas Family Law Foundation.

is appointed under Subsection (a)(5), the court shall issue written findings of fact and conclusion of law in support of the receiver's appointment.” TEX. FAM. CODE § 6.502 (c). This amendment further requires a court to provide an explanation if it dispenses with the issuance of a bond. *Id.*

TEX. FAM. CODE § 6.709 governs temporary orders during an appeal; the 2017 legislative changes to this section are fairly extensive. The primary focus of a majority of the changes regards the use, transfer, conveyance, and dissipation of property during the pendency of an appeal. While the changes are extensive, the authority to order support payments for the benefit of a spouse or to pay attorney’s fees, pending appeal, has been retained. The final amendment in Chapter 6 is to TEX. FAM. CODE § 6.711, which has really just streamlined the findings practice to require, upon request of a party, the characterization and value of “all assets, liabilities, claims, and offsets on which disputed evidence has been presented.” TEX. FAM. CODE § 6.711(a). The section further provides that “[t]he findings of fact and conclusions of law required by this section [§ 6.711] are in addition to any other findings or conclusions required or authorized by law.” TEX. FAM. CODE § 6.711(c).

The foregoing changes will become effective September 1, 2017.

As one might imagine, the cases relating to Chapter 6 code sections are numerous and for this reason the cases presented can only touch upon a few of the Chapter 6 provisions. Nevertheless, as with all chapters in this text, the entirety of the referenced Texas Family Code sections should be read and studied.

B. The Constitutionality of the No Fault Divorce

WAITE

v.

WAITE

64 S.W.3d 217

(Tex. App.—Houston [14th Dist.] 2001, pet. denied)

MURPHY, SENIOR CHIEF JUSTICE.

Specifically, appellant argues that section 6.001 violates 1) the Free Exercise and Establishment Clause of the U.S. Constitution and Texas Constitution article 1, section 6; 2) the “free institutions” clause of the Texas Constitution; and 3) the “open courts” provision of the Texas Constitution. Additionally, appellant asserts that section 6.502 of the Texas Family Code constitutes an unconstitutional invasion of his privacy under the Texas Constitution, as well as a violation of the Free Exercise Clause of the Texas Constitution. Lastly, appellant contends that the trial court erred in awarding attorney’s fees to appellee. We affirm.

I. Standard of Review

The denial of a temporary injunction is reviewed for a clear abuse of discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993); *Landry’s Seafood Inn & Oyster Bar-Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 926 (Tex. App.—Houston [14th Dist.] 1996, no writ). The trial court’s legal conclusions are reviewed *de novo*. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *Eakin v. Acosta*, 21 S.W.3d 405, 407 (Tex. App.—San Antonio 2000, no pet.).

II. Background

This is a divorce case in which Margaret Waite (“appellee”) is seeking a divorce from appellant. Section 6.001 of the Texas Family Code provides:

On the petition of either party to a marriage, the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

TEX. FAM. CODE ANN. § 6.001 (Vernon 1998). Invoking this “no-fault” divorce provision of the Texas Family Code, appellee alleged that “[t]he marriage has become insupportable because of discord or conflict of personalities between Petitioner and Respondent that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.” On September 19, 2000, appellant filed his first amended plea to the jurisdiction and his second amended petition for declaratory judgment, attacking the constitutionality of section 6.001 of the Texas Family Code. In his second amended petition for declaratory judgment, appellant requested that the trial court issue a temporary injunction enjoining appellee from relying upon various statutes as the basis of her cause of action.² The trial court held a hearing on appellant’s plea to the jurisdiction and petition for declaratory judgment in which appellant submitted evidence through the use of expert witnesses. After hearing all of the evidence, the trial court denied both the plea to the jurisdiction and the petition for declaratory judgment, and pursuant to the Declaratory Judgment Act, awarded attorney’s fees to appellee.³

III. Discussion

Whether section 6.001 is unconstitutional as a violation of the U.S. and/or Texas Constitutions is a question of law which we review *de novo*.

A. “Legitimate Ends of Marriage” and “Reconciliation”—Sacramental or Civil in Nature?

Appellant initially challenges the constitutionality of section 6.001 on the basis that it violates, 1) the Establishment Clause of the U.S. Constitution, because it entangles the judiciary in religious issues; and 2) the Free Exercise Clause of the U.S. Constitution and the “rights of conscience” guarantee under the Texas Constitution, because it requires the judiciary to interfere in a religious dispute. Appellant premises both of these arguments on the presumption that the terms “reconciliation” and “legitimate ends of marriage” are objectively religious. We disagree with this presumption. We also disagree with appellee’s contention that there exists two distinct forms of marriage—sacramental and civil. Precedent supports neither proposition.

Our analysis of cases addressing the role of marriage in society reveals that there is only one form of marriage which serves different purposes. *See Maynard v. Hill*, 125 U.S. 190, 210-11, 8 S.Ct. 723, 31 L.Ed. 654 (1888) (“It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract.”); *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124, 1130 (1913) (“The term, ‘civil contract,’ as applied to marriage, means nothing now, for there does not exist the church’s claim that it is a religious rite; there is nothing to be

² It is the trial court’s denial of this temporary injunction which is before us on appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (Vernon Supp.2001) (permitting interlocutory appeal of orders granting or refusing to grant a temporary injunction).

³ We note that no written order appears in the record before us regarding the award of attorney’s fees to appellee.

differentiated by the language; it is obsolete.”); *Gowin v. Gowin*, 264 S.W. 529, 540 (Tex. Civ. App.—Fort Worth 1924), *aff’d*, 292 S.W. 211 (Tex. 1927) (Conner, C.J., dissenting) (“[T]he main purpose of calling marriage a civil contract is to negative the idea that it is an ecclesiastical sacrament, or that in the eye of the law it is controlled by the mandates or dogmas, or subject to the observance of the rituals or regulations, of any particular churches or sects.”).

With regard to the purposes marriage serves for society, “[marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard v. Hill*, 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888). It is this public interest in marriage which allows the state to regulate not only the creation of the marriage, but its dissolution as well. *Id.* at 205, 8 S.Ct. 723 (noting that the legislature “prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution”); *Leon v. Torruella*, 99 F.2d 851, 855 (1st Cir.1938) (“[I]t has been recognized from time out of memory that it is within the power of the legislature of a state to enact laws defining who, when, and under what circumstances its citizens and subjects may marry and the causes of divorce upon which the marriage status may be dissolved whenever the public good or justice to either or both of the parties would thereby be preserved.”); *In re Marriage of Richter v. Richter*, 625 N.W.2d 490, 494 (Minn. Ct. App.2001).

Appellant asserts that any determination by the trial court of what constitutes the “legitimate ends of marriage” or the reasonable expectation of “reconciliation” necessarily involves a religious determination. Legal precedent, however, suggests otherwise. We believe, as was true in 1888, that the trial court is not being asked to make a religious determination, but rather to determine whether the continuance of the marriage relation has been rendered intolerable to the other party, and productive of no possible benefit to society. *See Maynard*, 125 U.S. at 205, 8 S.Ct. 723. The Texas legislature could rationally conclude that public policy requires an accommodation to the unfortunate reality that a marital relationship may terminate without regard to the fault of either marital partner, and that such a relationship should therefore be dissolvable in law upon a judicial determination that the marriage has become insupportable.⁴ *See Joy v. Joy*, 178 Conn. 254, 423 A.2d 895, 896 (1979). Accordingly, we overrule appellant’s assertion that section 6.001 violates, 1) the Establishment Clause of the U.S. Constitution because it entangles the judiciary in religious issues; and 2) the Free Exercise Clause of the U.S. Constitution and the “rights of conscience” guarantee under the Texas Constitution, because it requires the judiciary to interfere in a religious dispute.

B. Free Institutions Clause of the Texas Constitution

Additionally, appellant argues that section 6.001 violates the “free institutions” clause of the Texas Constitution. Specifically, appellant asserts that the institution of marriage is one of the institutions protected by article I, section 1 of the Texas Constitution. We disagree.

Article I, section 1 of the Texas Constitution provides as follows:

⁴ This opinion should not be read as approving of “no-fault” divorce. Whether the “no-fault” divorce movement in Texas has accomplished the purposes and goals as envisioned by the Texas Legislature is a matter left solely to the determination of the citizens of Texas and their elected representatives. We limit our review to the constitutionality of the “no-fault” divorce statute.

Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

TEX. CONST. art. I, § 1.

While we recognize that marriage is often referred to as an “institution,” the institution of marriage is not one of the “free institutions” contemplated in the language of article I, section 1 of the Texas Constitution. Instead, the language “free institutions” is a reference to institutions of state government necessary to ensure the right of local self-government. *See* TEX. CONST. art. I, § 1 interp. commentary (Vernon 1997) (“The provision of Section 1 referring to the right of local self-government . . . seems to be declaratory of the distribution of powers between the two governments, laying down the proposition that the right of local self-government remains unimpaired to all the states.”); *Davenport v. Garcia*, 834 S.W.2d 4, 17 (Tex. 1992) (orig. proceeding). Accordingly, appellant’s reliance on the “free institutions” clause of the Texas Constitution to challenge the constitutionality of section 6.001 of the Texas Family Code is misplaced. Appellant’s assertion that section 6.001 violates article I, section 1 of the Texas Constitution is overruled.

C. The Open Courts Doctrine

Next, appellant challenges the constitutionality of section 6.008 of the Texas Family Code as a violation of the “open courts” provision of the Texas Constitution. Specifically, appellant argues that by abolishing the defense of recrimination, the legislature arbitrarily and unreasonably interfered with his access to the courts.⁵ We disagree.

Article I, section 13 of the Texas Constitution states: “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.” TEX. CONST. art. I, § 13. This provision is directed at prohibiting the legislature from abrogating or unreasonably restricting a litigant’s right to seek redress by way of a well-established common law cause of action. *Rose v. Doctors Hospital*, 801 S.W.2d 841, 843 (Tex. 1990); *Capellen v. Capellen*, 888 S.W.2d 539, 545 (Tex. App.—El Paso 1994, writ denied). The “open courts” provision, however, does not apply to suits for divorce because they are not common law causes of action, but rather statutorily created and regulated proceedings. *Capellen*, 888 S.W.2d at 545-46 (holding “[b]ecause suits for divorce . . . are not common law causes of action, but are statutorily created and regulated proceedings designed to meet the changing desires and needs of the people in a dynamic society, the ‘open courts’ provision has no application”); *see Gowin v. Gowin*, 292 S.W. 211, 214 (Tex. 1927) (holding that the grounds for divorce are dependent upon the sovereign will, and the state may at any time take away that right entirely or change the conditions of its existence). Accordingly, we overrule appellant’s “open courts” challenge to section 6.008 of the Texas Family Code.

D. Privacy Arguments

Appellant contends that section 6.502(3) of the Texas Family Code violates article I, section 9 of the Texas Constitution while section 6.502(7) violates article I, section 6 of the Texas Constitution. Without deciding the merits of these arguments, we find such arguments not ripe for our review.

* * *

⁵ Section 6.008 provides: “(a) The defenses to a suit for divorce of recrimination and adultery are abolished. (b) Condonation is a defense to a suit for divorce only if the court finds that there is a reasonable expectation of reconciliation.” TEX. FAM. CODE ANN. § 6.008 (Vernon 1998).

Appellant complains that section 6.502(3) allows a court to order a party to a divorce suit to produce those items protected by article I, section 9, namely that person's "books, papers, documents, and tangible things." Appellant, however, fails to identify for this Court any specific order requiring production of documents protected by article I, section 9. Thus, appellant presents us with no concrete injury. Accordingly, any opinion as to the constitutionality of section 6.502(3) would be contingent upon events that have yet to occur, amounting to nothing more than an advisory opinion.

Likewise, appellant's complaint regarding section 6.502(7) of the Texas Family Code is not ripe for judicial determination. Section 6.502(7) allows a court to prohibit the parties, or either party, from spending funds beyond an amount the court determines to be for reasonable and necessary living expenses. Violation of such an order would subject the violator to contempt of court. *See* TEX. FAM. CODE ANN. § 6.506 (Vernon 1998). Appellant argues that "[t]he court might decide that gifts to charitable causes were not 'reasonable and necessary living expenses' and punish the philanthropist for contempt of court." Appellant, however, has failed to identify any order by the trial court in this case declaring his charitable contributions, if any, unreasonable, or holding him in contempt for making charitable contributions. Accordingly, any opinion as to the constitutionality of section 6.502(7) would be the equivalent of an advisory opinion. We overrule appellant's constitutional challenges to sections 6.502(3) and (7) of the Texas Family Code.

* * *

IV. Conclusion

Having overruled all of appellant's points of error, we affirm the judgment of the trial court in denying appellant's request for a temporary injunction.

EDELMAN, J., concurs.

FROST, J., concurs and dissents.

EDELMAN, JUSTICE, concurring.

The provision in question in this case (the "statute") states:

On the petition of either party to a marriage, the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys *the legitimate ends of the marital relationship* and prevents any reasonable expectation of reconciliation.

TEX. FAM. CODE ANN. § 6.001 (Vernon 1998) (emphasis added). The dissent essentially concludes that because Texas courts have recognized marriage as having a religious component, the term "legitimate ends of the marital relationship" in the statute cannot be construed to exclude that religious aspect. I disagree.

Wherever possible, we are to interpret statutes in a manner to avoid constitutional infirmities. *General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). It is undisputed, indeed beyond dispute, that our state and federal constitutions prohibit courts from addressing matters of religious doctrine in any context. Moreover, the extent to which marriage has a religious component is purely a matter within the beliefs of each individual, not a matter of legal interpretation or legislation.

Although courts may observe as a factual matter that some individuals have religious beliefs concerning their marriages, and although courts are bound to protect every individual's rights to

have such beliefs, courts certainly could not make, and have not made, any legal decision regarding whether marriage has a religious component because that is neither a legal issue nor a matter that courts may constitutionally decide, contrary to the dissent's numerous references to marriage as "a relationship that Texas case law recognizes as religious in nature," to marriage as being characterized by our state courts as a divine institution ordained by God, to "a wealth of Texas jurisprudence characterizing . . . marriage as having a religious component," and the like. Because marriage cannot be, and has not been, held by the courts to have (or not have) a religious component, there was no such case *law* for the Legislature to be aware of in drafting the statute. Accordingly, there is no basis to infer that the Legislature intended the phrase "legitimate ends of the marital relationship" in the statute to include any religious determination by the courts.

Perhaps the non-religious scope of the provision could have been expressed more distinctly or conspicuously if words such as "secular" or "non-religious" had been included. However, rather than changing the meaning of the words actually used, any such terms would only have been redundant since it is manifest that the Legislature and courts have power solely over secular matters in the first place. Although courts will undoubtedly be called upon to interpret what the "legitimate ends of marital relationship" consist of in a secular context, that term is no more inherently or unconstitutionally religious in its scope than the various other terms the law uses, such as "best interest of the child," which, despite potentially strong religious significance to some, can nevertheless be interpreted and applied by the courts without infringing upon the free exercise of religion.

FROST, JUSTICE, concurring and dissenting.

I concur in the court's disposition of both Mr. Waite's challenges to the award of attorney's fees and all of his challenges to the Texas no-fault divorce statute under the Texas Constitution, except for his challenge under the "rights of conscience" guaranty in Article I, Section 6. For reasons explained below, I agree with Mr. Waite that the no-fault divorce statute violates this provision of our state constitution by impermissibly interfering with Texans' rights of conscience in matters of religion. The court should not reach Mr. Waite's challenges under the United States Constitution because the statute violates the Texas Constitution. *See Davenport v. Garcia*, 834 S.W.2d 4, 11 (Tex. 1992). Because the court rejects Mr. Waite's state constitutional challenge under the "rights of conscience" guaranty of Article I, Section 6, I respectfully dissent.

Under the legal standard the Texas legislature adopted in the no-fault divorce statute, the fact-finder must determine whether the "legitimate ends of the marital relationship" have been destroyed. By requiring this judicial inquiry into the legitimate ends of a relationship that Texas jurisprudence recognizes as religious in nature, the no-fault divorce statute violates the Texas Constitution's strong guaranty of freedom from state control or interference in matters of religious conscience. Although the legislature could have prescribed a different legal standard that would not violate this state constitutional guaranty, this court must apply the statutory language the legislature actually used. Based on longstanding Texas jurisprudence, that language cannot reasonably be interpreted in a way that would render the statute constitutional. Therefore, despite the strong presumption of constitutionality, this court should hold that the Texas no-fault divorce statute violates the "rights of conscience" guaranty of Article I, Section 6 of the Texas Constitution.

THE TEXAS CONSTITUTION'S PROTECTIONS OF RELIGIOUS FREEDOM

The Texas Constitution contains the following guaranties of religious freedom:

All men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. *No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion*, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

TEX. CONST. art. I, § 6. (emphasis added). Mr. Waite claims the Texas no-fault divorce statute violates the “rights of conscience” guaranty, italicized above.

Our state constitution addresses fundamental principles in broad terms. When considering constitutional challenges asserted under both the Texas and United States Constitutions, this court should first rule on the challenges under the Texas Constitution, whose provisions reflect Texas values, customs, and traditions. *Davenport v. Garcia*, 834 S.W.2d at 11-21. Although Article I, Section 6 is the state counterpart to the Establishment and Free Exercise Clauses of the First Amendment in the sense that the provisions serve the same dual purpose of prohibiting the government from establishing religion and protecting an individual’s free exercise of it, the protections afforded are not the same and should not be construed as if they were identical. *See id.* at 20.

The Texas Supreme Court has provided the following guidance for construction of our state constitution:

The construction of any provision of the Texas Constitution depends upon factors such as the language of the constitutional provision itself, its purpose, the historical context in which it was written, the intention of the framers and ratifiers, the application in prior judicial decisions, the relation of the provision to other parts of the Constitution and the law as a whole, the understanding of other branches of government, the law in other jurisdictions, state and federal, constitutional and legal theory, and fundamental values including justice and social policy.

Tilton v. Marshall, 925 S.W.2d 672, 677 (Tex. 1996).

It is apparent from a plain reading of Article I, Section 6 that the framers of the Texas Constitution guarded religious liberty zealously, singling out this freedom for special treatment and protection. The bold language itself indicates that the rights and protections created in this section exceed those afforded by the United States Constitution.

In essence, Article I, Section 6:(1) grants all individuals the “right to worship Almighty God according to the dictates of their own consciences”; (2) protects any non-belief in Almighty God or non-adherence to religious views by keeping all individuals free from the compulsion to “attend, erect or support any place of worship or to maintain any ministry against his consent”; (3) restricts “human authority” from controlling or interfering with an individual’s “rights of conscience in matters of religion”; (4) proscribes the giving of preferences to “any religious society or mode of worship”; and (5) imposes an affirmative duty on the legislature “to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.” TEX. CONST. art. I, § 6.

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .” U.S. CONST. amend. I. This language is purely negative and prohibitive in character. The First Amendment clearly restrains governmental action, but, unlike its Texas counterpart, contains no language which actually bestows religious freedom as an affirmative “right.” See *Bullock v. Tex. Monthly*, 731 S.W.2d 160, 166-67 n.1 (Tex. App.—Austin 1987, writ ref’d n.r.e.) (Carroll, J., dissenting) (stating that the Texas Bill of Rights, in comparison to the federal Bill of Rights, is written as an affirmative grant of powers). In contrast, Article I, Section 6 actually grants all individuals the affirmative “right to worship Almighty God according to the dictates of their own consciences.” Moreover, the state provision uses stronger words than the First Amendment to convey the breadth of the restriction on control and interference with religious liberty. In emphatic language, the Texas Constitution condemns “*in any case whatever*” control or interference “with the rights of conscience in matters of religion.” TEX. CONST. art. I, § 6 (emphasis added). This spirited language shows that the people intended to claim the fullest measure of restraint over government control or interference in an individual’s “rights of conscience in matters of religion.”¹ The disparity in the wording of the United States and Texas Constitutions indicates that government actions that might not constitute an outright prohibition on religious activities in violation of the First Amendment could nonetheless “interfere with the rights of conscience in matters of religion.” TEX. CONST. art. I, § 6. The intention of the framers and ratifiers of the Texas Constitution, as evident in the plain meaning of the words they used, compels the conclusion that Article I, Section 6 provides broader protection of religious freedom than the First Amendment.

* * *

DETERMINING THE APPROPRIATE STANDARD FOR EVALUATING THE CONSTITUTIONALITY OF THE NO FAULT DIVORCE STATUTE

Mrs. Waite argues that the Texas no-fault divorce statute is a neutral law of general application and, as such, it does not single out Mr. Waite for adverse treatment based upon his religious convictions. She urges this court to adopt the rule the United States Supreme Court announced in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990): Neutral laws of general application do not violate the First Amendment merely because they infringe on the particular religious convictions of individual citizens. See, e.g., *id.* (rejecting religious objections to criminalization of peyote); *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) (rejecting religious objections to social security); *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) (rejecting religious objections to the draft); *Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (rejecting religious objections to Sunday-closing laws); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (rejecting religious objections to child labor laws); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878) (rejecting religious objections to criminalization of polygamy). Under this rule, an individual’s religious beliefs do not excuse him from the effects of an otherwise valid and neutral law. *Employment Div.*, 494 U.S. at 878-79, 110 S.Ct. 1595.

¹ Although the framers of the Texas Constitution used the word “ought” in the “rights of conscience” clause and “shall” in the preceding sentence, the word “ought” still is mandatory rather than directory. *Jackson v. State*, 32 Tex. Crim. 192, 22 S.W. 831, 839 (App. 1893) (“ought” is mandatory); *Hunt v. State*, 22 Tex. App. 396, 3 S.W. 233 (App. 1886, no writ) (Texas constitutional provisions are always mandatory); *McKay v. State*, 32 Md. App. 451, 362 A.2d 666, 674 & n. 13 (Md. App.1976) (“ought” as used in state constitution is mandatory), *aff’d*, 280 Md. 558, 375 A.2d 228 (Md. 1977); *Torcaso v. Watkins*, 223 Md. 49, 162 A.2d 438, 441-42 (Md. 1960) (“ought” as used in state constitution provision regarding religion is mandatory), *rev’d on other grounds*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961).

In *Employment Division v. Smith*, the defendants challenged the constitutionality of a state law criminalizing the use of peyote on the ground that peyote use was central to their religion. *Id.* at 874-76, 110 S.Ct. 1595. Upholding the statute, the United States Supreme Court found that it was a neutral law and did not unconstitutionally infringe on the defendants' religious liberty. *Id.* at 876-82, 110 S.Ct. 1595. The Court rejected application of the "strict scrutiny" test in connection with a First Amendment challenge to a neutral law of general application. JUSTICE O'CONNOR urged the Court to apply strict scrutiny to the free exercise claim, precisely as Mr. Waite urges in this case. *See id.* at 891-907, 110 S.Ct. 1595 (O'Connor, J., concurring). JUSTICE SCALIA, writing for the Court, rejected that suggestion in favor of a bright-line rule that neutral laws are immune from free exercise challenges. *Id.* at 885, 110 S.Ct. 1595 ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges.").

Mrs. Waite contends that, although the no-fault divorce statute incidentally burdens Mr. Waite's personal religious beliefs, it does not offend our state constitution. Relying on *Employment Division*, 494 U.S. at 876-82, 110 S.Ct. 1595, she argues that if that were not the rule, individual citizens would retain the privilege of deciding which laws they choose to obey, and each would be "a law unto himself." *See Reynolds v. United States*, 98 U.S. at 145, 166-67 (1878) ("Can a man excuse his practices to the contrary [of law] because of his religious belief? To permit this would be to make the professional doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."). No Texas court appears to have applied this rationale in addressing challenges under Article I, Section 6 of the Texas Constitution, although several have reached similar conclusions. *See, e.g., State v. Corpus Christi People's Baptist Church, Inc.*, 683 S.W.2d 692 (Tex.1984) (rejecting religious objections to licensing procedures for child care facilities); *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W. 303 (1918) (rejecting constitutional objections to requiring vaccinations for school children); *Gabel v. Houston*, 29 Tex. 335 (1867) (rejecting religious objections to Sunday-closing law); *Howell v. State*, 723 S.W.2d 755 (Tex. App.—Texarkana 1986, no writ) (rejecting religious objections to compulsory public education).

The reasoning in *Employment Division v. Smith*, however, does not address the dilemma of the Texas no-fault divorce statute. Unlike the statute criminalizing use of peyote, the Texas no-fault divorce provision requires an inquiry by the state into matters of religious conscience. The statute in *Employment Division v. Smith* was neutral on its face. It prohibited use of peyote; *it did not compel the court to determine whether peyote use was a "legitimate end" of the religious activities of the defendants.* In contrast, the Texas no-fault divorce statute does not merely ask the court to determine if there is discord or conflict of personalities; it goes further, requiring the court to determine the legitimate ends of the marital relationship and then to determine whether discord or conflict destroys those ends. The Texas no-fault divorce statute goes beyond a neutral law of general application, and thus is not analogous to the statute in *Employment Division v. Smith*. The reasoning of *Employment Division v. Smith* might well apply in cases that have statutes with the same characteristics, but it is not appropriate in cases such as this, where the statute, on its face, calls for court inquiry into protected matters. In any event, this court is not required to apply principles from the Free Exercise Clause of the First Amendment in construing the "rights of conscience" clause of the Texas Constitution. That is not to say, however, that application of that test would not be appropriate in a case with an analogous statute.

Relying on *Howell v. State*, 723 S.W.2d 755 (Tex. App.—Texarkana 1986, no writ), for the proposition that Mrs. Waite must prove the no-fault divorce statute is the "least restrictive alternative" to accomplish a "compelling state interest," Mr. Waite urges this court to analyze his

“rights of conscience” claim under the “strict scrutiny” test. Because the protections afforded by the Texas Constitution are greater than those afforded by the First Amendment, and because the test articulated in *Employment Division v. Smith* is not appropriate in this case, this court should apply the traditional strict scrutiny test to this constitutional challenge, i.e., a statute that substantially burdens an individual’s “rights of conscience in matters of religion” must be justified by a compelling state interest and utilize means narrowly tailored to achieve that interest. At least one other Texas court of appeals has applied the compelling interest/least restrictive alternative analysis to a “rights of conscience” claim. *See id.* at 757.

To demonstrate a violation of “rights of conscience” under Article I, Section 6, the party asserting the constitutional challenge must first show that the government “control” or “interference” with religious conscience substantially burdens the exercise of that person’s religious beliefs. Once the challenger establishes “substantial burden,” then there must be a showing of “a compelling state interest behind the regulation and the lack of a less restrictive alternative.” *Id.* at 758. The scrutinization of the legitimate ends of a couple’s marriage and the court’s ability to engage in unfettered inquiry into matters that impact the teachings of religious faith substantially burden Mr. Waite’s rights of conscience in matters of religion. Mrs. Waite offered no evidence demonstrating any compelling state interest for the inquiry nor did she undertake to establish that there is no less restrictive alternative to achieve such an interest. However, in her appellee’s brief, Mrs. Waite suggests two “compelling interests”: (1) to protect “unhappy spouses from a ‘lifetime in prison from which there is no parole,’ ” citing *Trickey v. Trickey*, 642 S.W.2d 47, 50 (Tex. App.—Fort Worth 1982, writ dismissed) and (2) maintaining uniform family laws.

The first reason evinces a lack of understanding of the nature of the problem. The constitutional defect in the statute is not that it permits a no-fault divorce but that it conditions the entitlement to one on an impermissible inquiry into the legitimate ends of a religious institution. Clearly, the Texas legislature could fashion a statute that would entitle a petitioning spouse to a no-fault divorce without inquiring into the religious convictions of the parties to the marriage.

The second proffered “compelling reason” for the no-fault divorce statute, maintaining uniform family laws, can be a legitimate objective for state legislatures, but it hardly rises to the level of a “compelling reason” justifying infringement on highly cherished “rights of conscience in matters of religion.” Moreover, there is no uniformity among the fifty states with regard to the statutory language at issue here. Every state in the country has some form of no-fault divorce statute, but very few states utilize the “legitimate ends of the marital relationship” language.⁸

⁸ Research reveals that of the fifty states, only Michigan and Iowa have no-fault divorce statutes with wording similar to that of Texas Family Code section 6.001, which conditions entitlement to the no-fault divorce on a finding that discord or conflict of personalities destroys the “legitimate ends of the marital relationship.” *See* IOWA CODE ANN. § 598.17 (West 2000); MICH. COMP. LAWS ANN. § 552.6 (West 2001). Some states have more objective and secular legal standards as the only grounds for a no-fault divorce, using criteria such as the spouses having lived apart from each other for a certain period of time (e.g., 12 or 18 months). *See, e.g.*, N.C. GEN. STAT. § 50-6 (2000). Other states use language such as “irreconcilable differences,” “incompatibility,” or “the marriage is irretrievably broken.” *See, e.g.*, WYO. STAT. ANN. § 20- 2-104 (Michie 2001) (irreconcilable differences); KAN. STAT. ANN. § 60- 1601 (2000) (incompatibility); FLA. STAT. ANN. § 61.052 (West 2000) (irretrievably broken). Some states allow divorce under more than one of the foregoing grounds. *See, e.g.*, NEV. REV. STAT. 125 .010 (1999) (incompatibility or living apart without cohabitation for one year). For example, even in the absence of Texas Family Code section 6.001, a no-fault divorce is available in Texas “if the spouses have lived apart without cohabitation for at least three years.” TEX. FAM. CODE ANN. § 6.006.

Moreover, less restrictive alternatives are available. The Texas legislature could formulate any number of legal standards for obtaining a no-fault divorce that would not require the government to make impermissible inquiries into matters of religious conscience and would not require a party defending the marriage against a petition for no-fault divorce to show that the “legitimate ends of the marital relationship” have not been destroyed.

Because there is no compelling state interest for the governmental intrusion on “rights of conscience in matters of religion,” and because there are less restrictive alternatives, Texas Family Code Section 6.001 is unconstitutional and cannot stand. *See Howell*, 723 S.W.2d at 757. Accordingly, Mr. Waite’s challenge to the Texas no-fault divorce statute under the “rights of conscience” guaranty of our state constitution should be sustained.

CONCLUSION

As the elected representatives of the people, the Texas legislature has the power and authority to enact a no-fault divorce law. However, in doing so, it is constrained by our state’s constitution, which emphatically proclaims that the government ought not control or interfere with Texans’ rights of conscience in matters of religion. Because the Texas no-fault divorce statute compels Texas courts to make impermissible inquiries that control or interfere with “rights of conscience in matters of religion,” it violates Article I, Section 6 of the Texas Constitution. There is no compelling state interest to justify the infringement on these invaluable rights, and there are less restrictive alternatives. Accordingly, this court should sustain Mr. Waite’s challenge to the Texas no-fault divorce statute under Article I, Section 6 of the Texas Constitution.

Notes, Comments & Questions

1. It is this public interest in marriage which allows the state to regulate not only the creation of the marriage, but its dissolution as well. Identify examples of legislative regulation affecting the marriage relationship.
 2. In *Waite v. Waite* what is the “religious determination” which Mr. Waite believes raises his case to the constitutional level?
 3. Why isn’t the institution of marriage protected by the “free institution” clause of the Texas Constitution?
 4. Identify the principles upon which Justice Frost’s dissent relies.
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C. Proving the No Fault Divorce

In re MARRIAGE OF RICHARDS

991 S.W.2d 32

(Tex. App.—Amarillo Feb 19, 1999) (pet. dismissed)

BOYD, CHIEF JUSTICE.

In this divorce case, appellant Teresa Jean Richards (Teresa), challenges a decree of divorce terminating her marriage to appellee, Donald Ray Richards (Donald). In support of that challenge, she raises four issues for our consideration: whether the trial court erred in 1) denying her special exceptions; 2) denying her request for a jury trial; 3) denying her motion for a directed verdict; and 4) whether there was legally sufficient evidence to support the court's decree. Finding no reversible error in the trial court's judgment, we affirm the judgment of the trial court.

The parties were married in February of 1968. They separated in January of 1997, and Donald filed a petition for divorce on April 16, 1997. The grounds asserted in Donald's petition tracked the language of section 6.001 of the Family Code entitled "Insupportability." That statute provides:

On the petition of either party to a marriage, the court may grant a divorce without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

TEX. FAM.CODE ANN. § 6.001 (Vernon 1998).¹ Teresa's answer included a special exception to that portion of Donald's petition alleging grounds for the divorce. She alleged that the grounds alleged were merely legal conclusions and failed to give her "adequate notice of the facts upon which the petitioner bases his claim in order to give [her] information sufficient to enable her to prepare a defense." The trial court denied the special exception with the comment that "there is no defense to no fault divorce."

In early October of 1997, the parties participated in mediation which resulted in an agreement as to all property issues. Teresa then served several discovery requests on Donald, including requests for production, written interrogatories and requests for admissions primarily seeking specific events of conflict or discord. Donald objected to most of the discovery requests and each of the requests seeking specific acts of conflict or discord. However, Teresa did not request a hearing on these objections.

On December 19, 1997, Teresa made a written request for a jury trial and tendered the required fees. Donald filed a response in which he contended that there were "no material issues of fact to be determined in this cause. The court has already ruled against [Teresa's] grounds claims and the parties have agreed to a division of assets and liabilities." Stating that Teresa's pleadings were filed "with the intention of preventing the divorce," Donald moved for sanctions

¹ On the date Donald filed his petition, the governing statute was former section 3.001 of the Family Code, containing virtually identical language to present section 6.001, which became effective April 17, 1997.

under Rule 13 of the Rules of Civil Procedure. At a subsequent hearing, the trial court denied the jury request, but declined to rule on the motion for sanctions.

On final hearing of the matter, over Teresa's objection, Donald testified that the marriage had become insupportable due to conflict and discord and that there was no reasonable expectation of reconciliation. He also testified to the terms of the agreed property division. When Donald rested his case, Teresa moved for directed verdict, which was denied. Teresa declined to present any evidence and the trial court rendered its decree of divorce and approved the agreed property division. It signed the final decree January 23, 1998, thus prompting this appeal.

Teresa's first issue challenges the trial court's denial of her special exception. She argues this denial was error because it denied her the opportunity to obtain a statement of the facts upon which the pleading was based and to test "the legal and factual sufficiency" of that pleading, and denied her the opportunity to adequately prepare her defense.

Texas Rules of Civil Procedure 45 and 47 set out the requisites of a plaintiff's petition. Rule 45(b) states that pleadings shall:

consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole.

TEX. R. CIV. P. 45(b). Rule 47 specifically applies to pleas seeking affirmative relief. It requires that such pleas shall contain a short statement of the cause of action sufficient to give fair notice of the claim involved. TEX. R. CIV. P. 47(a). The test whether the requisite fair notice has been given has been described as whether an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the nature and basic issues of the controversy and the testimony probably relevant. *State Fidelity Mortgage Company v. Varner*, 740 S.W.2d 477, 479 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

The legislature has elaborated on the requisites of a petition seeking the dissolution of a marriage. It has done this by enacting section 6.402 of the Family Code. That statute provides:

- (a) A petition in a suit for dissolution of a marriage is sufficient without the necessity of specifying the underlying evidentiary facts if the petition alleges the grounds relied on substantially in the language of the statute.
- (b) Allegations of grounds for relief, matters of defense, or facts relied on for a temporary order that are stated in short and plain terms are not subject to special exceptions because of form or sufficiency.
- (c) The court shall strike an allegation of evidentiary fact from the pleadings on the motion of a party or on the court's own motion.

TEX. FAM. CODE ANN. § 6.402 (Vernon 1998). Measured against the dictates of this statute, the trial court's action was clearly proper. Teresa's challenge is, as it must be, to the constitutionality of the statute.² The purpose of special exceptions is to inform the opposing party of a defect in its pleadings, typically a failure to state a cause of action, so that the party may cure

² Because this constitutional challenge was not brought under the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE §§ 37.001-.010 (Vernon 1997), Teresa was not required to serve a copy of her pleadings on the State Attorney General pursuant to section 37.006 of that act. *Alexander Ranch v. Central Appraisal Dist.*, 733 S.W.2d 303, 305 (Tex. App.—Eastland 1987, writ ref'd n.r.e.), cert. denied, 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988).

the defect by amendment. *Liberty Mut. Ins. Co. v. Sharp*, 874 S.W.2d 736, 739 (Tex. App.—Austin 1994, writ denied); *Cedar Crest Funeral Home, Inc. v. Lashley*, 889 S.W.2d 325, 331 (Tex. App.—Dallas 1993, no writ). Section 6.402 merely establishes a pleading which tracks the language of a statutory ground of divorce as sufficient to state a cause of action.

The thrust of Teresa's argument is that the statute denies her a "legal and factual test of the petitioner's pleadings before trial, [therefore] the respondent is denied 'honest and fair adjudication' of her defense that the petitioner's facts do not support his allegations." Her primary authority in support of this contention is the 1848 case of *Wright v. Wright*, 3 Tex. 168 (1848). There the court stated that the "defendant is entitled to have the judgment of the court whether the facts charged in the petition constitute offenses in law, before he can be compelled to proceed to trial on these facts." *Id.* at 181-82. That right, however, arose out of the governing statute which required petitions to contain a "full and clear statement of the cause of action [which] must embrace the material facts upon which the complaint is founded." *Id.* at 180. It is difficult to conceive how a right granted by a statute enacted over 150 years ago can render a subsequent statute on the same matter unconstitutional. The connection is even more remote when one considers that our present constitution was adopted 28 years after the decision in *Wright*.

Not only has the statutory scheme on which the right for a pretrial test of the sufficiency of the pleadings and the Texas constitution been changed, current civil practice also provides for both extensive discovery and summary judgments. See TEX. R. CIV. P. 166b-169 (discovery), 166a (summary judgment). Other than her misplaced reliance on *Wright*, Teresa presents no argument showing that she could not obtain the facts necessary for her defense through discovery, or that summary judgment did not provide an adequate method to avoid the burdens of trial if the facts did not support the action asserted. Because these procedures were available to her, section 6.402 of the Family Code neither denies her access to the courts of this state or deprives her of equal protection of the laws. We overrule Teresa's first issue.

Teresa next challenges the trial court's denial of her jury request. We initially note section 6.703 of the Family Code expressly provides that in a suit of this type, "either party may demand a jury trial." This provision is required by virtue of the right to trial by jury conferred by Article I, Section 15 of our constitution. See *Goetz v. Goetz*, 534 S.W.2d 716, 718 (Tex. Civ. App.—Dallas 1976, no writ) (holding Art. I, § 15 applicable to divorce actions). The only constitutional limitations on this right in cases of this type are that the party demand a trial by jury and pay the required fee. TEX. CONST. Art. V, § 10. Teresa fulfilled both of these requirements.

The cases discussing the question recognize two rules applicable here. First, that when the jury's verdict is merely advisory, as in issues of property division, child support, or possession, there is no right to a jury trial. *Martin v. Martin*, 776 S.W.2d 572, 574 (Tex. 1989) (conservatorship of child; see also § 105.002 of the Family Code); *Cockerham v. Cockerham*, 527 S.W.2d 162, 173 (Tex. 1975) (property division). Second, that error in denying a properly requested jury can be harmless if no material issues of fact exist and an instructed verdict would have been justified. *Grossnickle v. Grossnickle*, 865 S.W.2d 211, 212 (Tex. App.—Texarkana 1993, no writ); *Phillips v. Latham*, 551 S.W.2d 103, 105 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.). Donald does not argue that a jury's verdict on divorce would be advisory. It is his position that under the statute, there were no questions of material fact for resolution by the jury. We disagree.

Donald argues that at the time of Teresa's jury request, "the trial court had already ruled on, the facts and issues [she] sought to litigate." He provides no record reference for that ruling.

Elsewhere in his brief, however, he argues that the trial court's denial of Teresa's special exception was also a ruling on "the issues underlying that claim." This argument is apparently based on the trial court's statement when denying Teresa's special exception that "there is no defense to no fault divorce." Donald has not cited, and our research has failed to reveal, any support for that proposition.

We begin with the language of the governing statute. The insupportability ground of divorce is set out in section 6.001 of the Family Code. This ground, also known as no-fault divorce, *Cusack v. Cusack*, 491 S.W.2d 714, 716 (Tex. Civ. App.—Corpus Christi 1973, writ dismissed w.o.j.) (discussing previous codification as section 3.001 of the former Family Code), has three elements. They are 1) that the marriage has become insupportable because of discord or conflict, 2) that discord or conflict destroys the legitimate ends of the marriage, and 3) there is no reasonable expectation of reconciliation. TEX. FAM. CODE ANN. § 6.001 (Vernon 1998). There is nothing in the language of the statute to support the conclusion that these are not questions of fact. This conclusion is supported by the statute's application in *Cusack*.

In *Cusack*, the court stated: "[w]e concluded that it was the intent of the Legislature to make a decree of divorce mandatory when a party to the marriage alleges insupportability *and the conditions of the statute are met*, regardless of who is at fault." *Cusack*, 491 S.W.2d at 717 (emphasis added). This statement supports the conclusion that a petitioner's allegation of insupportability is not enough, they must also establish the other conditions of the statute are met, *i.e.*, that there is discord or conflict, that it destroys the legitimate ends of the marriage, and that there is no reasonable expectation of reconciliation. The court also noted, "[t]he courts have no right or prerogative to add to or take from such a legislative enactment, or to construe it in such a way as to make it meaningless." *Id.* To remove any doubt as to the factual nature of those elements, the court concluded: "[a]s we view the [Family] Code, when insupportability is relied on as a ground for divorce by the complaining spouse, *if that ground is established by the evidence*, a divorce must be granted." *Id.* (emphasis added). *See also Baxla v. Baxla*, 522 S.W.2d 736, 739 (Tex. Civ. App.—Dallas 1975, no writ).

Even assuming, *arguendo*, that the trial court's statement that there is "no defense" to a petition for divorce on the ground of insupportability were a correct statement of the law, that would not relieve the petitioner of his duty to establish the statutory elements with adequate evidence. Any attempt to determine those factual issues without giving Teresa an opportunity to respond would violate due process. *See Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 410 (Tex. 1997). If Donald sought to avoid the burdens of trial, our rules provide for summary judgment motions. *See* TEX. R. CIV. P. 166a. His petition and affidavit cannot be deemed to be a motion for summary judgment. While the adoption of "no-fault" divorce dispenses with any burden to establish the source of the conflict rendering the marriage insupportable, it does not relieve the petitioner of the burden to establish the existence of the statutory elements. *Cusack*, 491 S.W.2d at 717. Therefore, at the time of Teresa's jury demand, there were questions of material fact to be resolved and it was error to deny her request.

However, this holding does not end our inquiry. For an error to require reversal of the trial court's judgment, we must conclude that it either probably caused the rendition of an improper judgment or probably prevented the appellant from properly presenting the case to this court. TEX. R. APP. P. 44.1(a). That determination requires a review of the entire record. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). As noted above, Donald testified that the marriage had become insupportable due to conflict which destroyed the legitimate ends of the marriage. He also testified that there was no reasonable expectation of reconciliation. Even without stating the specific events on which his testimony was based, the testimony was evidence establishing the

elements of insupportability. Because Teresa chose not to introduce controverting evidence, the only evidence before the trial court established the elements of the statute. Where the only evidence before the factfinder supports but one conclusion, and there is no contrary evidence, an instructed verdict is proper. *Szczepanik v. First Southern Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). Because an instructed verdict would have been proper at the conclusion of the final hearing, any error in denial of a jury trial was rendered harmless. *Grossnickle*, at 212. We overrule Teresa's second point.

Teresa's third point assigns error to the trial court's denial of her motion for directed verdict. Parenthetically, because trial was to the court and not a jury, the proper motion would be a motion for judgment. *Qantel Business Systems, Inc. v. Custom Controls Co.*, 761 S.W.2d 302 (Tex. 1988). For our purposes, the primary distinction is that when a motion for judgment is granted, we must review the factual sufficiency of the non-moving party's evidence. *Id.* at 304. In support of this point, Teresa argues that the trial court should have sustained her objection to Donald's testimony supporting the grounds of his petition. This objection was based on Donald's objections to her interrogatories concerning the factual basis of the grounds for divorce. Teresa contends that Donald's objections were admissions that he had no admissible evidence on the issue of insupportability. This is not correct.

We initially note the rule that answers to interrogatories do not have the effect of answers to requests for admissions. *Standard Fire Ins. Co. v. Ratcliff*, 537 S.W.2d 355, 359 (Tex. Civ. App.—Waco 1976, no writ). They can be evidence if admitted or read into the record. *Eubanks v. Eubanks*, 892 S.W.2d 181, 181-82 (Tex. App.—Houston [14th Dist.] 1994, no writ). Here, however, there were no answers, only objections on which Teresa did not obtain rulings. An objection to a discovery request may not be treated as an admission that there is no evidence on that matter. Here, Donald's objections were based on relevance. As the court noted in overruling Teresa's trial objection, relevance was a legal question for the court and in making that determination, it was not bound by Donald's discovery objection. We overrule Teresa's third point.

Teresa's fourth and final point is also based on Donald's objections to her interrogatories, and is overruled for the same reasons as her third point. Finding no reversible error in the trial court's judgment, we affirm that judgment.

Notes, Comments & Questions

1. The *Richards* court stated that “[w]hile the adoption of ‘no-fault’ divorce dispenses with any burden to establish the source of the conflict rendering the marriage insupportable, it does not relieve the petitioner of the burden to establish the existence of the statutory elements.” What is meant by the statutory elements?
2. What type of proof would one present to establish the statutory elements?
3. In the case of *Baxla v. Baxla*, 522 S.W.2d 736, 738 (Tex. Civ. App.—Dallas 1975, no writ) the Dallas Court held that, “A statement by one party that the couple has irreconcilable differences is sufficient proof to decree divorce on insupportability grounds.” This tenet was recently reiterated by the El Paso Court, *see In re Marriage of Crosby*, 322 S.W.3d 354 (Tex. App.—El Paso 2010, no pet.).

4. Is there any defense to a no fault divorce?
 5. If one has clear proof of adultery, should one also plead insupportability? Why?
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D. Grounds for Annulment

The statutory grounds for annulment are:

TEX. FAM. CODE § 6.105 - Under the influence of Alcohol or Narcotics;

TEX. FAM. CODE § 6.106 - Impotency;

TEX. FAM. CODE § 6.107 - Fraud, Duress, or Force;

TEX. FAM. CODE § 6.108 - Mental Incapacity;

TEX. FAM. CODE § 6.109 - Concealed Divorce; and,

TEX. FAM. CODE § 6.110 - Marriage Less Than 72 hours After Issuance of License.

A marriage that is subject to annulment is said to be voidable—not void. As noted in the Introduction to this chapter, a marriage to a party under the age of 18 is void, absent a court order that removes the disabilities of the minor for general purposes. TEX. FAM. CODE § 6.205. Thus, an annulment is no longer available for a marriage where one party is under age.

Generally, if a marriage is voidable, a statute in the Texas Family Code provides that a marriage subject to annulment may not be challenged in a proceeding instituted after the death of either party to a marriage. TEX. FAM. CODE § 6.111. A significant departure from this general rule is set forth in the Texas Estates Code, which expressly provides that a marriage that is voidable due to mental incapacity may be declared void after the death of one of the parties. TEX. ESTATES CODE § 123.101 et seq. A challenge to a marriage based on mental incapacity must establish that a party to the marriage lacked the mental capacity to (a) consent to the marriage, and (b) understand the nature of the marriage ceremony, if one occurred. TEX. ESTATES CODE § 123.103. For your convenience, the relevant portions of the Texas Estates Code are set forth, thus:

§ 123.101. Proceeding to Void Marriage Based on Mental Capacity Pending at Time of Death

(a) If a proceeding under Chapter 6, Family Code, to declare a marriage void based on the lack of mental capacity of one of the parties to the marriage is pending on the date of death of one of those parties, or if a guardianship proceeding in which a court is requested under Chapter 6, Family Code, to declare a ward's or proposed ward's marriage void based on the lack of mental capacity of the ward or proposed ward is pending on the date of the ward's or proposed ward's death, the court may make the determination and declare the marriage void after the decedent's death.

(b) In making a determination described by Subsection (a), the court shall apply the standards for an annulment prescribed by Section 6.108(a), Family Code.

§ 123.102. Application to Void Marriage After Death

(a) Subject to Subsection (c), if a proceeding described by Section 123.101(a) is not pending on the date of a decedent's death, an interested person may file an application with the court requesting that the court void the marriage of the decedent if:

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- (1) on the date of the decedent's death, the decedent was married; and
 - (2) that marriage commenced not earlier than three years before the date of the decedent's death.

(b) The notice applicable to a proceeding for a declaratory judgment under Chapter 37, Civil Practice and Remedies Code, applies to a proceeding under Subsection (a).

(c) An application authorized by Subsection (a) may not be filed after the first anniversary of the date of the decedent's death.

§ 123.103. Action on Application to Void Marriage after Death

(a) Except as provided by Subsection (b), in a proceeding brought under Section 123.102, the court shall declare the decedent's marriage void if the court finds that, on the date the marriage occurred, the decedent did not have the mental capacity to:

- (1) consent to the marriage; and
- (2) understand the nature of the marriage ceremony, if a ceremony occurred.

(b) A court that makes a finding described by Subsection (a) may not declare the decedent's marriage void if the court finds that, after the date the marriage occurred, the decedent:

- (1) gained the mental capacity to recognize the marriage relationship; and
- (2) did recognize the marriage relationship.

§ 123.104. Effect of Voided Marriage

If the court declares a decedent's marriage void in a proceeding described by Section 123.101(a) or brought under Section 123.102, the other party to the marriage is not considered the decedent's surviving spouse for purposes of any law of this state.

E. A Void Marriage Can Yield a Putative Spouse

DAVIS

v.

DAVIS

521 S.W.2d 603
(Tex. 1975)

REAVLEY, JUSTICE.

Charles Davis was killed by shipwreck in the Sea of Java on December 24, 1970, at the age of 36 years. The Probate Court of Chambers County, where the administration of his estate is pending, is in possession of the small amount of his personal property, together with wages due from his employer, Reading & Bates Offshore Drilling Company, and the proceeds of a group accidental death insurance policy which was purchased by that employer and issued a few days prior to the death of Charles. The insurer has paid \$51,031.38 into the registry of the Chambers County Court. This litigation will determine the heirship of Charles Davis and the manner of division of this property.

Charles married Mary Nell in Liberty County in 1966, and in 1967 he departed for Australia without her on an assignment with Reading & Bates. After a year or so in Australia he was in Iran briefly, and then in August of 1968 he was assigned to Singapore. On October 2, 1968, a Buddhist wedding ceremony was performed to unite Charles and Nancy, and they lived together as man and wife in Singapore from that time until his death. Approximately one month after his death, both Mary Nell and Nancy gave birth to daughters.

This controversy ensues over the status and rights of Mary Nell and Nancy, and of the daughter of each. The County Probate Court held that Nancy was the lawful widow of Charles and that both of these daughters were entitled to inherit as children of Charles. The District Court, after an appeal and de novo trial without a jury, decided that Mary Nell was the widow, that Nancy was the putative wife, but that the daughter born to Mary Nell after the death of Charles was not his child and was not entitled to inherit any portion of his estate. The Court of Civil Appeals agreed that Mary Nell was the lawful widow and that her daughter was not the child of Charles, but it held that Nancy was not the putative wife at the time of the death of Charles. 507 S.W.2d 841. The only difference between the District Court and the Court of Civil Appeals in the division of the property was in the allotment to Nancy. What did not go to Nancy, under either judgment, went one-half to Mary Nell and the remaining one-half in equal parts to the children of Charles. The District Court awarded Nancy one-half of the wages due and the insurance proceeds; the Court of Civil Appeals judgment gave her nothing. Both Courts ruled that Mary Nell's daughter was not the child of Charles, and both ruled that Nancy's daughter inherited as a child of Charles. Even though the Court of Civil Appeals held that Nancy's putative status was terminated prior to the death of Charles, that holding would not prevent the daughter from being a legitimate child of their marriage. V.A.T.S. Probate Code, § 42.

Nancy is here contending that she is the lawful widow or, at least, that she was the putative wife. Mary Nell's daughter contends that she is the legitimate child of Charles.

We hold, first, that Nancy was not the lawful widow of Charles. While it is initially presumed that Charles and Mary Nell were divorced prior to the wedding ceremony between Charles and Nancy (*Texas Employers' Insurance Ass'n v. Elder*, 155 Tex. 27, 282 S.W.2d 371, 1955; Vernon's Tex. Family Code Ann. § 2.01, 1973), the evidence presented by Mary Nell was legally adequate to rebut that presumption. It is shown that the records in Chambers and Liberty Counties reflect no divorce between them, that the records of the State of Queensland, Australia, show no divorce during the period from September 1, 1967 to December 31, 1970, and that the records in Singapore show no divorce between them during that same period. It is not necessary in order to rebut the presumption that Mary Nell prove the nonexistence of divorce in every jurisdiction where proceedings could have been possible; it is only necessary to rule out those proceedings where Charles might reasonably have been expected to have pursued them. *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App. 1969, writ ref'd n.r.e.). The trial court was entitled to find that there had been no divorce between Charles and Mary Nell and that Mary Nell was therefore his lawful widow.

We next hold that Nancy was the putative wife of Charles. A written contract of marriage (the Chinese document and the English translation), signed by Charles and Nancy, together with her father and another witness, certifying the marriage as being solemnized on October 2, 1968, was placed in evidence. Nancy and two other witnesses testified to the full formality of the ceremony, which was held in the home of her parents with all of her family participating and with twenty persons in attendance. For more than two years thereafter, and until the date of his death, Charles and Nancy lived together as man and wife. Nancy testified that Charles told her of his previous marriage but also assured her that he was divorced and free to marry her. The evidence clearly

warrants the finding that Nancy entered this relationship in good faith. The attorney for Mary Nell, however, having proved that official Singapore records show no registration of this marriage prior to the death of Charles, contends that the marriage was entirely void and of no legal effect under Singapore law. He placed in evidence photographic copies of a portion of the pages of what appears to be an official publication of the law of the Republic of Singapore. There was no pleading as to the law of Singapore, nor do these pages establish the total effect of that law as it pertains to Nancy and Charles. Even if there had been an adequate pleading and if we assume that these copies faithfully reflect some of the pages of an official publication, on this record the Texas courts cannot determine that the total law of Singapore would brand the relationship of Nancy and Charles as meretricious. *See generally*: Thomas, *Proof of Foreign Law in Texas*, 25 Sw.L.J. 554 (1971).

The Court of Civil Appeals has held that even though Nancy may have become the putative wife of Charles at the outset and continued in that relationship for two years thereafter, at a time prior to his death she was put on notice that he was not divorced from Mary Nell—where-upon her putative standing terminated. The evidence on this point turns on the following testimony by Nancy:

Q: Now, during—well—subsequent to April 2, 1968 and before December 23, 1970, you learned, did you not, that Mary Nell Davis was trying to get a divorce from Charles Davis?

A: I didn't learn nothing of that.

Q: Well, you remember you (sic) asking that question on your deposition?

A: You asking me whether I received—

Q: No ma'am, I didn't ask you if you received it. I asked you if you learned that Mary Nell Davis was trying to get a divorce from Charles?

A: I learned it.

Q: Yes.

A: I know it.

The interrogation on the occasion of Nancy's deposition, which was introduced at the trial by the lawyer for Nancy to show a waiver of the dead man's statute, does not throw much light on this matter except for her statements that she knew that Charles was asked to sign a paper which came in the mail at a time when she was pregnant with the child born after the death of Charles. This testimony does not establish conclusively her lack of good faith. In the first place, it is not clear when Nancy understood that Mary Nell was 'trying to get a divorce.' She appreciated the facts as of the time of the trial, but it is not clear that she did so prior to the death of Charles. And even if she knew that these were divorce papers, it does not necessarily follow that Nancy had any reason to believe that Charles had been dishonest with her and had not obtained a prior divorce from Mary Nell. Before we charge Nancy with bad faith or impose upon her a duty to investigate matters, we must take into account that she was in Singapore and not in Texas, that she knew nothing of Texas law, and that she was a 20 year old Chinese woman who had always lived in Singapore and was then expecting a child by a husband who had given her no reason to believe that he had another wife. The trial court was entitled to find in her favor; we hold that the record does not conclusively establish her lack of good faith.

As a putative wife Nancy is entitled to the same right in the property acquired during her marital relationship with Charles as if she were a lawful wife. *Lee v. Lee*, 112 Tex. 392, 247 S.W. 828 (1923); SPEER'S MARITAL RIGHTS IN TEXAS § 56 (4th ed. 1961). In her case it will be half of

the wages owed by the employer at the date of his death as well as half of the proceeds from the insurance policy which was furnished by the employer as an incident of the employment.

This brings us to the question of the legitimacy of Mary Nell's daughter who was born a month after the death of Charles. We agree with the Court of Civil Appeals that impossibility of access between Charles and Mary Nell, during the time when this child might have been conceived, has not been proved unless we consider the testimony to that effect by Mary Nell herself. Whether her testimony may be considered depends on whether we apply the Rule of Lord Mansfield, so-called because it was Lord Mansfield in *Goodright v. Moss*, 98 Eng. Rep. 1257 who said in 1777 that husband and wife 'shall not be permitted to say after marriage that they had no connection and therefore that the offspring is spurious.' This rule has been applied to exclude testimony to facts that would bastardize one's own child as of the time of birth. *Esparza v. Esparza*, 382 S.W.2d 162 (Tex. Civ. App. 1964, no writ). It has even been used to exclude testimony on the ground that the effect would not be in accord with the innocence of married persons. *Burtis v. Weiser*, 195 S.W.2d 841 (Tex. Civ. App. 1946, writ ref'd); *Contra, Gravley v. Gravley*, 353 S.W.2d 333 (Tex. Civ. App. 1962, writ dism'd).

Until the Court of Civil Appeals opinion in the present case, Texas courts have accepted Lord Mansfield's Rule as the law of this state. *Adams v. Adams*, 456 S.W.2d 222 (Tex. Civ. App. 1970, no writ); *Barnett v. Barnett*, 451 S.W.2d 939 (Tex. Civ. App. 1970, writ dism'd); *Longoria v. Longoria*, 324 S.W.2d 244 (Tex. Civ. App. 1959), writ dism'd per curiam, 160 Tex. 134, 327 S.W.2d 453 (1959); *Carnes v. Kay*, 210 S.W.2d 882 (Tex. Civ. App. 1948, no writ); *Gonzalez v. Gonzalez*, 177 S.W.2d 328 (Tex. Civ. App. 1943, no writ); *Moore v. Moore*, 299 S.W. 653 (Tex. Civ. App. 1927, no writ); *Pinkard v. Pinkard*, 252 S.W. 265 (Tex. Civ. App. 1923, no writ). All the while there has been widespread denunciation of the Rule. WIGMORE ON EVIDENCE § 2063 (2nd ed. 1923); 1 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE § 90 (2nd ed. 1956); Note, 6 TEX. TECH. L. REV. 231 (1974).

Rules that exclude evidence bearing directly on the truth to be determined ought not to survive without very good cause. The testimony of a spouse on the matter of non-access by the other spouse is, subject to the usual tests of credibility, clearly the best evidence of that fact. The present case is one where all of the testimony establishes beyond any reasonable doubt that Mary Nell's daughter is not the child of Charles. Then why should the courts refuse to accept the truth? And is there not a valid objection to allowing the child of another father to inherit part of this estate? Some courts have said that the Rule is required for the protection of the child. This may or may not be its consequence. It may be harmful to the interest of the child. *E.g., Esparza v. Esparza*, 382 S.W.2d 162 (Tex. Civ. App. 1964, no writ); *U.S.F. & G. Co. v. Henderson*, 53 S.W.2d 811 (Tex. Civ. App. 1932, no writ).

The contention is made that this is a rule which cannot be changed by judicial decision, because it was adopted in 1840 by statute as part of the common law. Art. 1, Vernon's Ann. Civ. St. This argument is often made and sometimes accepted (*e.g., Gonzalez v. Gonzalez*, 177 S.W.2d 328, Tex. Civ. App. 1943, no writ), but it misunderstands what the common law was and is. The common law of England was conformable to 'the law of Nature, the law of God, to common sense, to legal reason, justice, and humanity.' BROOM, COMMENTARIES ON THE COMMON LAW, p. 21, (4th ed. 1869). *Calvin's Case*, 7 Co. 1a, 77, Eng. Rept. 377, 391 et seq. (K.B.1608); *Forbes v. Cochrane*, 107 Eng. Rep. 450, 455, 458 et seq. (K.B.1824). Lord Mansfield proclaimed the basis of this very rule to be "decency, morality and policy." The system and tradition that we call the 'common law' is not a body of law which evolved within historic England or a bygone age to stand immutable ever afterward. It is the guide and governance of this Court today—in the absence of a mandate of the Constitution or statute. Learned Hand said that our common law is 'a

combination of custom and its successive adaptations. The judges receive it and profess to treat it as authoritative, while they gently mould it the better to fit changed ideas.” THE SPIRIT OF LIBERTY p. 52 (1952). “This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.” *Hurtado v. California*, 110 U.S. 516, 530, 4 S.Ct. 111, 118, 28 L.Ed. 232 (1884). “(A)s life is always in flux, so the common law, which is merely life’s explanation as the lawyer and the judge, law’s spokesmen, are always making it, must also be.” Hutcheson, *The Common Law of the Constitution*, 15 TEX. L. REV. 317, 319 (1937).

This Court has not regarded the legislative adoption of the common law as installing all of the prior rules of English courts with statutory authority. It held that we would look to the declaration of the courts of the several states to determine the body of common law in 1840, and that this should be effectuated only so far as not inconsistent with the conditions and circumstances of the people of this state. *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913); *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935). This Court has often rejected earlier rules of common law, including those in force in 1840. E.g., *Roberts v. Short*, 1 Tex. 373 (1846); *Mud Creek Irr., Agr. & Mfg. Co. v. Vivian*, 74 Tex. 170, 11 S.W. 1078 (1889); *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1012 (1924); *Billings v. Atkinson*, 489 S.W.2d 858 (Tex.1973).

It does not follow that this Court, or any court, is entitled to apply or not apply the rules of law according to preference in the individual case. Those who depend upon the law require continuity and predictability. If the administration of justice is to be effective in the trial courts, the rules must not be constantly shuffled. The appellate court must always start with the rule of precedent and either apply it faithfully or modify the rule if it is not consistent with the prevailing customs and precepts of the legal profession and of the community, giving particular attention to that portion of the community most concerned and affected by the rule.

If Lord Mansfield’s Rule were one that had been counted upon in the planning of property rights, it should be left to the Legislature to change. That is no obstacle in this case. The Rule has never prevented proof of non-access of spouses for a determination of illegitimacy of a child born or conceived during wedlock. The exclusion has only applied to testimony by the spouses themselves. Proof of illegitimacy has been made more difficult, but there is no rule of law that prevents the fact from being shown if other evidence is available. Regarding blindfolds on triers of fact with disfavor, and finding no justification for perpetuating this decree by Lord Mansfield, we hold that testimony of non-access between man and woman is admissible from any witness knowledgeable of the fact.

The judgment of the Court of Civil Appeals is reversed; the judgment of the District Court is affirmed.

Notes, Comments & Questions

1. Identify the statute that provides the presumption with which *Davis* begins. The statute addresses the validity of a marriage.
2. In *Davis* is there a statute that renders Nancy’s marriage void?
3. In *Davis* who appears to be treated better, the lawful widow or the putative spouse?
4. Can the putative spouse take away any of the assets that were acquired during the marriage to the first wife?
5. What is the public policy behind the putative spouse doctrine?

6. Is a putative spouse married?
 7. How might a putative spouse become married?
 8. Describe scenarios which might give rise to a putative spouse.
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F. Cruel Treatment—A Fault Based Ground for Divorce

HENRY

v.

HENRY

48 S.W.3d 468

(Tex. App.—Houston [14th Dist.] 2001, no pet.)

LEE, JUSTICE (Assigned).

Norma Jean Henry appeals from a trial court judgment granting divorce on the ground of her cruel treatment of her husband, Ian Francis Henry. In three points of error, Norma challenges: (1) the sufficiency of the evidence to support the finding of cruel treatment; (2) the division of the community estate; and (3) the assessment of attorney's fees against her. We will affirm the parts of the judgment regarding cruel treatment and attorney's fees (to the extent based on a suit affecting the parent-child relationship), and we will reverse and remand for a new division of the property.

I. Marital History

Ian and Norma were married on June 30, 1990. The couple resided in Red Deer, Canada, and Ian worked as a millwright for Nova, where he had worked for the nine previous years. Norma was working part-time as a nurse while going to school to become a registered nurse. The couple's first child, Aaron, was born on July 14, 1991, and a second son, Dillon, was born on December 28, 1992.

In 1994, Ian learned that his employer was downsizing and that he would be eligible for a severance package. The couple then began looking to move. Norma found a job with a hospital in Corpus Christi and moved to Texas in May of 1995. Ian stayed in Canada with the children for nine more weeks in order to sell the house and complete his employment. For the next year, Norma worked the night shift at the hospital, and Ian was unemployed. The first of four marital separations occurred in late December of 1995.

In August 1996, the family moved to League City. Ian began working for Brown and Root, and Norma began working for Vitas. A second marital separation occurred in November 1996 and a third in January 1997. In March 1997, Ian began working a fourteen day on/fourteen day off schedule for Shell Offshore. A fourth separation began on April 8, 1997, and Ian filed for divorce on April 16.

On January 19, 1998, Ian and Norma entered into a mediated settlement agreement, which purported to resolve all issues relating to the children and the division of property except for the disposition of three accounts and the couple's vehicles. After a two day trial, the trial court granted divorce on the ground of cruel treatment as pled by Ian. The court also awarded a

majority of the three accounts to Ian, granted certain reimbursement claims in his favor, and ordered Norma to pay Ian's attorney's fees.

II. Cruel Treatment

Norma first challenges the sufficiency of the evidence to support the trial court's finding of cruel treatment. Findings of fact in a bench trial have the same force and dignity as a jury verdict; thus an appellate court reviews sufficiency challenges to findings of fact by the same standards as apply in reviewing a jury's findings. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). In reviewing for legal sufficiency, we consider only the evidence and inferences supporting the finding and disregard all evidence and inferences to the contrary. *Minnesota Mining and Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997). If more than a scintilla of probative evidence supports the finding, the no evidence challenge fails. *Id.* More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 523 U.S. 1119, 118 S.Ct. 1799, 140 L.Ed.2d 939 (1998). In reviewing for factual sufficiency, we weigh all of the evidence in the record and overturn the finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

Although seldom used since the advent of no-fault divorce, it is still possible for a court to grant a divorce on the ground of cruel treatment. See TEX. FAM. CODE ANN. § 6.002 (Vernon 1998). To constitute cruel treatment, the conduct of the accused party must rise to such a level as to render the couple's living together insupportable. *Id.*; *Finn v. Finn*, 185 S.W.2d 579, 582 (Tex. Civ. App.—Dallas 1945, no writ). "Insupportable" in this context means "incapable of being borne, unendurable, insufferable, intolerable." *Cantwell v. Cantwell*, 217 S.W.2d 450, 453 (Tex. Civ. App.—El Paso 1948, writ. *dism'd*). Mere trivial matters or disagreements do not justify the granting of divorce for cruel treatment. *Shankles v. Shankles*, 445 S.W.2d 803, 807 (Tex. Civ. App.—Waco 1969, no writ). See also *Golden v. Golden*, 238 S.W.2d 619, 621 (Tex. Civ. App.—Waco 1951, no writ)(complaining spouse suffered only some nervousness and embarrassment). Acts occurring after separation can support a finding of cruel treatment. *Redwine v. Redwine*, 198 S.W.2d 472, 473 (Tex. Civ. App.—Amarillo 1946, no writ).

A. Legal Sufficiency

We first examine the record for the legal sufficiency of the evidence concerning cruel treatment, considering only evidence and inferences that support the finding. See *Minnesota Mining*, 953 S.W.2d at 738. Ian claims that after the move to Texas, Norma underwent a lifestyle change and began going out with a group of single girls from work. He further stated that at times she made him feel excluded from family and social activities, including when she took one of the children on a yacht owned by a single male doctor friend and when she joined a volleyball club but did not invite him to join. Ian further complains that Norma took a vacation back to Canada with the children at a time when he could not go because he had just started a new job.

Ian testified that each of the four separations was instigated by Norma and that she never told him why she wanted him out of the house; she just told him to go. He attended marriage counseling without her and could only get her to go one time. During the fourth separation, the couple alternated who stayed in the apartment with the children, and Ian testified that Norma abandoned the family for eight days and refused to say where she was staying.

Ian stated that, after he filed for divorce, he got an apartment next door to the one where Norma and the children lived. He said that the lease was about to expire on the old apartment,

and Norma invited him over for coffee one night, seduced him, and asked him if she and the children could move in with him. He assented. He then went to work offshore for two weeks, thinking they had reconciled, but when he returned she had moved most of their things out of the new apartment, and she told him she wanted to go through with the divorce.

Ian further testified that, after the divorce was filed, whenever he went to pick up the children for visitation, they were dressed in dirty or torn clothes, and Norma would not give him things for the children that he had requested and she had agreed to give. Also, when he went to pick up his personal property pursuant to the settlement agreement, he found the items sitting in a flower bed, and several things were missing. They arranged to exchange a bookcase, which had been missing from the first exchange, and when he went to pick it up, he found it face down on the road.

Ian's testimony presented evidence on which the court could have reasonably concluded that Norma's conduct constituted cruel treatment such that the marriage was made insupportable. *See Merrell Dow*, 953 S.W.2d at 711. The evidence is, therefore, legally sufficient to support the finding, and we will not disturb the trial court's conclusion.

B. Factual Sufficiency

We now examine the evidence for factual sufficiency, weighing all of the evidence in the record and overturning the finding only if it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Ortiz*, 917 S.W.2d at 772. Norma disagreed that all of the separations were at her insistence. She testified that during one separation, Ian told her that he did not love her. She maintained that there was a communication problem in the marriage and that the fact that they both worked long and irregular hours made working through problems difficult. She stated that they attended marriage counseling in Canada at her request before they moved to Texas. She further testified that she never threatened legal action against Ian, as he contended, and that he had been saying that they should just agree on the divorce and not take it to court up to the time that he filed the lawsuit. She said that he moved some of his belongings out of the property before having her served and that he moved into the apartment next door to continue to exert control over the family. She stated that she did not seduce him during the pendency of the divorce. She tried to use a credit card during this period but found that Ian had cancelled it. She insisted that she did not intend to leave the bookcase in danger of being damaged, it just happened to fall over.

The vast majority of the evidence regarding cruel treatment in this case comes from the testimony of Ian and Norma. There were no other witnesses called at trial except for the trial attorneys, who principally testified regarding legal fees. The weight to be given the respective testimony of Ian and Norma, therefore, is largely a matter of judging the credibility and demeanor of the witnesses. This court is not permitted to interfere with the fact finder's resolution of conflicts in the evidence or to pass on the weight or credibility of the witnesses' testimony. *Sprick v. Sprick*, 25 S.W.3d 7, 13 (Tex. App.—El Paso 1999, pet. denied). It was within the trial court's discretion to believe Ian's testimony to the extent it conflicted with Norma's. With this in mind, the court's determination of cruel treatment was not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. *See Ortiz*, 917 S.W.2d at 772. Accordingly, we overrule this point of error.

* * *

Notes, Comments & Questions

1. In *Henry* after reviewing the evidence of “cruelty” to Ian, many of the incidents listed do not seem to be very bad. Would you describe Norma’s behavior as “incapable of being borne, unendurable, insufferable, intolerable”?
 2. Do you think there is an unstated reason why the court in *Henry* found for Ian and awarded him the majority of accounts, reimbursement, and even ordered Norma to pay Ian’s attorney’s fees?
 3. Do you think that the court in *Henry* seems to have expanded what constitutes cruelty sufficient to grant a divorce.
 4. What would you consider to be encompassed within the concept of “cruel treatment.”
 5. Identify all of the fault based grounds for divorce.
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G. Fault Based Grounds Can Accumulate

NEWBERRY
v.
NEWBERRY
351 S.W.3d 552
(Tex. App.—El Paso 2011, no pet.)

Before CHEW, C.J., MCCLURE, and RIVERA, JJ.

OPINION

DAVID WELLINGTON CHEW, CHIEF JUSTICE.

Appellant appeals a final divorce judgment, arguing that the evidence at trial was legally insufficient to support a finding of cruelty, legally and factually insufficient to support a finding of adultery, and that the division of the community estate was disproportionate to him.

Mr. Ruel Newberry and Ms. Brisa Newberry were married on September 1, 2002. Before marriage, they entered into a prenuptial agreement. After living in Tucson, Arizona for some years, where Appellee earned a Master’s in Business Administration, and Appellant worked as an engineer, they moved to El Paso, Texas after Appellee’s father, Victor Villalobos (“Mr. Villalobos”) offered each of them jobs. They owned a home in Arizona and bought a second house in El Paso on Oscar Perez Avenue.

Appellee filed for divorce on March 5, 2008. Appellant filed a general denial, and then a counterpetition. In his counterpetition, he sought a disproportionate division of the community estate based on fault grounds, among others.

The trial court held a hearing on this matter on various dates from March 2009 through September 2009, and at the end of trial, the court declared the parties divorced. The trial court rendered judgment on October 6, 2009, entering a judgment in final divorce/annulment and a final

divorce decree on January 28, 2010. In its final decree, the court granted Appellee divorce from Appellant “on the grounds of insupportability, adultery and cruelty.” Upon Appellant’s request, the court filed findings of fact and conclusions of law on March 8, 2010 to support its judgment. In its findings of fact, the trial court determined in part:

5. The legitimate ends of the marriage between Petitioner and Respondent had been destroyed because Respondent, Ruel Newberry, committed adultery during the marriage and because Ruel Newberry was guilty of cruel treatment towards Brisa Newberry, which renders the parties further living together insupportable and such behavior by Respondent prevents any reasonable expectation of reconciliation. In addition thereto, the marriage of Petitioner and Respondent had become insupportable because of discord and conflict of personalities that destroyed the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

On February 19, 2010, Appellant filed his notice to appeal the court’s judgment.

In his first two issues, Appellant challenges the legal and factual sufficiency of the evidence to support the adultery finding and the legal sufficiency of the evidence to support the cruelty finding, which were the bases for the disproportionate award of the marital estate going to Appellee.

* * *

Appellant asserts the trial court erred in finding that he committed adultery based only on Appellee’s testimony that he was in a room with his high school sweetheart with the door closed and lights off for more than twenty minutes. He claims that “[g]iven the motive of Brisa to fabricate an adultery claim (going through a divorce involving the disputed division of thousands of dollars of property and liabilities) and circumstances under which this evidence was acquired (just before Appellant and Appellee separated), very little weight should be given to this sparse and nebulous testimony.” Appellant concludes that because the trial court erred in granting Appellee a divorce on the fault ground of adultery, we should remand this case in order for the trial court to reconsider its division of the community estate.

Adultery can be shown by circumstantial evidence. See *Morrison v. Morrison*, 713 S.W.2d 377, 380 (Tex. App.—Dallas 1986, writ dismissed). At trial, Appellee testified Appellant admitted to her that when he attended a party at a friend’s house, he went into a room with his high school sweetheart, Liza, and stayed in there with her with the doors closed and lights off for more than twenty minutes. She testified that this happened after she and Appellant had ceased being sexually intimate. Appellant testified that he never did anything wrong outside of the marriage, but admitted that he viewed pornography online because Appellee had refused to have sex. We defer to the fact finder’s determination with regard to credibility and weight to be given their testimony, and conclude that the evidence was legally and factually sufficient to support the trial court’s finding of adultery as a basis for the divorce. See TEX. FAM. CODE ANN. § 6.704(b) (West 2006); see *Morrison*, 713 S.W.2d at 380 (concluding adultery can be shown by circumstantial evidence).

In Issue One, Appellant contends that Appellee was not entitled to a divorce on the fault ground of cruelty because the evidence was legally insufficient to support this finding. The sufficiency and weight of the evidence necessary to prove cruelty under the trial court’s standard of proof must, of necessity, be left to the sound discretion of the trier of fact. *In re Marriage of Rice*, 96 S.W.3d 642, 648 (Tex. App.—Texarkana 2003, no pet.). We shall not disturb the trial court’s finding of cruelty absent abuse of discretion. *Id.* at 648. In a divorce proceeding, one party’s testimony may alone be sufficient to support the judgment. *Henry*, 48 S.W.3d at 474

(finding husband's testimony, by itself, would support trial court's judgment and therefore no abuse of discretion); *Ingram v. Ingram*, 376 S.W.2d 888, 888-89 (Tex. Civ. App.-Waco 1964, no writ) (wife's uncorroborated testimony satisfies test for sufficiency).

Appellant argues that the court erred in concluding that he engaged in "cruelty" based on the sole evidence in the form of Appellee's testimony that "she caught Ruel on several occasions viewing pornographic materials and masturbating" as he did so. He argues that this conduct at most showed that he was suffering from a psychological condition or disorder, which required professional treatment, and not that he "willfully inflicted suffering on his wife." According to Appellant, the evidence does not support a finding that he engaged in cruel treatment of Appellee because there was nothing "willful" about his conduct. Appellant's complaint, again, goes to fault as a basis for the disproportionate property division.

Although infrequent since the introduction of no-fault divorce, a Texas court may still grant a divorce on the ground of cruel treatment. *Henry*, 48 S.W.3d at 473. A spouse's conduct rises to the level of cruel treatment when his or her conduct renders the couple's living together insupportable. *Id.*, citing TEX. FAM. CODE ANN. § 6.002; *Finn v. Finn*, 185 S.W.2d 579, 582 (Tex. Civ. App.—Dallas 1945, no writ). "Insupportable" means "incapable of being borne, unendurable, insufferable, intolerable." *Henry*, 48 S.W.3d at 473-74, citing *Cantwell v. Cantwell*, 217 S.W.2d 450, 453 (Tex. Civ. App.—El Paso 1948, writ dismissed). Mere disagreements or trifling matters will not justify granting a divorce for cruelty. *Shankles v. Shankles*, 445 S.W.2d 803, 807 (Tex. Civ. App.—Waco 1969, no writ). If, for instance, the complaining spouse suffers only nervousness or embarrassment, a trial court may not grant the divorce on the ground of cruelty. *Golden v. Golden*, 238 S.W.2d 619, 621 (Tex. Civ. App.—Waco 1951, no writ). Abuse need not be limited to bodily injury; nonetheless, physical abuse will support granting a divorce on cruelty grounds. *Waheed v. Waheed*, 423 S.W.2d 159, 160 (Tex. Civ. App.—Eastland 1967, no writ); *Cote v. Cote*, 404 S.W.2d 139, 140 (Tex. Civ. App.—San Antonio 1966, writ dismissed); *Blackburn v. Blackburn*, 163 S.W.2d 251, 255 (Tex. Civ. App.—Amarillo 1942, no writ). Acts occurring after separation may be used to support a finding of cruelty. *Redwine v. Redwine*, 198 S.W.2d 472, 473 (Tex. Civ. App.—Amarillo 1946, no writ).

Adultery may be considered to be cruelty sufficient to support the grant of a divorce on that ground. *Winkle v. Winkle*, 951 S.W.2d 80, 90-1 (Tex. App.—Corpus Christi 1997, writ denied) (concluding evidence of husband's adultery could support trial court's finding of cruel treatment). The accumulation of several different acts of cruelty may constitute sufficient grounds on which to grant a divorce. *Hester v. Hester*, 413 S.W.2d 448, 450 (Tex. Civ. App.—Tyler 1967, no writ); *Emerson v. Emerson*, 409 S.W.2d 897, 900 (Tex. Civ. App.—Corpus Christi 1966, no writ); *Wauer v. Wauer*, 299 S.W.2d 719, 721 (Tex. Civ. App.—Amarillo 1957, no writ).

At trial, Appellee testified that she caught Appellant viewing pornographic materials on television and on the Internet, and masturbating to them numerous times since 2003. Appellee testified that when she confronted Appellant about his actions, he explained that they were caused by her unwillingness to engage in sexual intercourse with him as frequently as he had wanted. After attempting to engage in counseling with family therapists in Tucson and El Paso, for a time Appellee believed that Appellant had stopped his habit of viewing pornography. Despite their reconciliation efforts, however, Appellant continued to view pornography, and admitted to Appellee that he had a problem with being addicted to viewing pornography. After his admission, Appellant denied viewing any more pornography, but Appellee later discovered a new laptop in his possession on which Appellant created a new e-mail address, and used an alias to communicate with another female. In one of his e-mails to this individual, he indicated that he

and Appellee were no longer in a relationship anymore, and that he was “available.” We find that this evidence, coupled with the evidence regarding Appellant’s involvement with Liza, were legally sufficient to support the trial court’s finding of cruelty. See *Winkle*, 951 S.W.2d at 91 (concluding evidence of husband’s adultery could support trial court’s finding of cruel treatment). As such, the trial court did not err in its finding of cruelty as a basis of fault, and we conclude the court did not err in awarding a disproportionate share of the marital estate to Appellee on both cruelty and adultery as bases of fault. Accordingly, we overrule Issues One and Two.

* * *

Having overruled Appellant’s [three] issues presented for review, we affirm the trial court’s judgment.

H. Jurisdiction, Divorce, and the Non-Resident Defendant

GOODENBOUR

v.

GOODENBOUR

64 S.W.3d 69

(Tex. App.—Austin 2001, pet. denied)

PURYEAR, JUSTICE.

Kathryn brings two points of error challenging the district court’s ruling regarding jurisdiction. In her first point of error, Kathryn argues the district court erred when it found that (I) it did not have personal jurisdiction over Jay, (ii) Texas was not the last marital residence of the parties,¹ and (iii) the parties’ children did not reside in Texas as a result of the acts or directives of Jay.² In her second point of error, Kathryn argues the district court erred when it dismissed her petition for divorce and held that it did not have jurisdiction over any issue therein. We will reverse the order and remand the cause for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Kathryn and Jay Goodenbour were married on August 2, 1980 and are the parents of two minor children. Before October 1996, Kathryn and Jay resided with their children in the state of Washington. On October 8, 1996, Jay moved to New Zealand to start a new job while Kathryn and the children remained in Washington. The plan was for Kathryn and the children to move to New Zealand after the Christmas break. At the end of 1996, however, Kathryn developed reservations about moving to New Zealand and decided to stay in Washington, at least until the children finished the school year. In July of 1997, Kathryn was offered a job in Texas. She accepted the job and moved to Austin in August 1997.

In March 1998, while Jay was with Kathryn and the children in Austin, they began looking for a house to buy because they had recently sold their house in Washington. Jay contends that he did not want to help Kathryn buy a house, but did so only to ensure that she and the children would be safe and happy. He still hoped to convince her to move to New Zealand. Jay provided financial

¹ See TEX. FAM. CODE ANN. § 6.305 (West 1998).

² See *id.* § 102.011 (West Supp.2001).

information in connection with the mortgage for the house and provided Kathryn with a power of attorney so she could close the sale in his name while he was on a business trip in Hong Kong. The Austin residence Kathryn and Jay purchased is held in both of their names.

After Kathryn and the children relocated to Austin, Jay returned to his family in Texas on at least five separate occasions, encompassing approximately forty days. One purpose of these trips was to “keep his marriage alive.” Until December of 1998, Jay and Kathryn acted as an intact family and as husband and wife. They filed a joint 1998 tax return reflecting Austin as their residence.³ For the same year, Jay filed a “nonresident” tax return in New Zealand.

In August 1999 Kathryn filed for divorce in Travis County. On April 20, 2000, Jay filed for divorce in Auckland, New Zealand. On May 9, Jay was served with citation in the Travis County divorce. Kathryn was served with papers in the New Zealand divorce, on May 13. On June 5, Jay filed his special appearance and original answer subject to special appearance in Travis County. On July 12, the Family Court in Auckland granted Jay’s application for dissolution of the marriage but did not divide the property or award custody of the children. Jay’s special appearance was heard and granted, on July 17. In its order granting Jay’s special appearance, the Travis County district court found that (1) Jay’s contacts with the state of Texas were insufficient to confer either general or specific jurisdiction over him and (2) Kathryn had failed to establish, pursuant to Texas Family Code sections 6.305(a)(1) and (a)(2), that Texas is the last marital residence of the parties. *See* TEX. FAM. CODE ANN. § 6.305(a)(1)-(2) (West 1998). In granting the special appearance, the court ordered Kathryn’s petition for divorce dismissed in its entirety, leaving her to seek a property division, and orders for the conservatorship, possession, and support of her children in another jurisdiction.

DISCUSSION

Kathryn contests the district court’s finding that Jay is not subject to the jurisdiction of Texas courts. We will first address her argument that the district court erred when it found that Texas was not the last marital residence of the parties.

Standard of Review

The existence of personal jurisdiction is a question of law, but proper exercise of that jurisdiction must sometimes be preceded by the resolution of underlying factual disputes. *Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 715 (Tex.App.—Austin 2000, pet. dism’d w.o.j.). We determine the appropriateness of the district court’s resolution of those disputes by an ordinary sufficiency of the evidence review based on the entire record. *Conner v. ContiCarriers & Terminals, Inc.*, 944 S.W.2d 405, 411 (Tex. App.—Houston [14th Dist.] 1997, no writ). If the court’s order is based on undisputed or otherwise established facts, we conduct a *de novo* review of the order. *Id.* A defendant who challenges a court’s exercise of personal jurisdiction through a special appearance carries the burden of negating all bases of personal jurisdiction. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985).

When a trial court rules on a special appearance, the losing party should request findings of fact. TEX. R. CIV. P. 296; *Daimler-Benz*, 21 S.W.3d at 715. If no findings are present in the record, all facts necessary to support the judgment of the trial court are implied. *Daimler-Benz*, 21 S.W.3d at 715. When a complete reporter’s record exists, however, these implied findings are not conclusive and an appellant may challenge the sufficiency of the evidence to support them.

³ Kathryn’s affidavit states that they filed a joint 1998 tax return although there is not a copy of the return in the record. Jay’s affidavit does not dispute this, and he admits in his brief to this Court that he filed jointly with Kathryn.

Roberson v. Robinson, 768 S.W.2d 280, 281 (Tex.1989). When such points are raised, the standard of review to be applied is the same as that to be applied in the review of jury findings or a trial court's findings of fact. *Id.*

We will set aside a finding of the trial court only if the finding is so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust. *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951); *Runnells v. Firestone*, 746 S.W.2d 845, 849 (Tex. App.—Houston [14th Dist.] 1988, writ denied). In reviewing such a point of error, we must consider and weigh all of the evidence, both the evidence that tends to prove the existence of a vital fact as well as evidence that tends to disprove its existence. *Ames v. Ames*, 776 S.W.2d 154, 158-59 (Tex. 1989); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). In considering the evidence, if a finding is so contrary to the great weight and preponderance of the evidence as to be manifestly unjust, the finding should be set aside, regardless of whether some evidence supports it. *Watson v. Prewitt*, 159 Tex. 305, 320 S.W.2d 815, 816 (1959); *King's Estate*, 244 S.W.2d at 661.

If evidence supports the implied findings of fact, we must uphold the trial court's judgment on any legal theory supported by the findings. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987); *Runnells*, 746 S.W.2d at 848. This is so regardless of whether the trial court articulates the correct legal reason for the judgment. *Harrington v. Railroad Comm'n*, 375 S.W.2d 892, 895 (Tex. 1964); *Fish v. Tandy Corp.*, 948 S.W.2d 886, 891-92 (Tex. App.—Fort Worth 1997, writ denied); *Marifarms Oil & Gas, Inc. v. Westhoff*, 802 S.W.2d 123, 125 (Tex. App.—Fort Worth 1991, no writ). We review the legal conclusions supporting the judgment to determine whether they are correct as a matter of law. *Lawrence v. Kohl*, 853 S.W.2d 697, 699 (Tex. App.—Houston [1st Dist.] 1993, no writ).

Texas Long-Arm Jurisdiction

Texas courts may exercise jurisdiction over a nonresident defendant if the Texas long-arm statute authorizes the exercise of jurisdiction and if the exercise of jurisdiction comports with due process. *Daimler-Benz*, 21 S.W.3d at 714 (citing *Guardian Royal*, 815 S.W.2d at 226). In a suit for dissolution of a marriage, a court of this state may acquire jurisdiction over a nonresident spouse if Texas was the parties' last marital residence or if there is any basis consistent with the state and federal constitutions for exercise of personal jurisdiction. Tex. Fam.Code Ann. § 6.305(a). Once a Texas court acquires jurisdiction under section 6.305(a), it also acquires jurisdiction in a suit affecting the parent-child relationship. *Id.* §§ 6.305(b), 102.011 (West Supp.2001). In her first point of error, Kathryn urges that the trial court erred in finding that Texas was not the last marital residence of the Goodenbours and that no other basis exists for the constitutional exercise of personal jurisdiction over Jay in this proceeding.⁴ We will address both arguments in turn.

⁴ In her pleadings, Kathryn relied on section 102.011 of the Family Code as a basis for long arm jurisdiction, and she includes the trial court's failure to find jurisdiction under this statute in her first point of error. See TEX. FAM. CODE ANN. § 102.011. The trial court heard evidence and based its ruling solely on section 6.305(a), which we rule was tried by consent. See TEX. R. CIV. P. 67; *Temperature Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 673-74 (Tex. App.—Dallas 1993, writ dism'd by agr.). Because of our disposition of the court's ruling on that statute, we do not find it necessary to address appellant's argument that the trial court erred in failing to find that the children resided in Texas as a result of the acts or directives of Jay.

I. Last Marital Residence

The Family Code does not define the term last marital residence, and case law interpreting section 6.305(a)(1) is sparse. In *Cossey v. Cossey*, 602 S.W.2d 591 (Tex. Civ. App.—Waco 1980, no writ), the court held that it would require more than occasional visits by one spouse with the partner and the children at the other spouse’s residence *during marital separation*. *Id.* at 595. The *Cossey* court also noted that one commentator had suggested that last marital residence implies “a permanent place of abode by the spouses.” *Id.* In *Scott v. Scott*, 554 S.W.2d 274 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), the court held that marital cohabitation in Texas from November to February was sufficient to create a last marital residence, bringing the nonresident spouse within Texas long-arm jurisdiction. *Id.* at 277.

In applying the term “last marital residence,” we should acknowledge that more and more frequently one spouse may, by choice or necessity, work in a state or country apart from the family unit for a period of time. A work separation, where spouses live apart to pursue professional opportunities, must be distinguished from a marital separation when spouses have decided to dissolve their marriage. Much as a military member may be on temporary assignment elsewhere, one spouse may, for a time, pursue a work assignment away from the other family members. The family decision to endure a work separation may include consideration of what schooling or other opportunities are best for the children. Because the family has made the decision to remain an intact unit, the fact that the spouses live apart does not mean that a marital residence no longer exists. As long as the parties choose to maintain a marriage, there will be a marital residence somewhere.

To address the first point of error, we must determine the location of the Goodenbours’ last marital residence. There are only three possible choices: Washington, New Zealand, or Texas. It is undeniable that every member of this family left the state of Washington several years ago. It is also clear that only Jay has any significant contact with New Zealand. While it may be true that Jay initially assumed that his family would follow him to New Zealand, neither Jay nor Kathryn sought to end their marriage when it became apparent that Kathryn and the children were not relocating to New Zealand.⁵

Kathryn and the children moved to Austin because she found employment there; she and the children lived there for approximately two years while the parties maintained their long-distance marriage. Jay argues that he never intended to live in Texas. However, there is evidence that he intended to maintain his marriage and his family while they were living in Texas: Jay returned to Austin five times to celebrate his wedding anniversary, family birthdays, and Christmas vacations. During these trips, the parties lived together as man and wife. Jay continued to try to persuade Kathryn and the children to move to New Zealand; Kathryn continued to try to persuade Jay to find employment in Austin. Where was the marital residence while they faced these joint decisions in their marriage? All the evidence suggests that it was in Austin, even though Jay never agreed to work there. This was the classic commuter marriage.

At the very least, Jay acquiesced in his family’s relocation to Austin. While Kathryn and Jay were apart, they had daily email communications and weekly phone conversations discussing school arrangements for the children, the effects of continuous moves on the children’s development in school, work arrangements for Kathryn, and appropriate housing for the family.

⁵ In overruling Kathryn’s *forum non conveniens* plea, the New Zealand court that granted Jay’s request for a divorce noted that Kathryn would not be inconvenienced if it entered a decree affecting only the marital status of the parties because the division of marital property, conservatorship, and support of the children would have to be handled in the forum more convenient to her, presumably Texas.

Jay always kept his personal belongings in the family residence in Austin, both before and after they purchased a home there. He traveled to Austin for family occasions and undertook domestic chores while he was there.

Jay played a major role in purchasing a home for the family in Austin. Jay participated with Kathryn in her search for a suitable home, encouraging her to find a house that would be comfortable and appropriate for the children and in a desirable school district. He completed the necessary financial applications for a mortgage and gave Kathryn his power of attorney to enable her to close on the property in his absence. Jay argues that he was simply trying to ensure that his family had the best available housing by offering his financial support. However, Jay did not merely guarantee or co-sign the loan; he took title to the house with Kathryn. Jay directed that the closing papers be delivered to an attorney of his choice for review. After the family moved into the new house, Jay undertook domestic chores, such as unpacking boxes, painting the living room, and installing a garage door opener. Jay participated in normal social activities with his family when he was in Austin. He conceded in his special appearance affidavit that his trips to Austin were made for the purpose of “keeping his marriage alive.” This family bore all the characteristics of a functioning family unit living in Austin, even though one of the spouses worked in New Zealand. In addition, Jay and Kathryn filed a joint tax return in 1998 listing Austin as their residence.

In light of the family and marital activities centered in Austin, we conclude that Texas was the last marital residence of the Goodenbours. All members of the family were located in Austin, except Jay, and he was there with the family when his work in New Zealand permitted. While his trips to Austin were not frequent or regular (the evidence shows that over two years he was in Austin five times for a total of forty days), they were purposeful and were designed to keep the marriage and the family unit intact. We conclude that the trial court erred in its application of section 6.305(a)(1) of the Family Code and hold that Texas is the parties’ last marital residence.

Having found the long-arm statute to be satisfied, we next consider whether the exercise of personal jurisdiction over Jay comports with federal due process.

Personal Jurisdiction

Federal due process protects a person’s liberty interest from being subject to binding judgments in a forum with which he has established no meaningful contacts, ties, or relations. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Under the federal constitutional test of due process, a state may assert personal jurisdiction over a nonresident defendant only if the defendant has purposefully established minimum contacts with the forum state, and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Id.* at 476, 105 S.Ct. 2174; *see also TeleVentures, Inc. v. International Game Tech.*, 12 S.W.3d 900, 907 (Tex. App.—Austin 2000, pet. denied). Central to the issue of due process “is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174.

A. Minimum Contacts

The minimum contacts analysis has been refined into two types of jurisdiction: (1) general and (2) specific. General jurisdiction exists when the defendant’s contacts with the forum state are continuous and systematic, even if the cause of action does not arise from or relate to activities conducted within Texas. *TeleVentures, Inc.*, 12 S.W.3d at 907. For general jurisdiction, the minimum contacts analysis is more demanding, requiring a showing of substantial activities

within the forum state. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990). Therefore, we must determine that there are either minimum contacts sufficient to confer specific jurisdiction or continuous and systematic contacts sufficient to confer general jurisdiction.

To establish specific jurisdiction, the cause of action must arise out of or relate to the nonresident defendant's contact with the forum state, and the conduct must have resulted from that defendant's purposeful conduct, not the unilateral conduct of the plaintiff or others. *TeleVentures, Inc.*, 12 S.W.3d at 907. Thus, in analyzing minimum contacts for the purpose of determining Texas courts' specific jurisdiction, we focus on the relationship among the defendant, the forum, and the litigation. *Id.*

Under the minimum contacts test for specific jurisdiction, we must determine whether appellee has had purposeful contacts with the forum state, thus invoking the benefits and protections of its laws. *Guardian Royal*, 815 S.W.2d at 226. This requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon random or fortuitous contacts or the "unilateral activity of another party or a third person." *Id.* As long as the contact creates a substantial connection with the forum state, even a single act can support jurisdiction, but a single act or occasional acts may be insufficient to establish jurisdiction if their nature and quality and the circumstances of their commission create only an attenuated connection with the forum. *Burger King*, 471 U.S. at 475 n. 18, 105 S.Ct. 2174. In determining whether a nonresident defendant's contacts are random and fortuitous, the Texas Supreme Court has looked at whether the contacts are based upon the unilateral acts of the plaintiff or if the defendant participated in an act that resulted in a contact. *Dawson-Austin v. Austin*, 968 S.W.2d 319, 321, 326 (Tex. 1998); *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996).

In *Dawson-Austin*, the Texas Supreme Court held that the district court did not have personal jurisdiction over the nonresident respondent. 968 S.W.2d at 326. The husband moved to Texas after separating from his wife and individually purchased a residence and opened bank accounts without any participation or cooperation from his wife. *Id.* at 327. He then filed for divorce. *Id.* at 326. The court held that the husband had unilaterally moved to Texas and had purchased the residence *without the involvement* of the wife and therefore concluded that the nonresident wife in no way purposely availed herself of the privilege of owning property in this state. *Id.* at 327 (citing *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174).

The case at hand is distinguishable from *Dawson-Austin*. Unlike the respondent in that case, Jay was voluntarily involved in the purchase of property in Texas, which was bought expressly for the purpose of *establishing a residence for his family*. He went house-hunting with Kathryn on numerous occasions and executed a power of attorney to facilitate the purchase of the family home, which was to be held jointly in his and his wife's name. These activities occurred at a time when the family was operating as an intact unit, albeit one affected by a commuter marriage. The purchase was completed and Jay became a record owner of real estate in this state.

Ownership of real property in Texas is an important consideration in any minimum contacts analysis. See *Shaffer v. Heitner*, 433 U.S. 186, 208, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977). Jay's purchase of a family home in Texas invoked the benefits and protection of the laws of the state of Texas in relation to his ownership of that property, as well as the laws regarding marital property.

The evidence as a whole shows that Jay's contacts with Texas were not the result of the unilateral acts of Kathryn. Jay was part of an intact family unit; his wife and children resided in Texas. He spent time in the family home on a regular basis. The couple's income tax return for the time period in question reflected Austin as the family residence, while at the same time Jay filed a nonresident return in New Zealand. Jay participated in the purchase of a family residence

in Texas and jointly held title to the property, where his personal belongings remained until the breakup of the marriage. Therefore, we conclude that Jay had sufficient minimum contacts with the State of Texas to subject himself to specific jurisdiction. Having satisfied the first prong of the personal jurisdiction test, we must now determine whether the exercise of jurisdiction satisfies the traditional notions of fair play and substantial justice.

B. Fair Play and Substantial Justice

Having found that Jay had sufficient minimum contacts with Texas, we next turn to whether the exercise of jurisdiction in Texas is reasonable. To determine whether jurisdiction is reasonable, we evaluate the following factors: (1) the burden on the appellee, (2) Texas's interest in adjudicating the dispute, (3) appellant's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174; *Guardian Royal*, 815 S.W.2d at 231.

There is no evidence in the record showing that litigation in Texas would be unfair or unreasonable to Jay. Although there is a significant geographical distance between the parties' current residences, distance alone is not sufficient to defeat jurisdiction. *Guardian Royal*, 815 S.W.2d at 231. Jay made several trips to Texas in the fourteen months preceding the filing of this cause of action, which demonstrates that travel to Texas does not impose an unreasonable and unfair burden. His employer pays for four round-trip tickets annually to the United States and he has accumulated numerous frequent flyer miles, lessening any financial burden that may be imposed on him.

Furthermore, Texas has a strong interest in adjudicating this dispute because it involves a parent-child relationship and protection of the rights of children within the state, as well as the disposition of Texas real property. See *In the Interest of S.A.V.*, 837 S.W.2d 80, 84, 87 (Tex. 1992). Generally, a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting the parent-child relationship even though one of the parties to the relationship may have had no personal contacts with the forum state. *Id.* at 84. Consequently, due process permits adjudication of the custody and visitation of a child residing in the forum state without a showing of minimum contacts on the part of the nonresident parent. *Id.* There is no dispute that Kathryn and Jay's children have been residing in Austin since August of 1997. Moreover, because Jay and Kathryn own real property in this state, Texas has a strong interest in serving as the forum for the adjudication of this suit. A state always has an interest in assuring the marketability of property within its borders as well as providing a procedure for resolution of disputes involving the possession of that property. *Shaffer*, 433 U.S. at 208, 97 S.Ct. 2569.

Finally, Kathryn's interest in obtaining convenient and effective relief suggests that Texas is the appropriate forum in which to adjudicate this matter. It would be more convenient for Kathryn to litigate the dispute in Texas, the state where she and her children reside, than it would be for her to go to New Zealand, a foreign nation to which she has no connection. Unlike Jay, Kathryn has no access to free travel to New Zealand. Furthermore, with regard to the interest of the judicial system in obtaining the most efficient resolution of this dispute, it should be noted that other than Texas and New Zealand, Washington serves as the only other possible forum for handling the dispute. Given the fact that neither party now has a tie to that state, Washington clearly is an inappropriate choice as a forum.

Thus, we conclude that Jay's contacts with Texas are sufficient, particularly considering the quality and nature of his contacts, to confer specific jurisdiction over him. Furthermore,

subjecting Jay to the jurisdiction of Texas courts is reasonable under the circumstances and does not offend the traditional notions of fair play and substantial justice. Given his activities and voluntary involvement with the family, and his joint ownership of the Texas residence, Jay should reasonably anticipate being haled into court in Texas in a suit pertaining to the dissolution of the marriage. Accordingly, we sustain Kathryn's first point of error. Having concluded that there are sufficient contacts to subject Jay to personal jurisdiction in Texas, we do not need to reach Kathryn's second point of error.

CONCLUSION

We conclude that Texas is the last marital residence and that Jay has sufficient minimum contacts with Texas to subject him to personal jurisdiction here. We reverse the judgment of the district court and remand the cause for further proceedings.

Notes, Comments & Questions

1. When may a Texas court exercise personal jurisdiction over a non-resident defendant?
 2. What statutory provision encompasses the acquisition of personal jurisdiction over the non-resident respondent.
 3. What did the court in *Goodenbour* consider in determining whether the exercise of personal jurisdiction comports with federal due process.
 4. How does TEX. FAM. CODE § 6.308 play into a trial court's exercise of jurisdiction?
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I. Temporary Orders When Children Are Not In Issue

Subchapter F. of Chapter 6 of the Texas Family Code governs temporary restraining orders, temporary injunctions, and other temporary orders, which may be obtained during the pendency of a divorce. TEX. FAM. CODE §§ 6.501 and 6.502. Unlike the usual civil case, almost every divorce entails temporary orders during its pendency in the trial court. For this reason, interlocutory appeals from temporary orders are not allowed within the family law realm, except for an appeal of an order appointing a receiver, which is considered an extraordinary remedy. TEX. FAM. CODE § 6.507. If a party to a divorce desires the appellate court to review a temporary order, such as temporary alimony ordered paid during the pendency of divorce, they are relegated to mandamus relief which is difficult to obtain. Temporary orders during the pendency of an appeal are addressed in Subchapter H at TEX. FAM. CODE § 6.709.

It should be noted that in the 2013 Legislative session TEX. CIV. PRAC. & REM. CODE §51.014(c). Appeal from Interlocutory Orders, was amended at b., thus:

- (b) An interlocutory appeal under section (a), other than an appeal under Subsection (a) (4) or in a suit brought under the Family Code stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a) (3), (5), or (8) also stays all other proceedings in the trial court pending resolution of that appeal.
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HARMON
v.
SCHOELPPLE
730 S.W.2d 376
(Tex. App.—Houston [14th Dist.] 1987, no writ)

ELLIS, JUSTICE.

This is an interlocutory appeal taken by appellant, William G. Harmon, Individually and as Secretary-Treasurer of AAA-Arrow Signs, Inc. (“Harmon”). Appellee, Emma Grace Schoelpple (“Schoelpple”), joined Harmon and four companies, one of which was AAA-Arrow Signs, Inc. (“AAA-Arrow”), as co-respondents in a divorce action filed against Schoelpple’s husband, James R. Schoelpple.

Harmon appeals the inclusion of portions of an order pendente lite, issued pursuant to the divorce action, appointing Schoelpple as receiver of AAA-Arrow, giving her sole possession and control of \$53,000 in corporate funds, and temporarily enjoining Harmon from interfering with Schoelpple’s sole and exclusive management of AAA-Arrow or appearing on the business premises. We reverse the judgment of the trial court and render judgment that the aforementioned portions of the order be dissolved. We further order the return of corporate funds to the possession of AAA-Arrow Signs, Inc.

Harmon presents six points of error on appeal. In three points he asserts the trial court erred in appointing Schoelpple as sole manager and receiver of AAA-Arrow, because (1) she was a party to the action pursuant to which the receivership arose; (2) she did not swear an oath, nor did the trial court require her to do so; and (3) the trial court required no bond, or, alternatively, insufficient bond, to be posted. Harmon also alleges the trial court erred in entering its order of receivership because (4) the application of funds allowed by the court exceeds both statutory receivership powers and statutory preferential application of funds. In his final points of error Harmon challenges the trial court’s issuance of a temporary injunction because (5) the trial court did not order the cause set for trial on the merits; and (6) the trial court required no bond, or, alternatively, insufficient bond, to be posted.

In 1982, Schoelpple and her husband purchased A-Arrow Sign Company, Incorporated (“A-Arrow”). The record shows also that Schoelpple’s husband and Harmon own another company, AAA-Bargain Sign Company, Inc. As well, Harmon presently owns 95% of a family sign business, Triple A Signs of Houston, Incorporated (“Triple A”), with which Schoelpple is in no way involved.

Although the precise method of formation is unclear, a new corporation, AAA-Arrow Signs, Inc., was organized in late April 1986 by Harmon as owner of Triple A, Schoelpple, and her husband. AAA-Arrow is housed in a building owned by Triple A (Harmon’s family business) and Harmon. The trial court’s order recognized the ownership interests of AAA-Arrow as follows: “fifty (50%) per cent to TRIPLE A SIGNS OF HOUSTON INC. and WILLIAM G. HARMON, and twenty-five (25%) per cent each to JAMES RALPH SCHOELPPLE and EMMA GRACE SCHOELPPLE.”

Schoelpple is a director, general manager, and vice president of the new corporation, AAA-Arrow. Harmon is a director and secretary-treasurer of AAA-Arrow. The record shows that Harmon and Schoelpple quarrelled constantly over the management of the newly formed corporation.

Schoelpple had filed a petition for divorce on April 1, 1986. She subsequently filed an amended petition on January 16, 1987, in which she joined Harmon and AAA-Arrow, as well as the three other sign companies, as co-respondents. Schoelpple's application for appointment of a receiver and for a temporary injunction were included in the amended petition.

On February 2, 1987, Honorable Allen J. Daggett conducted an evidentiary hearing regarding Schoelpple's application for temporary orders. The order pendente lite was entered February 6, 1987.

Harmon asserts in three points of error that the trial court erred in appointing Schoelpple sole manager and receiver of AAA-Arrow because she was a party to the action; she was not required to swear an oath, nor did she; and no bond, or, in the alternative, insufficient bond, was required. We agree and sustain the first three points of error.

It is well settled that the appointment of a receiver is within the broad discretion of the trial court; absent a clear abuse of discretion the appointment will not be disturbed on appeal. *Smith v. Smith*, 681 S.W.2d 793, 795 (Tex. App.—Houston [14th Dist.] 1984, no writ). Having reviewed the record, we hold the trial court clearly abused its discretion in appointing Schoelpple as receiver of AAA-Arrow.

The applicable receivership provisions of the Texas Civil Practice and Remedies Code read as follows:

§ 64.021. Qualifications; Residence Requirement

(a) To be appointed as a receiver for property that is located entirely or partly in this state, a person must:

* * *

(2) *not be a party*, attorney, or other person interested in the action for appointment of a receiver.

* * *

§ 64.022. Oath

Before a person assumes the duties of a receiver, he must be sworn to perform the duties faithfully.

§ 64.023. Bond

Before a person assumes the duties of a receiver, he must execute a *good and sufficient bond* that is:

- (1) approved by the appointing court;
- (2) in an amount fixed by the court; and
- (3) conditioned on faithful discharge of his duties as receiver in the named action and obedience to the orders of the court.

(emphasis added).

TEX. CIV.PRAC. & REM. CODE ANN. §§ 64.021-64.023 (Vernon 1986).

We hold the trial court violated sections 64.021(a)(2), 64.022, and 64.023 of the Civil Practice and Remedies Code.

The three sections are clear. Section 64.021 states a receiver must not be a party to the action pursuant to which the receivership arose. Schoelpple is undisputably a party. Moreover, she has been appointed receiver of the property of Harmon, a third party. Section 64.022 mandates that a

person swear an oath prior to assuming the duties of a receiver. We find no evidence in the record indicating the trial court required Schoelpple to swear an oath or that she in fact did so.

Section 64.023 requires a “good and sufficient” bond be executed before one assumes receivership duties. The order reflects the requirement of a cash bond of one hundred dollars. The bond paragraph is inserted ambiguously in the order between the receivership and injunction sections. However, we find a statement by the trial court ties the bond to the injunction rather than the receivership. In response to a remark by Harmon’s counsel that the injunction was void due to lack of bond, the court countered, “There’s been a bond set, and it’s been posted. . . .” The requirement of a bond is an essential element of receivership. *O’Connor v. O’Connor*, 320 S.W.2d 384, 391 (Tex. Civ. App.—Dallas 1959, writ dismissed). The absence of a bond is error.

We note that, had the bond been tied to the receivership order, the amount set (one hundred dollars) is insufficient in relation to a business grossing approximately \$70,000 monthly, and thus does not comply with the “good and sufficient” requirement of section 64.023.

We hold the trial court clearly abused its discretion by violating the mandates of sections 64.021 through 64.023. Harmon’s first three points of error are sustained.

In his fourth point of error, Harmon alleges the trial court erred in entering its receivership order because the application of funds allowed by the court exceeds both statutory receivership powers and statutory preferential application of funds. We agree.

The order gives Schoelpple the following powers as receiver:

It is ORDERED that Petitioner, EMMA GRACE SCHOELPPLE, shall be the sole Manager and Receiver of AAA-ARROW SIGNS, INCORPORATED, and Petitioner is accordingly hereby given the sole and exclusive right:

- (a) to collect and manage all monies from said business;
- (b) to hire and fire employees;
- (c) to determine the wages of each employee;
- (d) to promote or demote each employee;
- (e) to determine the working hours of each employee;
- (f) to determine the selection of a place of places where said AAA-ARROW SIGNS, INCORPORATED shall do business;
- (g) to receive all mail of said business;
- (h) to select and contract for the Yellow Pages Advertisement;
- (i) to enter into any contracts necessary for the management of said business, and;
- (j) to perform any and all other functions necessary for the management of said business.

In addition, the trial court ordered the following disposition of funds owned by AAA-Arrow:

It is ORDERED that the Fifty-Three Thousand (\$53,000.00) Dollars in checks and cash, owned by AAA-ARROW SIGNS, INCORPORATED and currently in the possession of WILLIAM G. HARMON, shall be turned over to the Petitioner, EMMA GRACE SCHOELPPLE, on the afternoon of February 2, 1987, and deposited by Petitioner in a new bank account.

It is ORDERED that Petitioner shall withdraw Ten Thousand (\$10,000.00) Dollars from said Fifty-Three Thousand (\$53,000.00) Dollars to be used for child support, ordinary

living expenses, mortgage payments ... and the payments for the 1982 Mercedes Benz 380 SL automobile.

It is ORDERED that Petitioner shall withdraw Twenty-Five Thousand (\$25,000.00) Dollars from said Fifty-Three Thousand (\$53,000.00) Dollars to pay the interim attorneys' fees due the law firm of Foreman & DeGuerin.

It is ORDERED that sums may additionally be withdrawn from said Fifty-Three Thousand (\$53,000.00) Dollars to pay the wages due employees of AAA-ARROW SIGNS, INCORPORATED.

The statutory powers and duties of a receiver are listed as follows:

§ 64.031. General Powers and Duties

Subject to the control of the court, a receiver may:

- (1) take charge and keep possession of the property;
- (2) receive rents;
- (3) collect and compromise demands;
- (4) make transfers; and
- (5) perform other acts in regard to the property as authorized by the court.

TEX. CIV. PRAC. & REM. CODE ANN. § 64.031 (Vernon 1986). A receiver's preferential application of funds reads:

§ 64.051. Application of Funds; Preferences

(a) A receiver shall apply the earnings of property held in receivership to the payment of the following claims in the order listed:

- (1) court costs of suit;
- (2) wages of employees due by the receiver;
- (3) debts owed for materials and supplies purchased by the receiver for the improvement of the property held as receiver;
- (4) debts due for improvements made during the receivership to the property held as receiver;
- (5) claims and accounts against the receiver on contracts made by the receiver, personal injury claims and claims for stock against the receiver accruing during the receivership, and judgments rendered against the receiver for personal injuries and for stock killed; and
- (6) judgments recovered in suits brought before the receiver was appointed.

* * *

(c) The court shall ensure that the earnings are paid in the order of preference listed in this section.

Id. § 64.051.

No language in the powers and duties provision allows Schoelpple such powers as the trial court has granted her. Schoelpple presently possesses absolute control of a corporation of which Harmon, a third party, is a fifty percent owner; moreover, she has total management and control of corporate funds, \$53,000 of which are to be expended in part on child support, living expenses,

and attorneys' fees. Furthermore, the application of corporate funds addressed in the order in no manner complies with section 64.051. We hold the trial court has clearly abused its discretion.

Schoelpple, in replying to Harmon's first four points of error, insists a receivership was not created, nor was there intent on the part of the trial court to appoint a receiver. In support of her position, Schoelpple cites several statements made by the trial court. However, she significantly omits the wording of the order itself: "It is ORDERED that Petitioner, EMMA GRACE SCHOELPPLE, shall be the *sole Manager and Receiver* of AAA-ARROW SIGNS, INCORPORATED. . . ." (emphasis added). Therefore, Schoelpple's claim that this court lacks jurisdiction to consider Harmon's interlocutory appeal, since there is no receivership, is meritless. Furthermore, Schoelpple's claim of nonappealability under § 3.58(g) of the Texas Family Code is likewise without merit. Although a court may enter nonappealable temporary orders pursuant to a divorce action, those orders concern only the parties to the divorce. "Parties" in the context of § 3.58 means "spouses." TEX. FAM. CODE ANN. § 3.58(g) (Vernon Supp.1987); *Commonwealth Mortgage Corp. v. Wadkins*, 709 S.W.2d 679, 680 (Tex. App.—Houston [14th Dist.] 1985, no writ). The orders entered concerning AAA-Arrow and Harmon are not within the parameters of the Family Code. We sustain Harmon's fourth point of error.

In his fifth point of error, Harmon claims the trial court erred in issuing a temporary injunction without an order setting the cause for trial on the merits. We agree.

Harmon complains specifically about the following injunctive orders:

It is ORDERED that WILLIAM G. HARMON, JAMES RALPH SCHOELPPLE, all other parties, and their attorneys, agents, servants, employees and those acting in concert are hereby ENJOINED from interfering [sic] in any manner with Petitioner's sole and exclusive management of AAA-ARROW SIGNS, INCORPORATED.

It is ORDERED that WILLIAM G. HARMON, JAMES RALPH SCHOELPPLE and all other parties are ORDERED to remain away from the offices and place of business of AAA-ARROW SIGNS, INCORPORATED, except when their presence is requested in writing by the Petitioner.

There is no evidence in the record of an order setting the cause for trial on the merits as mandated by Rule 683, which provides in relevant part:

Every order granting a temporary injunction shall include an order setting the cause for trial on the merits with respect to the ultimate relief sought. The appeal of a temporary injunction shall constitute no cause for delay of the trial.

The requirements of Rule 683 of the Texas Rules of Civil Procedure must be strictly followed or injunctive orders will be declared void and dissolved. *Interfirst Bank San Felipe, N.A. v. Paz Construction Co.*, 715 S.W.2d 640, 641 (Tex. 1986); *Commonwealth Mortgage Corp. v. Wadkins*, 709 S.W.2d 679. The temporary injunction issued is void as to Harmon and all other persons, excluding James R. Schoelpple.⁶ We accordingly sustain Harmon's fifth point of error.

In Harmon's sixth point of error, he alleges the trial court erroneously ordered no bond, or, alternatively, insufficient bond, to be posted as a condition for granting a temporary injunction. A bond is required to satisfy Rule 684 of the Texas Rules of Civil Procedure. As stated in point of error three, the one hundred dollar cash bond apparently relates to the injunctive relief ordered. For the reasons set forth above, we hold the court's requirement of a bond of one hundred dollars

⁶ The injunction concerning James R. Schoelpple, appellee's spouse, is governed by § 3.58(g) of the Texas Family Code.

to be insufficient. The trial court has abused its discretion. Accordingly, we sustain Harmon's final point of error.

We reverse the judgment of the trial court and render judgment that those sections of the order appointing Schoelpple as sole manager and receiver of AAA-Arrow Signs, Inc., and temporarily enjoining Harmon, and his attorneys, agents, servants, employees, and those acting in concert with him, from interfering with Schoelpple's sole and exclusive management of AAA-Arrow Signs, Inc., and from appearing on the business premises, be dissolved. We further order Schoelpple to return the sum of \$53,000 in corporate funds in her possession to the possession of AAA-Arrow Signs, Inc.

Notes, Comments & Questions

1. What are the requirements for appointing a receiver? Were they met in *Harmon v. Schoelpple*?
 2. Does granting a temporary injunction require setting the cause for trial?
 3. What are the rights of third parties?
 4. What would have been a sufficient bond in *Harmon v. Schoelpple*?
-

J. Alternative Dispute Resolution

Subchapter G of Chapter 6, TEX. FAM. CODE §§ 6.601-6.604, sets forth the basic alternative means to resolve disputes in family law cases, those are: arbitration; mediation; collaborative law; and, informal settlement conferences. TEX. FAM. CODE § 6.603 that covered collaborative law in divorce cases has been repealed and replaced by the Collaborative Family Law Act—Texas Family Code Chapter 15. The Collaborative Family Law Act adopted in Texas is based upon the Uniform Collaborative Law Act that was issued by the National Conference of Commissioners on Uniform State Laws. The Collaborative Law Act will be discussed, below.

The most frequently used method of dispute resolution is mediation. Indeed, in Harris County mediation is required in most cases before a hearing on temporary orders or a final trial on the merits will be allowed. Perhaps the most important section in this subchapter is TEX. FAM. CODE § 6.602 which sets forth the requisites if a mediated settlement agreement is to be binding on the parties. Specifically, the settlement agreement must: (1) provide in a prominently displayed statement that is in boldfaced type or capital letters or underlined that the agreement is not subject to revocation; (2) be signed by each party to the agreement; and, (3) be signed by the party's attorney, if any, who is present at the time the agreement is signed.

While Chapter 6 governs alternative dispute resolution in those cases that do NOT involve children, it is probably a good point to be alerted to the fact that a change was made to the enforcement of mediated settlement agreements that **do** involve children. Although it will be reiterated later in the course, during the 2017 legislative session, the Texas Legislature amended a provision governing Alternative Dispute Resolution Procedures § 153.0071(e-1) to permit a court to decline to enter judgment on a mediated settlement agreement if the court finds that the agreement would permit a person who is subject to registration under Chapter 62, Code of

Criminal Procedure, on the basis of an offense committed by the person when the person was 17 years of age or older or who otherwise has a history or pattern of past or present physical or sexual abuse directed against any person to: (i) reside in the same household as the child; or (ii) otherwise have unsupervised access to the child; and (2) that the agreement is not in the child's best interest. This amendment is in direct response to the Texas Supreme Court opinion of *In re Lee*, 411 S.W.3d 445 (Tex. 2013), also to be discussed later in the course.

Arbitration provisions have been expanded with the addition of TEX. FAM. CODE § 6.6015 which provides that if a party to a suit for dissolution opposes an application to compel arbitration or asserts the contract to arbitrate is unenforceable, the court shall try the issue of contract validity promptly and may order arbitration only if the contract is found valid.

The second most popular alternative means to settle a family law dispute is collaborative law now governed by the Collaborative Family Law Act which is based upon the Uniform Collaborative Law Act that was issued by the National Conference of Commissioners on Uniform State Laws. This Act, adopted in 2011 and effective on September 1, 2011. It is based on the policy of the State of Texas to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent child relationship. The Collaborative Family Law process is a procedure intended to resolve a Collaborative Family Law matter without the intervention by a tribunal in which parties sign a Collaborative Family Law participation agreement and are represented by Collaborative Family Law lawyers. Some of the most important requisites of this act are:

Requirements For Collaborative Family Law Participation Agreement. A Collaborative Family Law Participation Agreement must be in a record, signed by the parties, state the parties intent to resolve a collaborative family law matter through a collaborative family law process. In addition, it must describe the nature and scope of the collaborative family law matter and identify the collaborative lawyer who represents each party in the process. Said agreement must contain a statement by each lawyer confirming the lawyers representation in the process and the agreement must include provisions for: (1) suspending tribunal intervention while the families are using the collaborative law process; (2) unless otherwise agreed in writing, to jointly engage any professionals, experts, or advisors serving in a neutral capacity.

- 1. Proceedings Pending Before The Court Which Are In The Collaborative Process.** The parties must promptly notify the court of the collaborative law agreement after it is signed. While the collaborative law process is ongoing, the court may not: set a proceeding or hearing in the matter; impose discovery deadlines; require compliance with scheduling orders; or, dismiss the proceeding.
- 2. Notification of Status.** The parties shall notify the court in a pending proceeding if the collaborative law process results in settlement or if it does not result in settlement the parties shall file a status report on the 180th day after the collaborative family law participation agreement is signed and then again on or before the 1st anniversary of that same date.
- 3. If Collaborative Law Process Does Not Settle Case.** If the collaborative family law process does not result in a settlement on or before the 2nd anniversary of the date the proceeding was filed the tribunal may set the proceeding for trial on its regular docket or dismiss it without prejudice.
- 4. Effect of Written Settlement.** A party is entitled to judgment on a collaborative family law settlement agreement if the agreement provides a prominently

displayed statement that is in bold face type, capitalized, or underlined that the agreement is not subject to revocation and it is signed by each party to the agreement and the collaborative lawyer of each party.

5. **Disqualification of Lawyers, with Exceptions.** If the collaborative law case does not settle the collaborative lawyer is disqualified from appearing before the court to represent a party in a proceeding related to the collaborative family law matter regardless of whether the collaborative lawyer is representing the party for a fee. However, a collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party to request the court to approve an agreement resulting from the family law process or to seek or defend an emergency order to protect the health, the safety, welfare interest of a party or a family if the successor lawyer is not immediately available.
6. **Disclosure of Information.** On the request of another party, the party shall make timely full candid and informal disclosure of information related to the collaborative matter without any formal discovery. A party shall update promptly any previously disclosed information that has materially changed.
7. **Emergency Orders.** During a collaborative family law process a court can issue an emergency order to protect the health, safety, welfare or interest of a party or a family. If the emergency order is granted without the agreement of all parties the granting of the order terminates the collaborative process.

K. Trial, Appeal & Remarriage

Subchapter H of Chapter 6 of the Texas Family Code provides a series of miscellaneous provisions that affect the trial and appeal of a dissolution case. TEX. FAM. CODE § 6.703 provides that in a suit for dissolution of a marriage, either party may demand a jury trial. The statute still provides that actions to annul an underage marriage cannot be tried to a jury. However, since pursuant to the 2017 amendments, underage marriages are void, it is unlikely that the exception can or will be applied. This right to a jury trial is not as all encompassing as it may seem. This first part of the text deals only with dissolution of the marriage relationship; we will discover later in the course, many issues that arise within suits affecting the parent child relationship cannot be tried to the jury.

In addition, in divorce cases, it is up to the judge, not the jury to make a division of the property. Because a judge divides the property, there will be no questions submitted to the jury as to the ultimate division. The jury can answer questions of characterization and value, but they cannot divide the property. For this reason, it is very important to obtain findings of fact and conclusions of law regarding the division of property if such will be challenged on appeal. Prior to the passage of TEX. FAM. CODE § 6.711, the appellate courts were divided as to how detailed a trial court's findings on the division or property had to be. If one happened to be in an appellate district that did not require findings on value, it was most difficult to challenge any trial court division of property. TEX. FAM. CODE § 6.711 requires findings, if requested in proper conformance with the Texas Rules of Civil Procedure, on characterization, value and amount of each party's or the community estate's assets, liabilities, claims and offsets, on which disputed evidence has been presented.

Chapter 3
Dissolution of the Marriage Relationship

Other important provisions found within this subchapter include: the need to prove up a divorce even in a default situation, TEX. FAM. CODE § 6.701; the 60 day waiting period between filing of divorce and final judgment unless the 60 day waiting period is waived due to conviction or deferred adjudication for family violence or due to issuance of a protective order, TEX. FAM. CODE § 6.702; and that a party may request and obtain a name change in the decree of divorce, TEX. FAM. CODE § 6.706. Remember, the legislature also recently added §6.708(c) which allows for the award of reasonable fees and expenses in a dissolution case and allows the trial court to order that said fees and expenses and any postjudgment interest be paid directly to the attorney who may enforce the order in the attorney's own name by any means available for the enforcement of a judgment for debt. As previously mentioned, the 2017 legislative changes to TEX. FAM. CODE § 6.709, entitled Temporary Orders During Appeal, are fairly extensive, focusing primarily on the use, transfer, conveyance, and dissipation of property during the pendency of the appeal. Remember, the ability for a trial court to order support or attorney's fees pending appeal has not been hampered.

Remarriage of a divorced party is governed by Subchapter I of Chapter 6 of the Family Code. Neither party to a divorce may marry another before the 31st day after the divorce is decreed, TEX. FAM. CODE § 6.801(a), although this prohibition may be waived. TEX. FAM. CODE § 6.802. The former spouses may remarry each other within this time period. TEX. FAM. CODE § 6.801(b).
