Chapter III
Dissolution of the Marriage Relationship

Read Texas Family Code Chapter 6, Suit for Dissolution of Marriage.

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 than for insupportability.

No-fault divorce based upon insupportability has come under attack by certain litigants and by certain members of the legislature. For example, 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 too are found in Chapter 6 of the Texas Family Code. It should be noted that many states eliminated fault-based grounds for divorce when they adopted no-fault divorce.

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.

In addition, Chapter 6 of the Texas Family Code also establishes the grounds for annulment. A marriage can be annulled if a person is under 18 years of age, TEX. FAM CODE §6.102. However, this section should be considered in light of TEX. FAM. CODE §§2.003, 6.205, which also address underage marriage and the strict rules governing the entry into an underage marriage. Read these and consider the co-existence of §§2.003, 6.102, and 6.205.

A marriage can also be annulled, if it was entered into while under the influence of alcohol or narcotics, TEX. FAM. CODE §6.104. Likewise, a marriage can be annulled if either party was impotent at the time of marriage, TEX. FAM. CODE §6.106. Fraud, duress, or force can also be considered as a ground for annulment, TEX. FAM. CODE §6.107, as can mental incapacity, TEX. FAM. CODE §6.108, and concealed divorce, TEX. FAM. CODE §6.108. If one marries less than 72 hours after the marriage

[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.

license has been issued and does not qualify for waiver of the 72 hours or there has not been a waiver, an annulment can be sought within 30 days of the marriage, TEX. FAM. CODE §6.110.

One thing to remember about an annulment is that it is sought when a marriage is voidable – as opposed to when a marriage is void. Further, the general rule is that unless allowed under the Texas Estates Code, an annulment may not be sought after the death of either party to the marriage. TEX. FAM. CODE §6.111. In contrast, a void marriage can be attacked at any time for the following reasons: consanguinity, TEX. FAM. CODE §6.201; marriage during the existence of a prior marriage, TEX. FAM. CODE §6.202; marriage to a minor, TEX. FAM. CODE §6.205; or, marriage to a stepchild or a stepparent, TEX. FAM. CODE §6.206.

It is interesting to note that TEX. FAM. CODE §6.204, which bars recognition of same sex marriage or civil unions, remains on the books even after the United States Supreme Court's opinion in *Obergefell v. Hodges*. A possible Zombie Law!

Matters of jurisdiction, venue, residence qualifications, and the filing of a dissolution suit are addressed in TEX. FAM. CODE §§6.301- 6.411.

Subchapter F, TEX. FAM. CODE §§6.501- 6.507 address temporary orders during the pendency of a dissolution. This portion of the family code saw some minor changes during the 2023 legislative session. It should be noted that only since September 1, 2023, may a party be specifically and statutorily restrained from "tracking or monitoring personal property or a motor vehicle in a party's possession" without that same party's "effective consent." So, using a tracking device on the opposing party's person, property, or vehicle, even if the property is in your name, can be barred by court order. Likewise, physically following a party or causing another to physically follow that party can also be restrained by court order. Based on the foregoing, it looks like temporary orders and dissolution proceedings have, to some extent, entered the 21st-century.

Alternative dispute resolution is also addressed in Chapter 6 of the Texas Family Code, and this includes arbitration, mediation, and informal settlement conferences. TEX. FAM. CODE §§6.601-6.604. It should be noted that collaborative law is now addressed in its own chapter, entitled TEX. FAM. CODE, CHAPTER 15, COLLABORATIVE FAMILY LAW ACT.

The trial and appeal of a dissolution case is addressed in Chapter 6, Subchapter H, TEX. FAM. CODE §§6.701-6.712. Especially important within these sections is TEX. FAM. CODE §6.701 which provides that, unlike general civil law claims, "in a suit for divorce, the petition cannot be taken as confessed if the Respondent does not file an answer." Meaning, even in a default situation, a divorce MUST be proved. This is well illustrated in the case of *Lynch v. Lynch*, found in this chapter of the text.

Finally, the remarriage of one who has been a party to a marital dissolution is addressed in TEX. FAM. CODE §§6.801, 6.802.

As one might imagine, the cases relating to Chapter 6 code sections are numerous and for this reason the cases presented here 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 . . . 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

[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).

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 Constitution(s) 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 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 negate 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

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

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:

> 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.

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[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.

[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).

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.

* * *

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 indefeasible 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.

* * *

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. . . . 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.

* * *

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

[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 addressing challenges under Article I, Section 6 of the Texas Constitution, although several have reached similar conclusions. . . .

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.

* * *

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 dism'd) 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

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.

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.

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 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

[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.

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 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.

[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 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 dism'd 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 insupportabilty 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 fault (i.e., cruelty, adultery), should one also plead insupportability? Why?

D. 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.

* * *

The following is a short excerpt from the case *Baker v. Baker*, which is also found later in Chapter V of the text because of its holding regarding conservatorship and domestic violence. I have included a portion of the *Baker* opinion below because it illustrates the breadth of a trial court's discretion when compared to the previous case of *Henry v. Henry*. Also included in this Chapter is the *In re Baker* mandamus opinion issued upon remand of *Baker v. Baker* which is procedurally instructive and a testament to the fact that trial court discretion is not unbridled, especially in light of procedural rules. In reading the following two *Baker* excerpts, think about what might possibly have been the trial court's rationale. Also, what do you think was the ultimate outcome?

BAKER
v.
BAKER
469 S.W.3d 269
(Tex. App. – Houston [14th Dist.] 2015, no pet.)

OPINION
Tracy Christopher, Justice

This is an appeal from a judgment of divorce between Sarah Baker ("Mother") and Mitch Baker ("Father"), who are parents to two young children. Mother asks us to consider three issues: (1) whether the trial court erred by appointing Father as a joint managing conservator when the evidence established that Father has a history of family violence against Mother, (2) whether the trial court abused its discretion by imposing death penalty sanctions against Mother in her tort actions against Father, and **(3) whether the trial court abused its discretion by granting the divorce on the basis of insupportability instead of cruelty.** . . .

. . . We further conclude that the trial court erred in its conservatorship ruling and in its decision to impose death penalty sanctions. We reverse the trial court's judgment in part and remand for a new trial on conservatorship and on Mother's tort actions against Father. Because Mother's tort actions present a risk of a double recovery, we also remand for a new division of the community estate. In all other respects, we affirm the trial court's judgment.

BACKGROUND

The record shows that this was a troubled marriage. There were financial difficulties, problems with addiction, and allegations of infidelity. The tipping point for Mother occurred when Father punched her in the face. The blow knocked Mother to the ground and broke at least two bones in her skull. Surgery was needed to save Mother's eye.

Mother filed for divorce, seeking sole managing conservatorship of the children. She also asserted several torts against Father, including assault, battery, terroristic threats, and intentional infliction of emotional distress. Mother sought exemplary damages in connection with these torts, but the trial court struck them all as a sanction for discovery abuse.

During the non-jury trial, Mother testified that Father is an alcoholic. She also produced evidence that Father has a history of abuse that goes beyond the punch that precipitated this divorce. Mother asserted, for instance, that Father has pushed her, thrown a chair at her, spat on her, and called her derogatory names in front of the children. Father denied some of these assertions, but he does not dispute that he punched Mother.

The trial court rendered a final decree of divorce appointing both parents as joint managing conservators, with Mother having the primary right to designate the children's residence. The court also signed findings of fact and conclusions of law. One of the findings specifically addresses the issue of family violence. It says: "Family violence has occurred in the past but the court declines to find that it is likely to occur in the future." In a separate finding and conclusion of law, the court determined that joint managing conservatorship is in the best interests of the children.

* * *

GROUND FOR DIVORCE

In her final issue, Mother argues that the trial court should have granted the divorce on the basis of cruelty, and not insupportability, because there was evidence establishing cruelty as a matter of law.

A trial court may grant a divorce because the marriage has become insupportable or because one spouse's cruel treatment towards the other spouse has made the marriage insupportable. *See* TEX. FAM. CODE §§6.001, 6.002. The trial court has the discretion to choose among these and other fault-based reasons when deciding whether to grant a divorce. See *Clay v. Clay*, 550 S.W.2d 730, 734 (Tex.Civ.App.–Houston [1st Dist.] 1977, no writ).

Here, the trial court made a finding of fact that 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." Mother has not challenged that finding of fact, and there is legally and factually sufficient evidence to support that finding. The trial court could have concluded that the marriage should have been dissolved on the basis of cruelty, but it did not. The trial court did not abuse its discretion by granting the divorce solely on the basis of insupportability. . . .

CONCLUSION

The trial court's judgment is reversed in part and remanded for a new trial on the issues of conservatorship, Mother's tort actions, and the division of the community estate. In all other respects, the trial court's judgment is affirmed.

***In re* Sarah Lansden BAKER, Relator**
495 S.W.3d 393
(Tex. App. – Houston [14th Dist.] 2016)

On February 10, 2016, relator Sarah Lansden Baker filed a petition for writ of mandamus in this Court. *See* TEX. GOV'T CODE Ann. §22.221 (West 2004); *see also* TEX.R.APP. P. 52. In the petition, relator asks us to compel the Honorable Judy Warne, presiding judge of the 257th District Court of Harris County, to vacate her January 6, 2016, Order Denying Request for Jury Trial and Overruling Objection to Referral of Final Trial to Associate Judge. Because relator's consent to the original bench trial before the associate judge did not survive our partial reversal and remand, we conditionally grant the writ.

BACKGROUND

In July 2012, Sarah filed suit for divorce from Mark Mitchell Baker and conservatorship of the parties' children, and additionally asserted claims for assault, battery, terroristic threats, and intentional infliction of emotional distress against Mark. The parties, through their counsel, signed a waiver of any objection to the associate judge of the court hearing the trial scheduled for June 5, 6, and 7, 2013. The waiver was filed with the court on January 30, 2013. The case was tried by Associate Judge Deborah Patterson. A reformed final decree of divorce was signed December 18, 2013.

Sarah appealed. In *Baker v. Baker*, 469 S.W.3d 269 (Tex.App.-Houston [14th Dist.] 2015, no pet.), we affirmed the divorce judgment insofar as it granted the divorce, but reversed the judgment

in part and remanded for a new trial on (1) the conservatorship of the children, (2) Sarah's claims for assault, battery, terroristic threats, infliction of emotional distress, and exemplary damages, and (3) the division of the entire community estate.

On remand, Sarah filed a demand for jury trial and paid the jury fee on July 8, 2015--more than thirty days before the trial setting as required by Texas Rule of Civil Procedure 216. Later, the court notified Sarah that her case had been assigned for trial again by Associate Judge Patterson. Immediately thereafter, on October 5, 2015, Sarah filed an Objection to Referral of Final Trial to Associate Judge. At a status conference on November 11, the trial judge informed the parties that the trial would proceed before Associate Judge Patterson and that the case would not be submitted to a jury.

On January 6, 2016, the trial judge signed an _Order Denying Request for Jury Trial and Overruling Objection to Referral of Final Trial to Associate Judge that provides in relevant part:

History

This case was originally tried in 2013. The parties agreed at the time [January 30, 2013, before original divorce trial] to try it to the Associate Judge, the Honorable Deborah Patterson . . .

After judgment was signed on December 18, 2013, SARAH LANSDEN BAKER appealed the judgment to the 14th Court of Appeals sitting in Houston. The cause was reversed and remanded [redaction by trial court] *on two issues and affirmed in all other respects.*

Request for Jury Trial

Following the remand of this case for a new trial on various issues, the Petitioner [Sarah] filed a request for jury trial and paid the required jury fee. *The court deems this case in trial, inasmuch as the affirmed issues have been ruled upon.*

Objection to Referral of Final Trial to Associate Judge

SARAH LANSDEN BAKER [redaction by trial court] filed an objection to Referral of Final Trial to Associate Judge *long after the trial on the merits commenced.*

Order of the Court

The court having heard the evidence and argument of counsel, makes the following orders: *Because this matter is in trial, having been affirmed in part, it is appropriate that the remanded portion be tried by the same trier of fact and that the trial resume to the associate judge on the non-jury docket.*

> IT IS ORDERED that Petitioner's request for jury trial is DENIED.
>
> IT IS ORDERED that Petitioner's objection to referral of final trial referral of final trial to Associate Judge is OVERRULED. (emphasis added).

On February 10, 2016, Sarah filed her petition for writ of mandamus arguing that the trial judge abused her discretion by denying Sarah's constitutional right to a jury trial and by overruling her objection to the referral to the associate judge.

ANALYSIS

I. Mandamus standard

To obtain mandamus relief, a relator must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. *In re Prudential Ins. Co.,* 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). A trial court has no discretion in determining what the law is, which law governs, or how to apply the law, so an appellate court reviews those matters de novo. *See Walker v. Packer,* 827 S.W.2d 833, 840 (Tex. 1992).

II. The trial court clearly abused its discretion by denying Sarah's request for a jury trial and her objection to the referral to the associate judge.

Sarah's ability to request a jury trial on remand is governed by our decision in *In re Lesikar,* 285 S.W.3d 577, 581 (Tex.App.-Houston [14th Dist.] 2009, orig. proceeding). There, the judgment was reversed in part in a previous appeal and remanded for new trial on the issue of attorney's fees. The case initially was tried without a jury, but on remand, the defendant requested and paid the required fee for a jury trial. *Id.* The trial court granted a motion to strike the jury demand. *Id*. Our court held that the trial court abused its discretion and granted mandamus relief because waiver of a jury in one trial does not affect either party's right to demand a jury in the second trial after remand where the demanding party has complied with Rule 216. *Id.* at 586-87 (citing *In re Marriage of Stein,* 190 S.W.3d 73, 76 (Tex. App.-Amarillo 2005, no pet.); . . .

In *Lesikar,* we followed *Harding v. Harding,* 485 S.W.2d 297, 299 (Tex.Civ.App.-San Antonio 1972, no writ), in which the appellee, like the trial court here, took the position that when there is only a *partial* remand, a prior jury waiver remains effective and cannot be retracted. The court of appeals rejected that argument, stating "we believe the better view to be that on a trial after partial remand, the right to trial by jury would not be affected by a prior jury waiver." *Id.* at 300. The court gave three reasons for adopting this view: (1) our constitutional and statutory provisions in this State have been very zealous in preserving the right of trial by jury; (2) the adoption of this view would make the Texas rule on partial remands the same as and uniform with the Texas view where the entire case has been reversed; and (3) in numerous cases involving a partial remand, the case is remanded on a number of issues and a party should not be deprived of a jury trial on these various issues merely because he waived a jury trial on the original trial. *Id*. at 300 n. 3.

Similarly, *Lesikar* also involved a partial reversal and remand, yet we held that the waiver of a jury in the original trial does not preclude a party's right to demand a jury trial after a remand. 285 S.W.3d at 587. Applying *Lesikar* to this case, we hold that Sarah's waiver of a jury in the first trial did not preclude her from demanding a jury after remand for the second trial. The trial court misapplied the law in concluding otherwise.

Likewise, we hold that the parties' waiver of objection to the associate judge hearing the original trial, scheduled for June 5, 6, and 7, 2013, does not affect their statutory right to object to a trial by the associate judge after the case has been remanded for a partial new trial. The referral of a matter to an associate judge is governed by section 201.005 of the Family Code, which provides that a judge may refer to an associate judge any aspect of a suit over which the court has jurisdiction under Family Code Titles 1, 4, 5, or 45. TEX. FAM.CODE §201.005(a) (West Supp. 2015). If the trial court refers the suit to an associate judge for trial, "[a] party must file an objection not later than the 10th day after the date the party receives notice that the associate judge will hear the trial. If an objection is filed, the referring court will hear the trial on the merits or preside at a jury trial." TEX. FAM.CODE §201.005(c) (West Supp. 2015). "If one of the parties files a timely written objection to the associate judge presiding over trial, the case shall be tried by the referring judge rather than the associate judge." *In re I.J.R.,* 05-09-00565_CV, 2011 WL 711639, at *3 (Tex.App.-Dallas Mar. 2, 2011, orig.

proceeding) (mem.op.). Thus, a trial court has no discretion to overrule a timely objection to the referral.

Here, Sarah timely filed her objection immediately after she received notice that the new trial after remand had been referred to the associate judge. Upon objection, the statute prescribes that the referring trial court _will . . . preside at a jury trial._ TEX. FAM.CODE Ann. §201.005(c). Accordingly, the trial judge misapplied the law by overruling Sarah's objection to the referral to the associate judge.

III. Sarah does not have an adequate remedy by appeal.

The denial of trial by jury is reviewable by mandamus. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 139 (Tex. 2004). In *Lesikar*, we held that "because [the relator] stands to lose [his constitutional right to a jury trial], he does not have an adequate remedy by appeal." 285 S.W.3d at 587 (citing *Rosenthal v. Ottis*, 865 S.W.2d 525, 529 (Tex. App.-Corpus Christi 1993, orig. proceeding) (stating adequate remedy by appeal does not exist for denial of jury trial)). In addition, as our sister court has explained, an appeal is particularly inadequate to remedy the denial of a jury trial in cases involving child custody issues:

> Here, the district court's error in denying Reiter's request for a jury trial could be remedied on appeal, following a bench trial and final judgment. But we conclude that appeal from a bench trial would not be adequate under the circumstances of this case. In this situation, both parties would be required to endure a trial and its attendant expenses for naught. More importantly, the child affected by the underlying case should not suffer the delay of a second trial before parental rights and obligations can be established.

In re Reiter, 404 S.W.3d 607, 611 (Tex.App.-Houston [1st Dist.] 2010, orig. proceeding) (citations omitted). "Justice demands a speedy resolution of child custody and child support issues." *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (holding that relator had no adequate remedy by appeal for trial court's failure to enforce mandatory venue provision in child custody case).

These principles apply here because one of the issues to be tried is the conservatorship of the parties' children. We therefore conclude that appeal is not an adequate remedy for the trial court's legal error in denying Sarah's request for a jury trial and overruling her objection to the referral to the associate judge.

Conclusion

For these reasons, we direct the trial court to (1) vacate its January 6, 2016. Order Denying Request for Jury Trial and Overruling Objection to Referral of Final Trial to Associate Judge, and (2) grant Sarah's request for a jury trial and sustain Sarah's objection to the referral to the associate judge. We are confident that the trial court will act in accordance with this opinion. The writ will issue only if it fails to do so.

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. How does the cruel treatment in the *Baker* case compare to that in *Henry*?

E. Adultery – Another Fault-Based Ground for Divorce - the Determination of Which is Discretionary

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 dism'd). 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 dism'd). 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 dism'd); *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.

F. Grounds for Annulment

As mentioned above in the Introduction, 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. 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, annulments where one party is under age will be very rare.

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:

(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.

G. Fraud, Duress, Force – Extreme Enough to Support Annulment

LEAX
v.
LEAX
305 S.W.3d 22
(Tex. App. – Houston [1st Dist] 2009, Pet. Denied)

OPINION

EVELYN V. KEYES, JUSTICE.

Appellant, Elaine Leax ("Elaine"), appeals the trial court's decree annulling her marriage to appellee, Robert Leax ("Robert"). In three issues, Elaine contends that (1) the evidence was legally and factually insufficient to support the trial court's decree granting an annulment; (2) the trial court failed to divide the parties' estate in a just and right manner; and (3) the trial court erred in admitting any evidence regarding Robert's separate property.

We affirm.

Background

Elaine and Robert were married on July 1, 2001 and moved into Robert's home, located on Shalford Drive in Spring, Texas. They separated on March 12, 2007, when Elaine moved out while Robert was away on a cruise with his youngest daughter. Robert and Elaine did not have any children together. Elaine took the majority of the household items from their home, and she removed approximately $33,000.00 from a shared checking account, leaving approximately $1,700.00 in the account.

Elaine then filed a petition for divorce. In her petition, Elaine alleged that the marriage had become insupportable because of discord or conflict of personalities between herself and Robert and that Robert was guilty of cruel treatment toward her. She asked for a disproportionate division of the property based on the alleged cruel treatment, her disability, her loss of the benefits of the marriage, and Robert's superior earning capacity, education, and separate estate. Robert denied Elaine's allegation of cruelty.

In response to some interrogatories, Elaine disclosed the existence of eight previous marriages. This prompted Robert to file his "Second Amended Counterpetition for Annulment and Counterpetition for Divorce," asking for annulment on the basis of fraud and seeking a disproportionate share of the marital estate due to Elaine's fraud and fault in the break-up in the marriage, among other factors.

* * *

At a bench trial on December 3, 2007, the trial court heard testimony from both Robert and Elaine regarding whether the trial court should grant an annulment and regarding proper division of the parties' estate. Elaine testified that Robert made threats against her and called her names in 2006 and 2007 and that she moved out while he was on the cruise because she wanted to avoid being hurt or killed. Elaine also testified about specific property that she took from the house when she left that was acquired during the marriage, including a disputed china cabinet. Elaine testified that she believed she was entitled to a disproportionate share of their community estate because of the alleged

cruel treatment and because of her disability. She testified that Robert made $130,000.00 last year, while she received monthly disability income of only $1,600.00 each month.

Robert testified that he had been married to his previous wife for 25 years until she died of cancer. He met Elaine, fell in love with her, and proposed to her. He testified that he knew when they were dating that she had been married and divorced twice before. He also testified that, just prior to their marriage, she admitted to a third previous marriage when it became obvious that Robert was likely to find out through other means. Elaine told Robert that she did not tell him about the third marriage because she knew Robert would not like the fact that she had had another marriage. Robert testified that he specifically asked Elaine whether there were any other marriages in her past, and she told him that there were not. Robert testified that he would not have married Elaine if he had known that she had previously been married eight times. Elaine responded by testifying that she had revealed all of her prior marriages to Robert before they were married.

Regarding the circumstances of their separation, Robert testified that he won a cruise through his employer and that he and Elaine had planned to go on the cruise together. Sometime before the cruise occurred, Elaine told Robert that she did not intend to go on the cruise because she was having anxiety attacks at the thought of being on the open seas. Robert decided to cancel the trip because Elaine did not want to go, but Elaine suggested that he go with his youngest daughter. Robert left on the cruise thinking he was in a happy marriage, and he spoke with Elaine by phone several times while he was gone on the cruise. Elaine was supposed to pick Robert up from the airport. However, she told Robert over the phone that she was ill and could not drive to get him, so she arranged to have a car left at the airport for him. She asked Robert to call her when he was 30 minutes away from home. Robert testified that he thought Elaine might have been planning a surprise party for him for his sixtieth birthday, but when he got home he discovered that Elaine had moved out of the house and had taken the majority of their household items and furniture with her, including a china cabinet that they had purchased on their first anniversary and a flat screen television that Robert had won at work.

Elaine also removed $33,066.72 from their joint bank account, leaving $1,700.00 in the account. The majority of this money was from a large bonus Robert had received a few days after he left on the cruise. Elaine put the money into an account in her name. Robert testified that he had no idea why Elaine was now claiming that he had treated her cruelly because he had never threatened her or called her any names. Robert also testified regarding a pending personal injury suit that Elaine was pursuing for a car accident in which she had been rear-ended in 2004. Robert testified that he believed she was seeking damages in excess of $100,000 and that they had paid over $30,000 in medical expenses related to her injuries.

The trial court issued its decree declaring the marriage void and granting the annulment on December 19, 2007. The trial court's decree also rendered judgment apportioning the parties' estate. Robert was awarded the home on Shalford Drive, all "retirement accounts, 401(k)'s, stocks, bonds, and other investment accounts" in his name, 100% of all accounts in his own name, 50% of any joint accounts, all personal property in his possession plus the flat screen television in Elaine's possession, and a 1998 Honda Civic. Elaine was awarded all of the personal property that was in her possession except for the flat screen television, all real estate in her name, all "retirement accounts, 401(k)'s, stock and bonds, and other investment accounts" in her name, 100% of all accounts in her own name, 50% of any joint accounts, the china cabinet given to her by Robert, and a 1999 Honda CRV.

Elaine requested findings of fact and conclusions of law, which the trial court filed on January 16, 2007. The trial court found that Elaine misled Robert concerning the number of her previous marriages and "intentionally withheld from [him] the existence of five other marriages." The trial

court further found that Elaine's "misstatements . . . were both material and were made for the purpose of inducing [Robert] to rely upon them in entering into the purported marriage," that Robert did rely on Elaine's representations regarding the number of her previous marriages when he entered the marriage with Elaine, and that his reliance was reasonable and resulted in harm to him. The trial court found that Elaine induced Robert to take a cruise without her, and, while Robert was gone, she removed "most of the household furnishings from the parties' residence and withdrew $33,000.00 from the parties' financial account." Finally, the trial court found that Robert and Elaine did not voluntarily cohabitate after Robert learned of the existence of the five additional, undisclosed marriages and divorces. The trial court then concluded that Robert was entitled to an annulment of the marriage on the basis of fraud pursuant to section 6.107 of the Texas Family Code.

* * *

Regarding the division of property, the trial court found that both Robert and Elaine "acquired, prior to the purported marriage, various financial, retirement, and insurance accounts." The trial court found:

> Except as specifically set forth below, the Court finds that an equitable division of the property acquired during the purported marriage should be that each party be awarded the automobile standing in such party's name [a 1999 Honda CRV for Elaine and a 1998 Honda Civic for Robert], and all other property held in their respective names, including, but not limited to: real estate, personal property, retirement accounts, 401Ks, stocks and bonds, and investment accounts. Each party should be awarded the property standing in their [sic] name as of the date of the purported marriage.

The trial court's findings of fact also stated:

> An equitable division of any joint accounts should be fifty percent to each party. Individual accounts should be awarded to the party in whose name the account stands. Robert Leax should be awarded fifty percent of the $33,000.00 removed from the account by Elaine Leax on the date of separation.

* * *

Annulment

In her first issue, Elaine argues that the trial court erred in granting an annulment instead of a divorce because the evidence was legally and factually insufficient to support granting an annulment under the Texas Family Code.

A. Standard of Review

We review conclusions of law de novo. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Findings of fact in a case tried to the court have the same force and dignity as a jury's verdict upon jury questions. *City of Clute v. City of Lake Jackson*, 559 S.W.2d 391, 395 (Tex.Civ.App.-Houston [14th Dist.] 1977, writ ref'd n.r.e.). The trial court's findings of fact are not conclusive when, as here, we have a complete reporter's record. *Middleton v. Kawasaki Steel Corp*., 687 S.W.2d 42, 44 (Tex.App.-Houston [14th Dist.]), writ ref'd n.r.e., 699 S.W.2d 199 (Tex.1985). The trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence using the same standards that are applied in reviewing the sufficiency of the evidence underlying jury findings. *Vannerson v. Vannerson*, 857 S.W.2d 659, 667 (Tex.App.-Houston [1st Dist.] 1993, writ denied).

When, as here, an appellant attacks the legal sufficiency of an adverse finding on an issue for which she did not have the burden of proof, she must demonstrate that there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). In a legal sufficiency,

or "no-evidence," review, we determine whether the evidence would enable reasonable and fair-minded people to reach the verdict under review. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex.2005). In conducting this review, we credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id*. We consider the evidence in the light most favorable to the finding under review and indulge every reasonable inference that would support it. *Id*. at 822. We must sustain a no-evidence contention only if (1) the record reveals a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of the vital fact. *Id*. at 810; *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

In reviewing a challenge to the factual sufficiency of the evidence, we must consider and weigh all of the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Arias v. Brookstone, L.P.*, 265 S.W.3d 459, 468 (Tex.App.-Houston [1st Dist.] 2007, pet. denied) (citing *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986)).

The fact finder is the sole judge of witnesses' credibility; it may choose to believe one witness over another, and a reviewing court cannot impose its own opinion to the contrary. *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468. Because it is the fact finder's province to resolve conflicting evidence, we must assume that the fact finder resolved all evidentiary conflicts in accordance with its decision if a reasonable human being could have done so. *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468. An appellate court may not impose its own opinion to the contrary of the fact finder's implicit credibility determinations. *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468.

B. Analysis

The trial court found that Elaine misled Robert concerning the number of her previous marriages and intentionally withheld from him the existence of five previous marriages. The trial court also found that Elaine's misrepresentation was material and was made for the purpose of inducing Robert to enter into the marriage, that Robert did rely on Elaine's representations regarding the number of her previous marriages when he entered the marriage with Elaine, and that his reliance was reasonable and resulted in harm to him. The trial court concluded that Robert was entitled to an annulment of the marriage on the basis of fraud pursuant to section 6.107 of the Texas Family Code.

Section 6.107 provides:

> The court may grant an annulment of a marriage to a party to the marriage if:
> (1) the other party used fraud, duress, or force to induce the petitioner to enter into the marriage; and
> (2) the petitioner has not voluntarily cohabited with the other party since learning of the fraud or since being released from the duress or force.

TEX. FAM.CODE Ann. §6.107 (Vernon 2006). We were unable find any cases from Texas courts specifically articulating the proof necessary to warrant annulling a marriage on the basis of fraud.

Fraudulent inducement is a type of fraud. *Tex. S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 914 (Tex.App.-Houston [1st Dist.] 2007, pet. denied). Fraudulent inducement is established by proving that a false material representation was made that (1) was known to be false when it was made, (2) was intended to be acted upon, (3) was relied upon, and (4) caused injury. *Id*. American courts generally have held that marriages can be annulled on the basis of fraud only if the fraud concerns an issue essential to the marriage. See, e.g., *Elliott v. James*, 977 P.2d 727, 730 (Alaska

1999) ("Decisions from other jurisdictions generally hold that marriages are presumed valid and can be annulled on the basis of fraud only if the fraud concerns an issue essential to the marriage."); *Wolfe v. Wolfe*, 76 Ill.2d 92, 27 Ill.Dec. 735, 389 N.E.2d 1143, 1144 (1979) ("[A] marriage contract can be voided only if the nature of the fraud itself affects the essentials of the marriage."); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87, 91 (1984) ("While [exaggerations of accomplishments, character, and circumstances] constitute a species of fraud, they do not afford a basis for destruction of the marriage."); *Attor v. Attor*, 384 N.J.Super. 154, 894 A.2d 83, 87-88 (2006) ("The New Jersey Courts have held that where a marriage has been consummated, the fraud alleged must be of an extreme nature, that goes to one of the essentials of marriage."); *Stegienko v. Stegienko*, 295 Mich. 530, 295 N.W. 252, 254 (1940) (noting fraud must be "of a nature wholly subversive of the true essence of the marriage relationship" to support annulment of marriage).

Several courts have held that the nondisclosure of a prior marriage and divorce does not qualify as an extreme enough fraud to annul a marriage. See *Attor*, 894 A.2d at 88 (citing *Gerard v. Distefano*, 84 N.J.Super. 396, 202 A.2d 220 (1964) ("The nondisclosure of a prior marriage and divorce is not such a fraud, for it in no way impedes the carrying out of the marital obligations and does not go to the fundamentals of the relationship.")); *Hess v. Pettigrew*, 261 Mich. 618, 247 N.W. 90, 92 (1933) (holding concealment of prior marriage is generally not fraud justifying annulment). However, at least one jurisdiction has held that the wife's concealment of five of her previous seven marriages on the application for a marriage license was sufficient fraud to serve as a basis to annul the marriage. *Mayo v. Mayo*, 172 N.C.App. 844, 617 S.E.2d 672, 674-75 (2005).

Here, Robert testified that while he and Elaine were dating she told him that she had been married twice. Just before their marriage, Elaine was compelled to reveal a third previous marriage to Robert. At this time, Robert asked Elaine directly whether she had had any other prior marriages, and she told him that she had not. Robert testified that if he had known Elaine had actually been married eight times previously, he would not have married her. He testified that he did not discover the other five marriages until after Elaine had moved out of the house, taken most of the household furnishings, withdrawn $33,000 from their financial account, and filed for divorce while he was away on a cruise.

Elaine testified that Robert knew about all of her previous marriages at the time that they got married. She testified that she waited until he left on the cruise to move out of the house and file for divorce because she was afraid that he might hurt her. However, there was no record of any protective orders or incident reports of domestic violence presented at trial, and Elaine had made similar allegations in two of her previous eight divorce proceedings.

The trial court, as the fact finder, was the sole judge of the credibility of these two witnesses. See *Wilson*, 168 S.W.3d at 819; *Arias*, 265 S.W.3d at 468. The findings of fact clearly show that the trial court found Robert's testimony to be more credible than Elaine's. See *id*. In light of Robert's testimony at trial, we conclude that there was legally sufficient evidence to support the trial court's finding of Elaine's fraud. See *Wilson*, 168 S.W.3d at 810 (discussing legally sufficient evidence); *State Street Bank*, 212 S.W.3d at 914 (discussing elements of fraudulent inducement). Therefore the evidence was legally sufficient to support the trial court's annulment of the marriage based on fraud.

Furthermore, in light of all the evidence, we cannot conclude that the trial court's findings are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. See *Arias*, 265 S.W.3d at 468. Robert testified that he was unaware of five of Elaine's eight previous marriages. This is certainly more significant than a spouse concealing only one previous marriage and divorce and clearly goes to the essentials of the marriage. See *Mayo*, 617 S.E.2d at 674-75. The only contrary evidence was Elaine's own testimony that Robert knew of all of her previous marriages at

the time that they married. This is not enough for us to conclude that the trial court's findings were against the great weight of the evidence.

Elaine argues that section 6.107 should not have applied to her case because only section 6.109 of the Texas Family Code allows a trial court to annul a marriage because of a concealed marriage, and the terms of section 6.109 do not allow an annulment in this case. Section 6.109 allows a court to annul a marriage when one spouse concealed a prior divorce that occurred within the 30-day period preceding the date of the marriage ceremony. *See* TEX. FAM.CODE Ann. §6.109 (Vernon 2006). This statute is clearly not applicable to Robert and Elaine's situation, as Robert's petition for annulment was based on the concealment of five previous marriages that occurred over a number of years. Elaine argues that " '[c]oncealed divorces' that do not fall within the 30-day window of [section 6.109] cannot constitute grounds for annulment merely by re-categorizing them as 'fraud' under section 6.107." However, Robert did not "merely re-categorize" Elaine's prior marriages and divorces. As we have already discussed, the extreme number of Elaine's concealed previous marriages was sufficient to justify annulment based on Elaine's use of fraud "to induce [Robert] to enter into the marriage" under section 6.107 of the Family Code.

We overrule Elaine's first issue.

Notes, Comments & Questions

1. Do you agree with the appellate court's determination that TEX. FAM. CODE §6.109 did not govern the case, but rather §6.107 did?

2. The appellate court informs that an annulment based on fraud has not been the subject of an appellate review, why do you think this is?

3. Can you think of some examples of fraud that might support an annulment?

H. 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 spokemen, 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.

I. 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.

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

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

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 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*

[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.

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. *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.

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

[4] In her pleadings, Kathryn relied on section l02.011 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.

[5] In overruling Kathryn's *forum non conviens* 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.

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. 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?

J. Temporary Orders When a SAPCR is Not Joined with the Divorce

TEX. FAM. CODE §6.501 governs the issuance of temporary restraining orders in suits for divorce. Under TEX. FAM. CODE §6.501, a party to a divorce may restrain the other party from no less than 28 statutorily enumerated actions. The actions to be restrained are primarily such actions as would affect the physical health and safety of the other party and family members, as well as actions which might threaten preservation of property. One might say, the temporary restraining orders are to restrain extraordinary acts.

Temporary restraining orders, TROs, may be issued without notice and without a hearing, The best way to obtain a temporary restraining order is to inform the other side rather than skirting notice, and to make the restraining orders mutual. However, even if the other party has not been given notice, a presentation of a mutual TRO can only work in favor of the party seeking it. As noted in the introduction to this chapter, effective September 1, 2023, the use of tracking devices, and physically following the other party can now be specifically restrained.

Perhaps one of the most important aspects of the temporary restraining order is that under TEX. FAM. CODE §6.501 (b) a temporary restraining order, may not include a provision that: (A) excludes a spouse from the residence, unless a protective order has been obtained in accordance with Title IV of the TEX. FAM. CODE; (B) prohibits a party from spending funds for reasonable and necessary, living expenses; or, (C) prohibits a party from engaging in acts, reasonable and necessary to conduct that parties, usual business and occupation.

Pursuant to TEXAS RULE OF CIVIL PROCEDURE 680, a TRO expires by its terms, but for a time not to exceed 14 days unless the time so fixed in the order, for good cause shown, is extended for a like period of time – another 14 days, maximum. However, if the party against whom the order is directed consents, then it might be extended for a longer period.

Since TROs are used to restrain extraordinary acts, the temporary injunction and other temporary orders obtained under TEX. FAM. CODE §6.502 address the more ordinary acts. First, it must be noted, that any restriction that can be obtained as part of a TRO under TEX. FAM. CODE §6.501 can be included in temporary order under TEX. FAM. CODE §6.502.

The ordinary acts that can be affected under TEX. FAM. CODE §6.502, include the following: requiring a sworn inventory; requiring payments of support for either spouse; requiring production of documents; ordering the payment of reasonable attorneys fees and expenses; appointing a receiver; awarding, one spouse the exclusive use of the residency; prohibiting the parties, or either party from spending funds beyond those necessary for reasonable, living expenses; and, awarding one spouse control of the parties' usual business or occupation.

In a departure from the Texas Rules of Civil Procedure, a TRO or a temporary injunction issued under the Texas Family Code, subchapter E of Chapter 6, may be granted without an affidavit or verified pleading stating specific facts showing that immediate or irreparable injury, loss or damage will result without issuance. Further, the request need not define the injury or say why it is irreparable, or state why the order was granted without notice. In addition, the order need not include a setting (date certain) for the suit for a trial on the merits. Furthermore, in a suit for divorce, the court may dispense with the issuance of bond between the spouses in connection with temporary orders for the protection of the parties and their property. Why do you think the Texas Rules of Civil Procedure are departed from in suits for divorce?

While the Texas Rules of Civil Procedure governing TROs and Injunctions generally do not apply to divorce, the Texas Rules of Civil Procedure do apply to third parties dragged into a divorce who might happen to be business partners of the divorcing couple. For example see, *Harmon v. Schoelpple*, 730 S.W.2d 376 (Tex. App. – Houston [14th Dist.] 1987, no writ) (business partner of divorcing couple afforded all procedural safeguards provided for under TEXAS RULES OF CIVIL PROCEDURE). Accordingly, if a third-party is to be restrained within a divorce proceeding, there must be verified pleadings, the suit must be set for a trial on the merits, and bond cannot be dispensed with.

As part of the temporary orders that can be obtained in a dissolution proceeding, while a suit is pending, the court, under TEX. FAM. CODE §6.505, may direct the parties to counsel with a person named by the court if reconciliation seems possible. However, there are restrictions on the report that is issued by this court appointed counselor. In the report, the counselor can only give an opinion as to whether there is a reasonable expectation of reconciliation. While each party is furnished, a copy of the report, under TEX. FAM. CODE §6.705, the person named by the court to counsel the parties may not have their report entered into evidence and said appointed counselor is not competent to testify in any suit involving the parties or their children. Furthermore, the files, records, and other

work product of the counselor is privileged and confidential for all purposes and may not be entered, as evidence in any suit involving the parties or their children.

Under TEX. FAM. CODE §6.507, an order entered under Subchapter. E, of Chapter 6 is not subject to an interlocutory appeal which is also a departure from the general Rules of Texas Civil Procedure. The only Family Code exception to the foregoing would be an order appointing a receiver under TEX. FAM. CODE §6.502, which can be reviewed via an interlocutory appeal.

In addition, it must be noted that any violation of temporary restraining orders, a temporary injunction, or other temporary orders issued under Subchapter E of Chapter 6, is allowed punishable by contempt.

K. An Unanswered Petition for Divorce is NOT Taken as Confessed

Under TEX. FAM. CODE §6.701 it is provided that in a suit for divorce the petition may not be taken as confessed, if the respondent does not file an answer. This means that, even in a default situation, a cause for divorce must be proved. This would include proof of everything such as the basis for the division of property, of the determination of conservatorship, or, whatever else could be in controversy.

Although *Lynch v. Lynch* is a case focused on property, it is included in this text. In *Lynch*, the trial lawyer, a graduate of South Texas College of Law, Cheryl Jeter, did a masterful job of proving up a divorce and complicated property division upon default. It is a lengthy case, although greatly edited for this text. Nonetheless, it is worth your read, and may be a bit entertaining as well as instructive.

LYNCH
v.
LYNCH
540 S.W.3d 107
(Tex. App. – Houston [1st Dist.] 2018, pet. denied)

OPINION

Laura Carter Higley, JUSTICE

Michael Lynch appeals from a final default divorce decree, dissolving his marriage to Donna Falcon Lynch. In 16 issues, Michael challenges the provisions in the divorce decree that divide the marital estate, award Donna appellate attorney's fees, require Michael to pay federal income tax liabilities, and order the parties to defend and indemnify each other concerning outstanding liabilities. Michael also contends that the trial court abused its discretion in denying his motion to set aside the default judgment and motion for new trial.

* * *

After 27 years of marriage, Michael and Donna separated in March 2015. Michael moved out of the couple's house in Houston and into his own apartment.

In February 2016, Donna filed a petition for divorce and a request for temporary restraining orders. Among the grounds for the divorce, Donna claimed that Michael was "guilty of cruel treatment" toward her and that he had committed adultery. Donna asserted that she should be awarded a disproportionate share of the marital estate for a number of reasons, including "fault in the breakup of the marriage," "disparity of earning power of the spouses," "education and future employability of the spouses," "ages of the spouses," and "wasting of community assets." Donna also requested that she be awarded her attorney's fees, including appellate attorney's fees.

On February 18, 2016, a licensed process server served Michael with the divorce petition and the request for temporary orders. A hearing was held on the temporary orders on March 2, 2016. Although he had been served notice of the hearing, Michael did not attend. Donna testified at the hearing and presented documentary evidence. She offered evidence showing that Michael had earned $639,000 in 2014, and she testified that she believed his pay had increased in 2015. Donna stated that Michael had refused to give her any money for the previous six months, and she had been paying her expenses with credit cards.

She also indicated that the couple owned a home in Houston and a home in Pittsburgh. Donna testified that there were outstanding property taxes on the Houston home that Michael had not paid. Donna requested the trial court to order Michael to pay her $25,000 per month in spousal support to cover the expenses for their two homes. She also requested the trial court to order Michael to pay the outstanding property taxes on the Houston home and to pay the credit card debt she had incurred to cover her living expenses for the preceding six months.

On March 15, 2016, the trial court signed temporary orders, requiring Michael to pay Donna $25,000 per month in spousal support and ordering him to pay various debts, including credit card balances and various property taxes owed on the couple's Houston home. The trial court also required Michael's employer to withhold income from Michael's paycheck to satisfy the spousal support.

On March 28, 2016, Donna filed a Petition for Enforcement of Temporary Orders by Contempt. In the enforcement petition, Donna claimed that Michael had violated the temporary orders because he had not paid the various credit card debts and property taxes he had been required to pay in the orders. A hearing was scheduled on the motion for May 2, 2016. A licensed process server served Michael with a copy of the enforcement petition and with notice of the hearing on April 8, 2016.

Michael did not file an answer to the divorce petition or otherwise appear in the suit. On April 22, 2016, the trial court conducted a trial in Michael's absence.

Donna offered into evidence her inventory and appraisement in which she itemized the community estate, providing values for the itemized property and listing the community estate's debts and liabilities. However, the inventory indicated that the values for several financial and retirement accounts identified in the inventory were unknown. The bottom of the inventory stated that the net value of the community estate was $3,367,208.

Under the heading "miscellaneous assets," Donna indicated that Michael owed her money because he had failed to comply with the temporary orders, which had required him to pay spousal support and to pay outstanding credit card and tax liabilities. Based on his noncompliance with the temporary orders, Donna indicated in the inventory that Michael owed her $29,728 for spousal support and $82,248 for the credit card and tax liabilities.

In her inventory, Donna also recommended how the community estate should be divided. She proposed that Michael receive two motor vehicles listed in the inventory, worth a combined value of $30,000 and that she receive the remainder of the community estate. Because he owed her money for

his noncompliance with the temporary orders, Donna proposed that the value of the community estate received by Michael be–$81,975. This figure represented the $30,000 value of the motor vehicles, minus the amount of money he owed her pursuant to the temporary orders.

Donna testified at trial. She reaffirmed the itemized values for the community assets identified in the inventory. She also confirmed that the total value of the marital assets listed in the inventory was $3.367 million. However, she stated that she did not know the value of several financial accounts held by Michael. And she stated that she believed there were other community assets of which she was not aware, raising the total value of the marital estate to $5 million.

Donna further testified that Michael, who has a college degree in chemical engineering, worked as a manager at an energy company and had earned $700,000 in 2014. Donna testified that she had not been employed during their 28-year marriage. She agreed that Michael, who was 56 years old, had "some years left to work and make a lot more money" and that she was "not going to have the benefit of [Michael's] income" after the divorce. Donna, who was 60 years old and without a college degree, indicated that she had been looking for work but was finding it difficult to enter the workforce at her age and skill level.

Donna further averred that Michael had used the community estate to support other women. Donna testified that, in October 2014, she found a hand-written note on her car at the couple's Houston home. The note, admitted into evidence, was signed by a woman named Lydia. It read as follows:

> *. . . Sugar Daddy—*
>
> *Our arrangement was for $750.00 per week Money Me and my daughter rely on. You have to look At yourself every day and know what you did.*
>
> *Your [sic] a dishonest man.*
>
> *With no morals or values.*

Donna was able to contact Lydia, and the two began texting one another. The text messages were admitted into evidence.

Through the texts, Donna learned that Lydia had met Michael through a website called "Seeking Arrangement." Lydia described the website as follows: "It is a website where you can find a sugar daddy to help you financially and in return you are his sugar baby. Your his gf [girlfriend] or mistress . . . ." Lydia explained to Donna that she had a sugar baby-sugar daddy arrangement with Michael that had ended. As part of the arrangement, Lydia indicated that Michael had agreed to pay her $3,000 to $5,000 per month and a $750 per week allowance. Lydia told Donna that Michael had taken her to lunch and dinner numerous times and that she and Michael had sex three times: twice in Donna and Michael's home and a third time at a hotel.

Lydia told Donna that her arrangement with Michael had ended, but Michael still owed her $750 pursuant to the arrangement. Lydia explained that is why she went to the couple's home on the day she left the note found by Donna on the car.

Donna told Lydia that, in the past, she had gotten calls from other women who claimed that Michael owed them money. Donna stated that she did not realize until she corresponded with Lydia "what was going on." When she asked him about it, Michael had told Donna that he had no idea who the women were and had suggested that she call the police.

Lydia also forwarded Michael's profile from the Seeking Arrangement website to Donna. The profile indicated that Michael joined the website in August 2014. Michael's profile stated that his net worth was $5 million. The profile described Michael as "a bona fide [sugar daddy]" who was

"looking for one sweetheart for rendezvous to fine places, trysts and some travel." The profile, which Lydia forwarded to Donna in March or April 2015, indicated that Michael had been "active" on the website four days earlier. Lydia also told Donna that, when she logged on, she could see that Michael was still active on the website.

Donna also testified at trial that she had had found emails, from 2015, between Michael and another woman, Keira, with whom Michael appeared to be having an affair. The emails were admitted into evidence, and Donna testified about their content. In one email, Keira is seen in a photograph lying nude on a bed on a comforter that Donna testified belonged to Donna's daughter. Donna confirmed that the emails indicated that Michael was providing financial support to Keira. In the emails, Michael and Keira discussed money they had spent and trips they had taken to Maine and North Carolina for which Michael had paid. In addition, Donna testified that, after she and Michael had separated in March 2015, Keira began living with Michael. Donna confirmed that Michael was financially supporting Kiera with community funds.

Donna further testified that Michael had physically abused her during their marriage. She stated that a couple of times each year, throughout their entire 28-year marriage, Michael would pick her up and throw her against the wall or to the floor. One such instance occurred in 2012 while Donna and Michael were on a cruise. While on the ship, Michael picked Donna up and threw her. Donna hit her head, was knocked unconscious, and suffered a concussion. Donna offered records from the ship's medical doctor indicating the doctor's diagnosis was "assault," "minor head injury," and "hematoma left ankle." Donna testified that, as a result of the incident, Michael was asked to disembark from the ship at the next port. Donna also offered into evidence a photograph showing bruising on her upper arm, resulting from the incident on the ship.

Donna also testified that in March 2015 Michael again grabbed her and threw against the wall. She stated that she grabbed a gun from her closet but did not point it at Michael. Donna told Michael that he needed to leave, and he did. Michael moved out, and Donna and Michael separated.

Donna testified that, because of the abuse she suffered, she has been in counseling since 2012. She confirmed that she anticipates requiring counseling for many years to come due to the abuse.

With regard to the property division, Donna informed the trial court that she agreed to pay the community indebtedness that Michael had been ordered to pay in the temporary orders but had failed to pay. Specifically, she agreed to the pay the credit card debt and the outstanding property tax liabilities that Michael had been required to pay in the temporary orders. Concomitantly, Donna requested the trial court to award her a money judgment for $82,248, which was the amount of the credit card debt and property taxes that Michael had failed to pay as ordered in the trial court's temporary orders. Donna also asked the trial court to award $29,728 to her in the judgment for the spousal maintenance that Michael was ordered to pay in the temporary orders but did not pay.

In addition, Donna requested the trial court to sign a decree awarding her a disproportionate share of the community estate based on her inventory, which provided that she be awarded all the community estate, except for two motor vehicles worth a total of $30,000 and a bank account with an unknown amount of funds. Donna told the trial court that she believed she was entitled to a disproportionate share of the marital estate for a number of reasons, including the disparity in the earning power between her and Michael, her age, her lack of separate property, the physical abuse she suffered throughout the marriage, and Michael's wasting of the community estate by spending community funds on other women.

Donna further requested that the trial court to award her the couple's home in Pittsburgh and all interest in a company, Freeport Services, LLC. Donna pointed out that the Pittsburgh home and the

company were not listed in her inventory. In addition, Donna requested $10,000 for appellate attorney's fees. Lastly, with regard to income taxes, Donna requested that Michael be ordered to pay "all taxes owed by the parties through the end of 2015 tax year" and that each party be responsible for his and her own taxes for 2016.

At the end of the trial, the trial court stated as follows:

> Based on the testimony presented to the Court, the Court grants the divorce on grounds of insupportability, cruelty and adultery. The court further finds as to family violence. The Court awards property as follows: The Court grants the first judgment of $82,248 of unpaid debt that's listed in the temporary orders as well as the judgment for $29,728 for unpaid spousal maintenance and going forward from today the Court will not give spousal maintenance. In regard to property, the Court awards the property as requested, finding it's a fair and equitable division of the community estate based upon the facts and circumstances. We are not going to go through that or recite that again. The Court states that the property is awarded as set out in [Donna's inventory.]

The trial court further stated that it was awarding "the property interest that may or may not exist" in the house in Pittsburgh and in Freeport Services, LLC to Michael. The court ruled, "Husband ordered to be responsible for 100 percent of the tax liability [incurred] in 2015. Each party is responsible for 2016 taxes." The trial court ended the trial by awarding Donna $10,000 in appellate attorney's fees. [No trial fees were awarded.]

In conformance with its oral rendition, the trial court signed a final divorce decree on April 26, 2016, ordering the marriage between Michael and Donna dissolved on the grounds of adultery and cruelty. The trial court also found that Michael had committed family violence against Donna within the last two years.

* * *

On May 22, 2016, Michael filed a "Motion to Set Aside the Default Judgment and Motion for New Trial." Michael supported his motion with his affidavit, which contained the same factual information and assertions stated in his motions.

Michael asserted that his failure to file an answer before "judgment was the result of accident and mistake" and was not the result of his "intentional or conscious indifference." The motion explained Michael's failure to file an answer as follows:

> Francis Michael Lynch believed, although mistakenly, that the papers he received back in February were only informal or informational copies. A lady had called him to pick up papers that he assumed were divorce papers. He met the lady at her minivan and she handed him the papers through her window. The lady was not wearing a uniform, but instead looked like an office assistant. The lady did not require a signature confirming receipt. Francis Michael Lynch read only enough of the papers to realize two things: (a) his wife was starting the divorce process after about a year of being separated; and (b) a Google search of his wife's lawyer indicated that her firm appeared to have a good reputation.

Michael then explained that, in the mid-1980s, he had been involved in a family law suit in Louisiana. In that suit, he had first received "an informal copy of the [suit] papers," and then later had received "a formal copy by a person in uniform from the sheriff's office," who had required him to sign for the papers. He averred in his affidavit, "Only then was I required to do anything to contest the case, which I did by hiring a lawyer." He explained that he thought he knew from that

experience, and "from legal advice from my lawyer" in that case, that he "had the right to be served with formal notice of the lawsuit by a sheriff, constable or police officer." He stated that he thought suit was not "formally" initiated until he was served by a law enforcement officer. He also believed from that experience that he "would receive advance notice of any trial date."

Michael also explained that he had "dealt with legal issues in Pennsylvania between 1999 and 2010." He "recall[ed] all legal dealings and documents in Pennsylvania were submitted by certified mail and required a signature, something that did not happen with what he thought were the informal or informational divorce papers delivered to him here." He pointed out that he was not required to sign for the papers that he received in this suit, which further led him to believe that the papers he received were "informal or informational divorce papers."

Michael claimed that it was because of his past experiences that he "treated the divorce papers as only informal notice" and "failed to act and failed to seek advice of counsel sooner in this divorce." In his affidavit, Michael stated that it was only after learning of the default divorce decree that he discovered that in Texas "process servers, who look like civilians, may serve formal lawsuit papers just like a sheriff or constable."

Michael also discussed the service of the petition to enforce the temporary orders by contempt, which occurred on April 8, 2016. He stated that a "person that looked like a private citizen delivered these papers. This person was wearing a t-shirt, shorts, and tennis shoes and was driving a private pickup truck. The person was not in uniform and did not ask [him] to sign anything." Michael also stated that he "did not read the papers because, again, he thought he was only being given a copy informally" but he "knows now that the papers related to temporary orders and enforcement of temporary orders."

Michael also claimed that he had "a meritorious defense" to the suit because the court's property division in the decree was "manifestly unjust." Michael asserted that the grounds supporting the trial court's dissolution of the marriage, including the family-violence finding, were "wrong." Michael also challenged Donna's inventory and appraisement. He asserted that she had not given correct values for some items listed in the inventory and that she had mischaracterized certain property as community property that was Michael's separate property. In the motion, Michael also averred, "A new trial in this case will neither occasion delay nor prejudice [Donna] because [Michael] is ready for trial and is willing to reimburse [Michael] for reasonable costs and expenses incurred in obtaining the default judgment."

On June 23, 2016, the trial court conducted a hearing on Michael's Motion to Set Aside Default Judgment and Motion for New Trial. At the hearing, Michael testified that, when he was sued in Louisiana in the 1980s, he had first received an "informal copy" of the suit papers in the mail. After receiving the informal copy, Michael had had been formally served with the suit papers in the Louisiana case by a sheriff's deputy who Michael said wore "a flat brim hat and full uniform." Michael said the process of being served by the sheriff's deputy had been "very formal." He described the process in more detailed as follows: "[The deputy] gave me a business card, advised me that there was a court date, upcoming court date involved. I had to sign. On his business card he suggested I call him if I had any questions. It was pretty clear there was something that was going to happen." Michael testified that, after being served by the deputy, he had hired an attorney and answered the Louisiana suit.

Michael recalled being served in this suit on February 18, 2016. He testified that, at the time of service, he believed that he was not being formally served; instead, he had believed, at that time, that he was receiving an informational copy of the suit papers. He had thought that he would be formally

served with the divorce suit by a uniformed officer at a later date, as he had been in the Louisiana suit. Michael testified as follows with regard to what occurred when he was served in this case:

> A woman called me in advance saying she had papers for me, and she asked if it would be okay to meet her in front of my [work] building. And when she arrived—it might have been that same day or the next day—I met her downstairs. I remember leaving my office. I grabbed my pen so I could be able to sign because I thought they might be divorce papers. So, I went to meet her right in the parking lot. She never got out of her vehicle. She was just driving a minivan. She happened to be dressed in a floral print. It was clearly not a uniformed officer. And she handed me the papers. I reached for my pen to sign; and she said, "No. There is no need to sign." And that was it. The whole exchange took 10 seconds, perhaps; and she said that was it.

Michael testified that, based on his experience in Louisiana, he believed that the suit papers he received were an "informational copy." He acknowledged that he now knows that "a private process server can . . . serve you the official copy just like a sheriff or constable," but he claimed that he did not know that before the default judgment was rendered in this case.

On cross-examination, Michael testified that he did not recall whether the process server, who served him with the suit papers, told him her name or identified herself as a licensed processor server; however, when asked if she had informed him of the date of the hearing on the temporary orders, Michael responded, "She did not."

Michael acknowledged that, in the Louisiana case, he had received the informational copy of the suit papers in the mail, in contrast to this case in which he was served with what he had thought was an informational copy in person by the licensed process server. Michael testified that, [b]y the level of informality of . . . a woman in minivan [giving him the papers], it just felt like it was not service."

Michael also testified regarding what he did with the original divorce petition after he was served. He stated he brought it home and put it on his kitchen counter. He continued, "I was waiting for the official service to be filed; so, I kept it. And eventually I think it got—believe it got mixed in with other mail, newspapers. And I cannot locate the document now."

Michael acknowledged that the first page of the suit papers he was served was the citation. In his affidavit supporting his motion for new trial, he stated, "I recall having read only the first couple of pages of the divorce petition itself, not the 'Citation.' " At the hearing, Michael acknowledged that the citation, which was the first page of the documents her received, warned that a default judgment could be taken against him if he did not file a timely answer. Michael claimed that he had not read the citation, believing it to be a "cover letter of sorts." He said that he flipped the pages, proceeding directly to the divorce petition. Michael was asked, "How can you be certain, sir, that you didn't read that language [regarding the default judgment] that I just told you was on the thing called a citation?" Michael responded, "Because if I had read that, I would have been on the phone with you [his attorney] the next business day."

Michael also acknowledged that he had been served with the Petition for Enforcement of Temporary Orders by Contempt. The enforcement petition was also accompanied by a citation and a hearing notice.

With regard to service of the enforcement petition, Michael stated that a man, driving a white truck and dressed in shorts, had come to his home. Michael testified that, at the time, he thought that the man was "a tradesman that was going to approach me about soliciting for work." He said that the man asked him his name and handed him the enforcement papers. Michael claimed that he did not

read the papers completely, including the notice of the enforcement hearing. In his affidavit, Michael had stated that he had not read the enforcement papers because he was "extremely busy at work" and because he "was about to leave on a personal trip to Italy scheduled for April 15-30." When asked at the hearing, Michael stated that he did not come to court on the date of the enforcement hearing because he was waiting "for the official service" of the divorce suit by a uniformed officer.

Donna pointed to evidence showing that her attorney had emailed a copy of the temporary orders to Michael at this personal email address. Michael acknowledged that the email was received in the inbox of one of his personal email accounts; however, he testified that he used that email account infrequently and had not read the email. He offered a screenshot of the inbox of the account showing that the email sent by Donna's attorney had not been opened.

Michael further acknowledged that funds had been withheld from his paycheck to satisfy the temporary order that had awarded spousal support to Donna. Michael's wage-earning statement from his employer dated March 25, 2016, indicated that $3,885.84 had been withheld from his paycheck to satisfy the past-due spousal support payment. Michael claimed that he had not noticed the deduction because he had received a $120,000 bonus on that pay check.

Michael also testified that he believed the property division was "extremely unjust" and unfair because "it's 101 percent to my wife and minus 1 percent to me." Michael further asserted that Donna had not included items of value in her inventory that were part of the marital estate and had improperly included items that were Michael's separate property.

At the hearing, Donna presented the testimony of one witness: Anne Barthlow, the licensed process server who served Michael on February 16, 2016, with the original petition and request for temporary orders. Barthlow testified that she first contacted Michael on the telephone and introduced herself "as Anne with Esquire Legal" and identified herself "as a licensed process server." She told Michael that she had court documents that she "needed to serve to him." Michael indicated to her that he would "be down in a few minutes [to meet her in front of his office building]."

Barthlow then testified as follows with regard to how she served Michael with the suit papers:

> I pulled up in the circle drive [of the office building], and [Michael] came out [after] about four minutes and walked up to the window. I remained seated in my car, extended my right hand, and shook his hand and said, "Hi. My name is Anne. I'm with Esquire Legal. I'm a licensed process server. I have court documents to give to you." And I handed him the documents and told him that he would be due in the 310th court on March 2nd, 2016.

Barthlow stated that Michael then thanked her and walked back into his office building. She testified that she saw Michael look at the first page of the documents, which the record shows was the citation.

On cross-examination, Michael's attorney asked Barthlow why she identified herself as a licensed process server both on the phone and when she served the documents. Barthlow responded,

> To identify myself. When someone is answering the phone, I want to make it clear who I am. And, then, once they walk up, that person still doesn't know, you know, who I am. They have not met me before. So, it's standard practice. You have to identify yourself and who you're with and that you are a licensed process server.

At the end of the hearing, the trial court denied Michael's motions for new trial and to set aside the default judgment. Michael did not request, nor did the trial court file, findings of fact and conclusions of law regarding the denial of the motions.

This appeal followed. Michael presents 16 issues challenging the trial court's final divorce decree.

Setting Aside Default Divorce Decree and Granting New Trial

In issues 15 and 16, Michael contends that the trial court erred in refusing to set aside its default judgment and grant a new trial.

A. Standard of Review & Applicable Law

When a default judgment is attacked by a motion for new trial, the critical question is: "Why did the defendant not appear?" *Sutherland v. Spencer*, 376 S.W.3d 752, 755 (Tex. 2012) (quoting *Fid. & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 574 (Tex. 2006)). We review a trial court's decision to overrule a motion to set aside a default judgment and grant a new trial for abuse of discretion. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009). The Supreme Court of Texas established the standard for setting aside a default judgment in *Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939). Under the *Craddock* test, post-answer as well as no-answer default judgments should be vacated and a new trial granted when the defaulting party establishes that (1) the failure to answer or to appear was not intentional, or the result of conscious indifference, but was due to a mistake or an accident; (2) the motion for a new trial sets up a meritorious defense; and (3) granting a new trial will not occasion delay or work other injury to the prevailing party. *In re R.R*., 209 S.W.3d 112, 115 (Tex. 2006); *Craddock*, 133 S.W.2d at 126. When a defaulting party meets all three *Craddock*-test elements, a trial court abuses its discretion if it fails to grant a new trial. . . .

B. Analysis

Because it is dispositive, we address only whether Michael met the first element of the *Craddock* test; that is, whether he proved that his failure to file an answer was not intentional or the result of his conscious indifference. See *Craddock*, 133 S.W.2d at 126. Failing to file an answer intentionally or due to conscious indifference means "the defendant knew it was sued but did not care." *Drewery Constr*., 186 S.W.3d at 576.

In determining whether he showed that his failure to answer or appear was not due to his intentional disregard or conscious indifference, we look to Michael's knowledge and his acts. See *Dir., State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 269 (Tex. 1994). "The absence of an intentional failure to answer rather than a real excuse for not answering is the controlling fact." *Milestone Operating, Inc. v. ExxonMobil Corp*., 388 S.W.3d 307, 310 (Tex. 2012) (citing *Craddock*, 133 S.W.2d at 125). A defendant's excuse for failing to answer or appear "need not be a good one to suffice." *Id*.

A defendant satisfies his burden under the first *Craddock* element when his factual assertions, if true, negate intentional or consciously indifferent conduct by him and the factual assertions are not controverted by the plaintiff. *Sutherland*, 376 S.W.3d at 755. However, "when the trial court conducts an evidentiary hearing on a motion for new trial and the party that obtained the default judgment presents controverting evidence at the hearing to show that the defaulted party acted intentionally or with conscious disregard to his rights, the question of why the defaulted party failed to answer presents a question of fact, which is resolved by the factfinder." *Pekar v. Pekar*, No. 09-14-00464-CV, 2016 WL 240761, at *3 (Tex. App.—Beaumont Jan. 21, 2016, no pet.) (mem. op.) (citing *Utz v. McKenzie*, 397 S.W.3d 273, 278 (Tex. App.—Dallas 2013, no pet.); *Freeman v. Pevehouse*, 79 S.W.3d 637, 641 (Tex. App.—Waco 2002, no pet.)). In that event, the trial court, as factfinder, may generally believe all, none, or part of a witness's testimony. *Id*. (citing *Utz*, 397

S.W.3d at 279). At that point, "[a] trial court can reasonably believe, based on contradictory evidence, that there was intentional or consciously indifferent conduct on the part of a defendant." *Rodriguez v. Medders*, No. 10-11-00369-CV, 2012 WL 4862588, at *3 (Tex. App.—Waco Oct. 4, 2012, no pet.) (mem. op.) . . .

In the trial court, Michael acknowledged that he had been served with the divorce papers, including the motion for temporary orders. Cf. *Milestone Operating*, 388 S.W.3d at 310 (holding that defendant satisfied first *Craddock* element because its registered agent testified that he did not recall being served, even though evidence showed he had been served, and plaintiff did not controvert the testimony). Nonetheless, in his affidavit and in his testimony, Michael stated that, based on his experience in the Louisiana lawsuit in the mid-1980s, he mistakenly believed he was not required to answer the instant lawsuit until he was served with the "formal" suit papers by a law enforcement officer wearing a uniform. He testified in his affidavit that he thought the process server, Barthlow, was "an administrative assistant," who, driving a minivan and not wearing a uniform, was delivering informational copies of the suit papers to him. He stated in his affidavit, "I thought I had to be served by a sheriff, constable or police officer to formally start a divorce [suit]." Michael asserts that his sworn belief that he did not need to answer until he was served by a uniformed peace officer—based on his past experience in the Louisiana suit—negated any determination that his failure to answer was intentional or the result of consciously indifference conduct but instead, when taken as true, showed that his failure to answer was the result of a mistake of law. *See Bank One Tex., N.A. v. Moody*, 830 S.W.2d 81, 84 (Tex. 1992) (holding that defendant bank did not act with intent or conscious indifference because it believed that freezing accounts and tendering the balance of the accounts to clerk issuing the writ was sufficient response to suit); *Angelo v. Champion Rest. Equip. Co.*, 713 S.W.2d 96, 97 (Tex. 1986) (holding that defendant's belief that paying underlying claim was sufficient answer, negated intent or conscious indifference).

Michael likens this case to *In re R.R.*, a termination-of-parental-rights case. 209 S.W.3d at 116. There, the defendant mother was served with the termination suit but did not answer or otherwise appear before a default judgment was rendered terminating her parental rights. *Id*. at 114.

The mother then filed a motion for new trial, challenging the default judgment based on *Craddock*. *See id*. She asserted that she had not answered the suit, not only because she did she not understand the suit papers, but because she had believed she would be appointed counsel to represent her. *See id*. She had formed this belief based on an earlier criminal case in which she had been appointed counsel and based on the representations of her CPS caseworker, who had indicated that the mother would "get an attorney" to represent her in the termination suit. *See id*. The evidence also showed that, during the pendency of the termination case, the mother had maintained contact with her CPS caseworker and with her children. *See id*.

With regard to whether the mother had acted with conscious indifference, the *In re R.R.* court held,

> [The mother's] affidavit and testimony were not to the effect that her failure to file an answer was only because she lacked an understanding of the citation. They were to the effect that based on her prior experiences with the court system and her contacts with CPS, she believed no action on her part was necessary for her interests to be protected and for an attorney to be appointed for her without further action on her part. Those experiences and [the mother's] stated beliefs based on those experiences, together with the uncontroverted facts as to actions [the mother] took—staying in regular contact with the caseworker about the progress of the case, writing her children, inquiring regularly about the children—when taken as true, negate the

> element of conscious indifference to proceedings designed to terminate the parent-child relationship between [the mother] and her children.

Id. at 115 (citing *Evans*, 889 S.W.2d at 269).

Michael asserts this is case is similar to *In re R.R.* because he, like the mother in that case, did not appear in the suit based on an experience in an earlier case. However, this is where the similarity between the two cases ends. In *In re R.R.*, the evidence showed that the mother had reason to maintain her belief, throughout the pendency of the termination suit, that she would be appointed counsel to represent her just as she had been appointed counsel in an earlier criminal case. Specifically, the mother's belief was reinforced by her caseworker's representation that she was entitled to counsel. See *id.* at 114.

Here, Michael averred in his affidavit and in his testimony that he also maintained his belief, during the pendency of the case, that the divorce action had not been initiated against him because he had not been formally served by a uniformed peace officer; thus, he was not required to answer or appear in the suit. Michael indicated that nothing occurred before the rendition of the default judgment to dispel his belief that the suit had not been formally initiated, and therefore he did not need to act. He pointed out that Barthlow did not provide him with a business card, and she conducted herself in an informal manner. He also pointed out that the process server who served him with the enforcement petition was also not a peace officer. Michael further pointed out that Donna's attorney never called him to inform him that suit had been filed.

In determining if Michael's factual assertions are controverted, we look to all the evidence in the record. See *Evans*, 889 S.W.2d at 269. At the hearing, Donna offered controverting evidence from which the trial court, as the fact finder, could have reasonably inferred that Michael knew that the Donna had initiated suit against him and that he was required to take action, responding to the suit. In contrast to Michael's testimony describing how informal his interaction with Barthlow was when she served him, Barthlow provided testimony showing that there was a level of formality to the interaction and that she made statements to him indicating that suit had been formally initiated against him. Not only did Barthlow indicate that she had identified herself twice to Michael—once on the phone and once in person—as a licensed process server, she also testified that she told Michael that she had court documents that she "needed to serve to him." While Michael testified that his interaction with Barthlow was only about 10 seconds, Barthlow testified that her exchange with Michael was "closer to a full minute."

Most significantly, Barthlow testified, "I handed him the documents and told him that he would be due in the 310th court on March 2nd, 2016," which was the hearing on the temporary orders. In his testimony, Michael stated that the sheriff's deputy, who had served him in the Louisiana suit, had "advised me that there was a court date, upcoming court date involved."

Michael had mentioned this detail as an indicia of formality that had alerted him in the Louisiana suit that he was being served and that "there was something that was going to happen." He stated that he had then contacted his attorney in that suit.

When he was asked at the hearing whether Barthlow had informed him of the hearing date, Michael stated, "She did not." Despite Michael's denial, as the fact finder, the trial court was entitled to disbelieve Michael's testimony and to believe Barthlow when she testified that she informed Michael that he was due in court in two weeks on March 2. See *Pekar*, 2016 WL 240761, at *3. From this, the trial court could have reasonably inferred that there was a level of formality to the service. And the court could have reasonably inferred that Michael knew, when he was served, that suit had been initiated against him and that he was required to appear in court.

It was with the knowledge that he needed to appear at the March 2 hearing, then, that Michael chose not to read the citation served on him by Barthlow. The citation warned him that a default judgment could be taken against him if he did not answer. Barthlow indicated in her testimony that she saw Michael look at the citation when she gave it to him. Although Michael described it as a "cover letter of sorts," the citation—marked "CITATION"—had at its top the style of the case (identifying Michael as the "Defendant"), the court cause number, the name of the court in which the case had been filed, and a statement that the citation had been filed four days earlier "in the above cited cause number and court." After stating that the citation had been filed in court in the cited cause number in which Michael was a defendant, the citation read,

> YOU HAVE BEEN SUED, You may employ an attorney. If you or your attorney do not file a written answer with the District Clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of 20 days after you were served this citation and petition, a default judgment may be taken against you.

When he was later served with the Petition for Enforcement by Contempt and accompanying citation on April 8, Michael had already failed to appear in court on March 2. The trial court could have reasonably inferred that Michael knew that he had failed to appear. The trial court could have also found that Michael, who described himself as "a high-up executive at an energy company," knowing that he missed the March 2 hearing, chose not to read the enforcement petition and accompanying citation at his own peril. The citation accompanying the enforcement papers, like the citation that had accompanied the divorce petition, warned Michael that a default judgment could be taken against him if he did not answer. Michael acknowledged at the hearing that, had he read the language in the citation warning him of the default judgment, he would have immediately contacted his attorney.

In addition, Michael points out that Donna's attorney did not call him to inform him about the divorce proceedings. He relies on this as a reason why he did not discover that he had been formally sued and that needed to respond. However, Michael acknowledged that he had looked at the last page of the divorce petition at the time he was served in order to determine whether Donna had hired a reputable attorney. Michael testified in his affidavit that he had "Googled" the attorney's name and was pleased to see that Donna had hired a reputable lawyer. In so doing, Michael acknowledged that he knew that Donna had an attorney to represent her in the divorce, and he knew the attorney's name.

Michael also acknowledged that, attached to her response to his motion for new trial, Donna had offered an email sent by her attorney to Michael on March 18, 2016. Attachments to the email had informed Michael that temporary orders had been entered against him on March 15 and had forwarded a copy of the temporary orders. Michael acknowledged that the email had been sent to an account belonging to him; however, Michael claimed that he had never opened the email because it was an account that the used infrequently. Michael testified that, the night before the new trial hearing, he had looked at the email account's inbox and had, for the first time, discovered the email from Donna's attorney.

Michael testified that he had taken a screen shot of the inbox, and he offered it into evidence. The screenshot showed the email from Donna's attorney in bold letters, indicating that the email had not been opened. However, the screenshot also showed that a number of other emails had been sent to that email account around the same time that Donna's attorney had sent her email. These other emails included emails received on March 21, 2016 from an airline identifying the subject of the emails as airline reservations to Rome. There were also several emails regarding vacation rentals in Italy. Another mid-March email had as its subject line: "Online Mortgage Payment Ready to View."

And there were other emails in the inbox showing that the email account had been used, presumably by Michael, on March 16, 2016 to reset a password for an online-line municipal payment account.

Given the indications that Michael was actively using the email account at the time that Donna's attorney—whose name Michael had admittedly researched on the Internet—sent her email, the trial court, as the factfinder, could have disbelieved Michael's claims that he was not actively using the email account. Instead, the trial court could have believed either that Michael had read the email when it was received and then marked it as unread before printing the screenshot of the inbox, or the trial court could have believed that Michael had recognized the attorney's name from the divorce petition and had purposefully chosen not to open the email. See *Utz*, 397 S.W.3d at 279 ("As the sole judge of the credibility of the witnesses and the weight to be given to their testimony, the trial court may choose to believe all, none, or part of a witness's testimony."); *Rodriguez*, 2012 WL 4862588, at *3 ("A trial court can reasonably believe, based on contradictory evidence, that there was intentional or consciously indifferent conduct on the part of a defendant.").

* * *

After reviewing the evidence of Michael's acts and of his knowledge, we conclude that the trial court could have reasonably found that Michael "knew [he] was sued but did not care." *Sutherland*, 376 S.W.3d at 755. In other words, the trial court could have determined that Michael acted with conscious indifference to the proceedings when he failed to answer the suit, and as a result, did not meet the first *Craddock* element. See *Craddoc*k, 133 S.W.2d at 126; see also *Evans*, 889 S.W.2d at 269 (stating that courts look to knowledge and acts of defaulting party to determine whether failure to answer or appear was intentional or due to conscious indifference). Accordingly, we hold that the trial court did not abuse its discretion when it denied Michael's motions to set aside the default judgment and for new trial.

We overrule Michael's fifteenth and sixteenth issues.

L. Alternative Dispute Resolution - Mediation

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.

Some recent opinions regarding meditation and family law are instructive, for example:

Highsmith v. Highsmith, 587 S.W. 3d 771 (Tex. 2019). In this case, wife argued that a mediated settlement agreement (MSA) had to be made appurtenant to a pending suit for divorce. The Texas Supreme Court determined that TEX. FAM. CODE §6.602 does not require that a divorce suit be pending in order to enter into voluntary, pre-suit, mediation proceedings. Accordingly, the parties could enter into and execute a binding. MSA.

Milner v. Milner, 361 S.W.3d 615 (Tex. 2012). While general agreements incident to divorce need to be approved by the trial court as a just in right division of the community property, an MSA need not be approved by the trial court. In addition, a party cannot revoke consent to an MSA anytime before a court renders judgment. If an MSA meets the requirements of TEX. FAM. CODE §6.602, a party is entitled to a judgment on the MSA. However, a court can remand a property division issue to the lower court if there is an ambiguity that must be resolved; judgment can be rendered thereafter.

In re Marriage of Moncur, 640 S.W.3d 309 (Tex. App — Houston [14th Dist.] 2022, no pet). In this case, both husband, Ross, and wife, Leticia, were represented by counsel. After an MSA had been entered into, Leticia urged that husband had fraudulently withheld information from her regarding certain assets, thereby breaching his fiduciary to her. However, it was undisputed, that this had been a long and drawn out adversarial dispute between Ross and Leticia.

Specifically the court opined: "In support of her marital duty to disclose contention, Leticia relies on the fact that a marriage creates a fiduciary relationship between the parties to the marriage. She contends that because of that relationship, Ross owed her a duty to disclose material facts within his knowledge. . . While it is true that marriage creates a fiduciary relationship, the fiduciary nature of the relationship terminates when each spouse is independently represented by counsel in a contested divorce proceeding. . . . It was established in this case and undisputed that Ross and Leticia both had counsel and that the divorce proceedings were adversarial long before the mediation occurred and the MSA was signed. In fact, attorneys representing both parties attended mediation and signed the MSA. Accordingly, by then, there had been no fiduciary duty between the parties for some time. Therefore, Ross had no fiduciary duty to disclose financial information at or near the time of the MSA. . . . If Ross was required to provide information on all accounts that could contain community property or if he represented to Leticia that he was providing such information or circumstances suggested as much, then a duty might arise to make sure the disclosure was complete, but if there was no such requirement or representation or circumstances then no such duty likely arose. In the absence of such contextual evidence, we cannot say that the trial court abused its

discretion in refusing to set aside the MSA on the ground of fraudulent nondisclosure." 640 S.W.3d 318-320.

Morse v. Morse, 349 S.W.3d 55 (Tex. App. — El Paso 20, no pet.). An MSA that meets all the requirements of TEX. FAM. CODE §6.602 is binding, even if it is urged that a party intentionally breached the MSA with malice by damaging certain items of property.

M. Alternative Dispute Resolution – Arbitration

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.

N. Alternative Dispute Resolution – Collaborative Law

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.

O. 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. Indeed, Texas is the only state in the United States that allows for jury trials in divorces as a matter of right. The statute still provides that actions to annul an underage marriage cannot be tried to a jury. However, since underage marriages are void, it is unlikely that any exception can be argued or 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 during divorce concerning 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.

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, 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.

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).