INTERESTING CASES: June 5, 2019
Sallee S. Smyth

1. *Bennett v. Bennett,* 2019 Tex. App. LEXIS 3543 (Tex. App. – Beaumont May 2, 2019) (mem. op.) (Cause No. 09-17-00162-CV)

H and W married in 1991 and had two children. H was an anesthesiologist and W had a college degree but had not worked outside the home since early in the marriage. W filed for divorce in 2015 on the basis of cruelty and sought appointment as SMC. Ultimately conservatorship was tried to a jury and all other issues were tried to the court. The jury named W SMC. W asserted claims for a disproportionate division of property and independent claims of waste and breach of fiduciary duty. W alleged that H had prepaid substantial property taxes on the residence he was living in, had liquidated the children's 529 accounts for payment of fees, maintained an unknown bank account with his father and had borrowed on a line of credit and sent those funds to his mother. W alleged that much of this conduct violated existing temporary orders. In support of her fraud and reconstitution claims, W offered the testimony of an expert witness, an experienced board certified family law attorney who had published several articles on these topics and who had been directly involved in legislative efforts to pass TFC 7.009 (the reconstitution statute). H's counsel asserted a *Daubert* challenge, arguing that the attorney was not a forensic accountant and thus could not offer expert testimony on fraud, waste and reconstitution. H's counsel did not argue that whether such fraud and waste had occurred were ultimately legal decisions for the court or that W's expert was attempting to offer testimony on pure questions of law. Despite denying the *Daubert* challenge, the trial court advised H's counsel to explore those issues on cross and if he changed his mind, he would not consider the evidence, but that until then the expert would be allowed to testify. W's expert testified as to the definition of waste in a family law matter and offered testimony regarding some of H's financial activities based on his review and analysis of information provided by H in discovery. W's expert further testified regarding the amount of attorneys fees and expenses either spent by H or those W had to incur because of his actions, suggesting that because H had agreed in temporary orders for W to be named SMC and to supervised visitation, moneys spent in litigation on a jury trial were unreasonable and unnecessary. He further cited to H's expense on a private amicus attorney for the children he had no authority to retain, and experts he hired who later were never called to testify at trial or who were retained to do work on what he considered to be non-issues. There was further evidence of numerous subpoenas issued by H before trial at significant expense, including many outside subpoena range, and many of these witnesses were not called to testify. W's expert testified that H's actions in repeatedly changing attorneys (requiring each new counsel to learn the case) was a waste of community resources. W's expert further questioned H's actions in prepaying federal income taxes and property taxes but failing to reflect these amounts as credits for the community on his inventory. In the end, the trial court found that H was guilty of cruel treatment, found that he had committed waste of approximately $19,000 (substantially less than the amount of W's claim), divided the estate disproportionately in favor of W and ordered H to pay attorney's fees. H appealed. On appeal H challenged the trial court's decision to admit the expert testimony as well as the ultimate division. In examining the expert witness issue, the COA acknowledged the *Daubert* standards. The COA determined that the expert was in fact qualified and that because his opinions were based upon an analysis of records in evidence, including those prepared by a forensic accountant, that there was in fact not too much of an analytical gap between the data and the opinions offered and that because his opinions were based on application of sound principles, his testimony was properly admitted. H's challenge to the sufficiency of the evidence supporting waste and fraud were overruled, in part because the actual award ($19K) was so much less than the value of the claims that the W had asserted. H's challenge to the disproportionate division of the estate were also overruled, leading the COA to affirm the trial court's judgment. **COMMENT:** It is worth mentioning that experts should not be allowed to testify on pure questions of law and when there are legal issues to be addressed, they may only testify on mixed questions of law and fact. In this case, H's counsel did not object to the expert's testimony on this basis but the COA discussed it within a footnote. The footnote suggests that such an objection might have been valid but speculated that the trial court may have determined that the expert's testimony did in fact rely upon his knowledge of the facts supporting waste and his understanding of the law in this area, making it permissible in a mixed question of law and facts situation. Even so, the COA examined how inclusion of the testimony did not result in an improper judgment, examining how the trial court could have reached many of the conclusions that it did even without the expert's testimony. As such, the COA determined that admission, even if declared error, was not harmful requiring reversal. I am not sure that

hiring qualified family law attorneys to offer this kind of testimony in the future should become vogue, even if it seems W got away with it in this case. I don't question the use of such expert testimony as to the reasonableness or lack thereof of fees and expenses, a subject clearly opined upon by the expert in this case. However, retaining a family law attorney to offer testimony on what does or does not constitute waste and breach of fiduciary duty in a particular case seems to me to cross over into areas that are strictly within the purview of the trier of fact, whether judge or jury.

2. *Mason v. Mason,* 2019 Tex. App. LEXIS 3580 (Tex. App. – Austin May 3, 2019) (mem. op.) (Cause No. 03-17-00546-CV)

H and W married in 2010. Before marriage, H became the sole member and manager of 338 Industries, LLC. W filed for divorce in 2016 and asserted claims of waste, fraud and breach of fiduciary duty. W's claims alleged that during marriage, H spent substantial sums on gambling, traveling, staying in hotels in Austin where he otherwise lived, frequenting bars and adult entertainment venues. W offered evidence that H paid for many of these expenses with community funds as well as charging expenses on the LLC credit cards and paying those debts with LLC funds. Accounting for the LLC characterized many of these items as business expenses. The trial court ultimately determined that H had committed fraud and waste in the amount of $752K, reconstituting the estate by that amount and then dividing it 55/45 in favor of W. The court also awarded the community estate reimbursement of $283K against H's separate estate for outstanding loans made to 338 Industries and awarded W attorneys fees. H appealed. H challenged the fraud findings by arguing that many of the expenditures by the LLC were legitimate business expenses incurred while entertaining clients in Las Vegas and he objected to the trial court's community property characterization of these expenditures. H argued that because these expenses had been treated as legitimate in IRS filings and not questioned by the IRS the trial court abused its discretion by considering them as the personal expenditures of H. The COA notes that funds of an LLC are not marital property and although H's LLC interest was separate property (acquired before marriage), funds expended by the LLC for his benefit and not affording any benefit to the LLC could be considered distributions to H which were in fact community property under entity theories adopted in TX. The COA concluded that because the evidence established H's use of community funds for improper purposes without W's consent, the trial court's fraud findings were proper. As to the reimbursement claim the COA notes that although it was undisputed that the community estate loaned funds to the LLC, once loaned, those funds became the property of the LLC. The COA notes that the community could not recover reimbursement directly from the LLC and further, absent constructive fraud, could not recover the funds from H's separate estate simply because he was the sole member and manager of the LLC. The COA did however find that because H's membership interest in the LLC was in fact his separate property, W could recover reimbursement from H's separate estate if she could establish that the loans benefitted or enhanced H's separate estate. Examining the evidence, the COA determined that it supported the notion that the loans benefitted H's separate estate. However, the COA found that "enhancement" was not the proper measure of the reimbursement claim, determining under TFC 3.402 that W's claim was not based on funds expended for the improvement of another martial estate. Instead, the COA determined that W's reimbursement claim should be measured by the "cost" to the contributing estate. Likening this claim to the analysis under a *Jensen* claim for uncompensated time and effort, the COA holds that funds expended by the community to benefit the H's separate property membership interest in the LLC should be measured by the cost to the community, finding that the cost was the amount of the outstanding loans as determined by the trial court. Judgment affirmed.

3. *In the Matter of the Marriage of Piske,* 2019 Tex. App. LEXIS 3646 (Tex. App. – Houston [14th Dist.] May 7, 2019) (Cause No. 14-17-00869-CV)

H and W married in 2008. H filed for divorce in 2014 and pursuant to the parties' premarital agreement, they filed a joint motion asking the trial court to refer the matter to arbitration. The parties agreed to the appointment of WC. Upon his appointment, WC forwarded "Family Law Arbitration Rules" to both parties which rules required the arbitrator to disclose to the parties any circumstances that might likely affect impartiality including any past or present relationships he may have with the parties or their counsel. At the initial status conference, WC represented that he did not have a material relationship with any of the parties or their attorneys other than normal professional relationships. In January 2017, a new attorney appeared for H. WC did not supplement his initial disclosures after such counsel appeared and the case went to arbitration in

February and March of that year. The arbitration order obligated WC to issue his award within 21 days after arbitration concluded but he did not do so. In July, H's new counsel sent an email to WC, copying W's counsel. The email began by acknowledging her personal and professional respect for WC and their friendship but thereafter stressed her frustration and the inequity to the parties that no arbitration award had been forthcoming. WC issued his award several days later, ruling in favor of H. The trial court scheduled an entry hearing. W filed a motion for continuance, arguing that the email was her first discovery of a relationship between the arbitrator and H's counsel and that she desired to pursue further discovery on the issue. Depositions of WC and H's counsel were taken. Both admitted that they had been involved in 5 or 6 past mediations on other cases, they had worked on many SBOT activities together, that counsel had attended several functions at WC's home in connection with those activities and both had spent a weekend with their significant others and 6 or 8 other couples at a mutual colleagues' ranch. When discovery concluded, W filed a motion to vacate the arbitration award, asserting that her rights were prejudiced by WC's evident partiality and his failure to disclose a close, personal friendship with H's counsel. The trial court denied W's relief and signed a final decree pursuant to the arbitration award. W filed a motion for new trial which was denied. W appealed. The COA initially notes that if there is evidence that a party is prejudiced by evident partiality of an arbitrator, the TAA mandates that the trial court set aside the award. The standard for evident partiality requires that the award be set aside "if the arbitrator fails to disclose facts which might, to an objective observer, create a reasonable impression of the arbitrator's partiality." The COA notes that the partiality is established from the failure to nondisclosure itself, regardless of whether the undisclosed information actually shows partiality or bias. W argued that WC's failure to disclose his friendship and the various shared activities between himself and H's counsel satisfied the evident partiality standard and the COA agreed. The COA concluded that WC and H's counsel had a relationship that extended beyond purely professional or trivial connections. H argued that W waived her objections by proceeding to arbitration after receiving the email which identified WC as a "friend." Rejecting this argument, the COA found that the email did not demonstrate the extent of the friendship and was not a full disclosure by the arbitrator in any event. The COA found error in the trial court's failure to set aside the award and grant a new trial. Judgment as to divorce affirmed, but all other issues reversed and remanded for further proceedings. **COMMENT:** It must be recognized that many of our really competent and qualified arbitrators are those who are genuinely well known to the family law bar statewide and who are, therefore, often selected by those family lawyers who know them best and trust their ability to do a fair and impartial job in arbitrating difficult or complex cases. In my opinion, this decision substantially threatens the role of those arbitration candidates in future cases. Some of our best leaders in the family law bar have established and maintained professional relationships and personal friendships with one another and have mentored many a young lawyer as their practices have grown and evolved. While this case turns on a failure to disclose, it highlights how such relationships will apparently justify evident partiality, therefore allowing any party to simply reject otherwise qualified arbitration candidates who has proven their ability to rule according to the law and the facts without bias. It seems that this decision could encourage arbitrators to disclose even the most remote or trivial connections with involved counsel and parties, so as to insure that the proceedings are not at risk of being set aside. Interestingly, many lawyers have similar relationships with elected judges and appear before them routinely without disclosure, without ramification and without grounds for recusal. More often than not, that works out just the way it should.

4. *In the Interest of T.A.*, 2019 Tex. App. LEXIS 4015 (Tex. App. – Fort Worth May 16, 2019) (mem. op.) (Cause No. 02-17-00435-CV)

M and F divorced in 2013. Subsequent modification filings by both led to a bench trial where they announced their agreement on all issues except as to the location for pick-up and drop-off of the child surrounding periods of possession. (Only a foreshadowing of things to come!) Counsel for M recited the parties' agreement into the record which included F's general obligation to bear financial cost for the child's health and dental insurance coverage, which the parties' confirmed. Thereafter hostilities escalated and it took two years to enter a final order. The final order (approved as to form by both counsel) included terms which obligated F to reimburse M for 100% of the child's dental insurance coverage, which the order specified was currently $37.37 per month. F did not object at the time of entry and he filed no post-judgment motions. Instead F appealed. F's only issue on appeal challenged the dental insurance terms, arguing that (1) the trial court erred by requiring reimbursement to M as the agreement did not specify this (suggesting he had an option to provide and pay for it directly); (2) the final order was not an

"agreed order" as to the dental insurance provisions and (3) there was no evidence to support the dental insurance terms. M chose not to file a brief. Even so, the COA scheduled the case for oral argument, which surely had to be motivated in large part by the COA's desire to dress these folks down in person. As the Opinion reflects, it pains the COA to agree with F that the record contained no evidence supporting his obligation to reimburse M (vs. pay the cost directly) and/or to pay the amount of $37.37, requiring them to reverse and remand for further proceedings. ("It is with great consternation that … we reverse … and remand …"). Within the Opinion and during oral arguments, the COA quotes Abraham Lincoln's sage advice given to a group of new lawyers: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser; in fees, expenses and waste of time. As a peace-maker; the lawyer has a superior opportunity of being a good man. There will still be business enough." In a further footnote the COA had these instructions to the parties' and counsel upon remand, quoting from the Texas Lawyer's Creed: "We are confident that [M, F] and their respective attorneys will be able to communicate promptly and effectively to resolve these prolonged proceedings with a minimum of judicial involvement. … In doing so, the attorneys are encouraged to remember their various obligations as members of the Texas Bar, such as 'I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice;' 'I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party;' and 'I will not quarrel over matters of form or style, but I will concentrate on matters of substance." **COMMENT:** We should all be reminded of these words and principles, which is why I have included this particular case summary.

5. *In re J.W.,* 2019 Tex. App. LEXIS 4287 (Tex. App. – Fort Worth May 23, 20192019) (mem. op.) (Cause No. 02-18-00419-CV)

M and F divorced in 2016. F was named as primary JMC with the right to establish domicile of the parties' 3 children without geographical restriction. The final order granted each the independent right to make decisions regarding education. F chose to homeschool the children. M became concerned that they were falling behind academically and the parties discussed enrolling them in public school F enrolled them in Northwest ISD based on his residence. M enrolled them in Keller ISD. Two days before school began, M filed a motion to modify and the court issued a TRO giving M possession and enjoining F from interfering with the enrollment in Keller ISD and from enrolling the children in any other district. The children began school at Keller ISD. Then the trial court vacated the TRO and the children were returned to F. The children went to school in Keller ISD for an additional week while with M and then attended an elementary school in Northwest ISD when school started there. On the first day of school at Northwest ISD the trial court held an evidentiary hearing. Evidence suggested that the children were academically behind. M also expressed concern about the children's care and hygiene while in F's possession and their living conditions at F's residence. The court issued TO which ordered the children to attend Keller ISD and modified possession between M and F on a week on/week off basis, but expressly provided that F was to remain the parent with the right to designate the children's residence. F sought mandamus review. The COA notes that while the temporary orders in this case retain F as the primary parent with the exclusive right to determine residence, the orders which direct that the children remain in a particular school district effectively obligate the F to remain in the area. Even though Keller ISD might have open enrollment, if the children are required to remain enrolled there, F could not relocate with the children any significant distance away if he was so inclined. The TO effectively restricted or modified F's exclusive right which would only be permitted in cases where the heightened level of proof establishing that the children's current situation would significantly impair their physical health or emotional development. Upon review of the evidence and the M's concerns, the COA determined that M had not carried her burden. Mandamus granted.

6. *Bunts v. Williams,* 2019 Tex. App. LEXIS 4267 (Tex. App. – Houston [1st Dist.] May 23, 2019) (mem. op.) (Cause No. 01-17-00643-CV)

M and F, never married, had a child together. At the time of the child's birth in 2009, M lived in NJ and F lived in CA. F attended the birth and routinely traveled to visit with the child. The parties successfully co-parented without court orders until 2015 when M relocated to Houston for employment and filed a suit to establish parentage and all orders attendant to a SAPCR. Up to that point, F had contributed financially as his circumstances allowed but if he was unable to

support, M bore all financial responsibility. F left his employment when a transfer was offered which would take him further away from the child and thereafter relocated to the Houston areas as well. F was unemployed at the time of trial, but being well-educated, agreed to maximum guideline child support. The parties also agreed on conservatorship and possession. Issues regarding retroactive child support, attorneys fees, and requested restrictions on international travel were tried to the court. H offered detailed evidence of the amounts he had contributed to the support of the child over the four year period prior to suit, testifying generally that other amounts had been contributed since the child's birth as well. M testified that F had ties to Brazil and owned rental property there, expressing her concern that she would not be able to retrieve the child from there if he were allowed to take her to visit. F testified that he did desire to share a trip to Brazil with the child but that he would never consider refusing to bring her home. At the conclusion of trial the court awarded M a retroactive child support judgment of $52,500, determining that a maximum guidelines, F should have paid $130K in child support and insurance coverage since the child's birth, but determining from the evidence that he had only contributed $78K. The trial court awarded some attorneys fees payable by F and issued orders enjoining F's travel with the child to Brazil, making specific findings that credible evidence supported a potential risk of international abduction and made further findings within the judgment that there would be obstacles to recovery because while Brazil is a signatory to the Hague Convention, they have demonstrated patterns of non-compliance, have not enforced orders against fleeing parents and had 8 applications for return pending for more than 5 years. H filed a post judgment motion which was denied and thereafter appealed the rulings regarding retroactive child support and travel restrictions. The COA found no abuse of discretion regarding retro c/s and determined that the amounts calculated back to the birth of the child were proper and would create no hardship upon F. As to the travel restrictions, H argued that there was no evidence supporting the trial court's findings, noting that M's vague concerns were not well-founded and specifically arguing that no evidence of any kind about Brazil and its history of Hague Convention compliance or activity was ever admitted. As to this point, the COA determines that details regarding Brazil and the Hague Convention qualified as "legislative facts" which are appropriate to consider under the rules of judicial notice rather than formal admission into evidence. Thereafter the COA opines that while parties may specifically request judicial notice, legislative facts are matters which trial and appellate courts have the authority to take notice of without prompting. As such, the trial court was free to do its own research into Brazil's activities as far as the Hague Convention was concerned, with the COA opinion citing to their own findings from a review of the resources provided on the US State Department's website, determining that these resources supported the trial court's decision. Judgment affirmed. **COMMENT:** In circumstances where legislative facts may be relevant to a particular issue, attorneys should be aware that the trial court has the authority to review and consider relevant information even without suggestion or direction from the attorneys. Further, based on this Opinion, it doesn't seem that the trial court was under any obligation to advise the parties of its outside investigation or give them an opportunity to offer contrary or defensive evidence. In those situations, an attorney who is defending against a request where such independent investigations could take place must be careful to identify the possibility in advance and prepare to counteract them.

7. *Alcedo v. Alcedo,* 2019 Tex. App. LEXIS 4456 (Tex. App. – Fort Worth May 30, 2019) (mem. op.) (Cause No. 02-17-00451-CV)

H and W married in 2005. It was a third marriage for H and a second for W. During the divorce proceedings, it was undisputed that both parties brought significant separate property into the marriage. Both parties pled the existence of separate property and testified that each had separate property. They both submitted sworn inventories admitting that the other party had separate property. They both produced documentation proving their separate property and they both filed proposed property divisions judicially admitting that the other party had separate property. The only disputed issues at trial were how to divide W's retirement benefit accruing during marriage and whether reimbursement claims existed against the other's separate estates. At the end of trial, the court issued a Letter Ruling that divided all of the assets belonging to both parties as if it were all community property, ignoring agreements and stipulations made by the parties. H filed a motion to reconsider. W, who had received a disproportionate share of the property, including much of which was stipulated to be H's separate property, filed only a short response contending that H's unhappiness with the outcome was not a basis to reconsider and failed to submit any legal arguments which might have otherwise supported the trial court's decision. The trial court denied the motion to reconsider, stating that neither party produced clear

and convincing evidence of separate property and thus the trial court had determined it was all community. H appealed. On appeal, H asserted that the trial court had erred in failing to confirm separate property as stipulated by the parties and erred in dividing the marital estate. The COA notes that stipulations are binding on the parties, the trial court and the appellate court, defining them as a contract between the parties and the court and creating judicial admissions. Based on the record, which evidenced extensive stipulations, the COA was quick to determine that the trial court abused its discretion by completely ignoring them. The COA notes that while a court has discretion to divide community property, it has no discretion to divest a spouse of separate property and lumping all property together in the face of the agreements and stipulations before dividing it was error. The COA affirmed the divorce and remanded the division of property. **COMMENT:** Much like it did in the TA case (#4) discussed above, the FW COA takes another opportunity to remind us of our ethical obligations as attorneys, noting that in this case, in an effort to retain the trial court's favorable, but improper award, the W's counsel filed a response in the trial court containing inflammatory and unprofessional attacks and W's appellate briefing failed to offer any genuine dispute as to the H's legal position. Clearly irritated, the COA again emphasizes the significance of the Texas Lawyer's Creed which mandates courteous and civil communications and efforts to avoid disparaging remarks and decisions influenced by ill feelings between the clients, as well as our responsibilities of candor, diligence and respect to the judiciary. It is unfortunate that family law cases can sometimes manage to bring out the worst in our choices. In this case, the COA does not hesitate to call out W and her counsel for seemingly ignoring the law while trying to protect what amounted to an improper windfall. This is an Opinion we should all learn something from.