INTERESTING CASES: November 6, 2019
Sallee S. Smyth

1. ***In re Marriage of Hutcherson,* 2019 Tex. App. LEXIS 8719 (Tex. App. -- Tyler September 27, 2019) (mem. op.) (12-18-00345-CV)**

W filed a suit for divorce. The parties were the only ones to testify at trial and H testified by phone as he was incarcerated. During trial, W testified that a Pomeranian dog, Sassy, was her property. H disputed this claim and testified several times that the dog had previously belonged to his brother, who committed suicide, and that now the dog belonged to his parents who had take care of the dog for 4 years. H testified that he had documents showing that his parents owned the dog but because of his circumstances he did not have that with him. The court offered to withhold ruling on the divorce until H could provide the paperwork, however H decided he wanted to be divorced that date. The trial court determined it would award the dog to W and H objected, stating over and over that the dog belonged to his parents and the court ended up terminating the call with H because he continued to argue about the award of the dog. The court granted divorce, divided property and signed a decree that same day. H filed a motion for new trial. Attached to the motion was H's affidavit and a note signed by the W where in she stated that she was giving up ownership of the dog to H's parents and an email from W admitting she had done so. At the new trial hearing, W argued that she did sign the note but did so based on a promise made by H's parents which they broke, and so she considered their agreement regarding the dog to be void. The trial court denied H's MNT, explaining that it offered H an opportunity to prove the dog was not marital property but suggested that H declined because he wanted to be divorced. H appealed. The COA notes that the trial court has no authority to divide property between H and W if that property belongs to a third party, stating that the dog is property which is neither community or separate. The COA further notes that a judgment based on fraud, including perjured testimony, must be set aside. Here the COA found that the trial court abused its discretion by offering H an opportunity to obtain documentation he claimed was relevant, but then in terminating trial and ruling on a division, which included awarding the dog to W. The COA found that H's evidence attached to the MNT was not something the trial court could ignore. The trial court solicited testimony from the parties that Sassy the dog was a mixed breed probably worth only about $50, however, the COA states that when a trial court, upon divorce, includes a valuable asset within its division, the mischaracterization of a third party's property affects the trial court's just and right division, warranting reversal. Divorce affirmed, division of property reversed and remanded for further proceedings. **COMMENT:** Every dog has its day!

2. ***Tidwell v. Tidwell,* 2019 Tex. App. LEXIS 8748 (Tex. App. – El Paso September 30, 2019) (mem. op.) (Cause No. 08-17-00120-CV)**

W filed for divorce from H and H filed a counter petition. Both parties sought temporary orders. At the temporary orders hearing in May 2014 the parties announced to the court that they had reached an agreement on all matters regarding their child and the division of their property. The attorneys recited there agreement into the record and the parties acknowledged their agreement. The AJ, presiding, announced that the parties were divorce but he never entered judgment. In September 2014, H filed a motion to enter judgment on the parties' Rule 11 Agreement. Several days later, W filed a formal revocation of the Rule 11. Thereafter H filed a motion to enforce the Rule 11 agreement. A the hearing on the motion, the AJ announced that he had no authority to render judgment on the agreement because it had been revoked. H amended his pleadings and sought enforcement of the Rule 11, alleged breach of contract and requested attorneys fees. A trial, the parties testified about possession of the child under the Rule 11 and the judge found it to be a significant source of conflict. W argued that the Rule 11 could not be enforced because it was revoked before judgment was rendered. She further argued that H could not be awarded fees because there is no valid contract to enforce. Finally, W argued that agreements regarding their child could not be enforced by contract under TFC 153.007(c). The trial court issued its ruling, enforcing the Rule 11 agreement as to the property division but issued a different possession schedule ofor the child. H filed a MNT which was overruled by operation of law. H appealed. Acknowledging Rule 11, the COA determines that the parties' consent must exist at the time judgment is rendered and if revoked prior to rendition. In this case, W revoked consent before rendition. While the AJ did have the authority to render and sign a final judgment based on the parties' agreement, the AJ did not do so prior to W's revocation. Further, because the Family Code precludes enforcement of agreements regarding child under contract principles, H could not secure enforcement of the possession periods in the Rule 11 or recover fees. The COA

further holds that contracts that violate public policy cannot be enforced and because the trial court determined that the possession agreement was not in the child's best interest, the agreement was against public policy and thus unenforceable. Judgement affirmed.

3. ***In re Marriage of Keys,* 2019Tex. App. LEXIS 8814 (Tex. App. – Texarkana September 18, 2019) (mem. op.) (06-19-000018-CV)**

Within their divorce, H and W agreed to all issues with the exception of whether or not the final order would include an injunction prohibiting the child from being around the people they were dating. Both parties pled for temporary orders to include a morality clause preventing individuals they were dating from spending the night while in possession of the child. Neither party pled for permanent injunctions. While the case was pending, the parties had agreed to temporary orders which included the morality clause and further included terms enjoining H's girlfriend from being around the child at any time. Within their MSA the parties noted that all matters were resolved with the exception that the court would decide whether or not the injunctions would be continued. At the final hearing H's attorney announced there was no agreement on the injunction but the trial court granted it without hearing any evidence. H's counsel asked the court to define the basis of the ruling to which the trial court stated it was granting a permanent morality clause in part because the court believed that W's efforts to serve the GF with a subpoena for trial were being avoided. The trial court suggested it was only granting a morality, not an injunction but then considered evidence from the process server, the mother and the mother's older child from another marriage. H objected to testimony from the child because she had not been identified as a witness in Rule 194 disclosures. The court overruled the objection. The child testified regarding Instagram messages which were attributed to H's GF. H objected to the testimony as hearsay but the objection was overruled. The court admitted screen shots of the instagram messages attributed to GF in which GF said many hateful things about W. W testified that she had knowledge from social media that GF used drugs and that when she asked H about the drugs he admitted it was true but did not seem concerned. The trial court issued a morality clause and further issued an injunction that GF could not be around the child "at any time" period. H appealed. H argued there were no pleadings to support the relief. The COA disagreed, stating that in SAPCR cases permanent injunction standards under TRCP do not apply and that the technical requirements of pleadings are relaxed. Further the COA notes that the parties MSA clearly indicated the parties were on notice that the court would hear this issue. Regarding his evidentiary objections, the COA found no abuse of discretion in allowing the older child to testify despite not being timely identified, because best interest of the child was at issue and this justified a finding of "good cause" to allow the evidence. As to the hearsay objection, the COA found that W did not offer the Instagram messages to prove that their content was true (that W was a bad mother, etc.) but instead offered them to show the kinds of statements that GF was making to her child. As such the COA found the Instagram messages were not hearsay. Finally the COA found that the content of the messages could have suggested that GF engaged in alienating behaviors directed to one child which could create concern that she would do the same with the child of the parties and further, H when confronted with GF's drug use, did not seem concerned. These facts supported a determination that enjoining H from allowing GF around the child at any time was in the child's best interest. Affirmed.

4. ***In re M.B.,* 2019 Tex. App. LEXIS 8847 (Tex. App. – Beaumont October 3, 2019, orig. proceeding) (mem. op.) (Cause No. 09-19-000247-CV)**

F was charged with murdering M and the Department removed the children from F's care, placed them with Grandmother (GM) and filed suit to terminate F's rights. Grandfather (GF) sought to intervene in the pending SAPCR pursuant to TFC 102.004(b). GF's pleadings asserted that appointment of the only surviving parent would significantly impair the welfare of the children. An evidentiary hearing was held in which GF testified that he and GM were never married but that he had always maintained a relationship with his daughter, M (the murder victim) and his grandchildren when they came along. He admitted that he did not see them as often as GM but that he wanted to maintain a relationship with them and have rights to the children. GM agreed that he had visited with the children regularly but that she had reduced his visits because the Department instructed her not to let the children visit with anyone otherwise they would have to place them in foster care. The Department did not rebut the claims raised in GF's pleadings. Instead, the Department argued that because the intervention statute is discretionary (may) not mandatory (shall) the trial court is permitted to look beyond the requirements of the statute to determine whether allowing the intervention would be in the best interest of the children and

further whether the intervention would unnecessarily complicate the case. The trial court ultimately denied the GF's requested intervention and he sought mandamus relief. The COA considered that while TFC 102.004(b) is discretionary, there was no evidence that demonstrated it would not be in the best interest of the children to grant GF standing to intervene when he did have a relationship with the children and in fact the GM testified that this relationship should continue and the only reason it had been reduced was because the Department had advised her on that matter. The COA notes that allowing intervention is not a decision on the merits, but only gives GF the right to participate. Further the COA found that there was nothing which suggested GFs participation would complicate or delay the trial. The COA did not expressly recognize the Departments argument as valid (arguments suggesting determine that TFC 102.004(b) allows for a best interest determination) but instead found that if the Department was correct, the evidence supported that GF's participation in the suit was beneficial to the children. Mandamus granted.

5. ***Mansfield v. Mansfield,*** **2019 Tex. App. LEXIS 8939 (Tex. App. – San Antonio October 9, 2019) (mem. op.) (Cause No. 04-18-00551-CV)**

In 2010 H received a structured settlement annuity after a job related accident. The annuity paid him $6900+ per month until the latter of his death or 360 months. In 2016 H married W and they had one child in 2017. W filed for divorce shortly after the child's birth and they settled all matters with the exception of child support and medical support. At trial the court considered H's structured settlement income as part of his resources for establishing child support. H appealed, citing a Waco decision that delineated between income from annuity versus return of principal from annuity when considering what should be included within the definition of resources for child support. (In re AAG, 303 SW3 739) The San Antonio COA declined to follow the Waco decision, determining instead that the plain meaning of TFC 154.062 defined resources to include "annuities" without distinguishing between different types of annuity contracts. The COA notes that if the Legislature had intended to include some annuities but not others it would have specified such, but because it did not the trial court was correct to include H's $6,900/mo in its child support calculation. Affirmed.

6. ***In re M.B.,*** **2019 Tex. App. LEXIS 8496 (Tex. App. – Dallas September 19, 2019, orig. proceeding) (mem. op.) (Cause No. 05-19-00971-CV; Cause No. 05-19-00973-CV)**

CPS removed the child from her mother and father at age 3 and placed her with Foster Parents (FP). The child remained with FP for 13 months before return to her parents. She remained with her parents for 5 months before removal again and return to FP. At a permanency hearing 10 months later, FP became concerned about further concerns and the next day filed a petition in intervention in the CPS suit. A month later they filed an original SAPCR and asserted standing under TFC 102.003(a)(12) which confers standing on a foster parent to bring suit if a child has been placed with them for not less than 12 months ending not more than 90 days from the date suit is filed. TFC 102.003(b) further provides that in computing the time requirements for (a)(12) standing the court may not require that it be continuous or uninterrupted. Within the original SAPCR, FP made a written demand for jury and paid the required fee. The Department and the mother challenged FP's standing but later withdrew their motions. The Department filed a motion to consolidate the CPS case and the original SAPCR, citing to common questions of law and fact. FP opposed consolidation, however argued that if granted, the court should allow a jury trial. The trial court granted consolidation but denied a jury, citing that the request was not timely in the CPS case and further it was concerned about FP's strategy to file a SAPCR with the same claims as the intervention in order to secure a jury. FP filed for mandamus relief. The COA first addressed standing since it had been raised in the trial court. The COA found that FP had possession of the child for 13 months during the first placement and 10 months during the second placement, interrupted by 5 months when the child was returned to her parents. At the trial court level, the Department's abandoned motion had argued that the 12 month possession should not be counted and at the time of the intervention they had only had the child for 10 months. The COA held that TFC 102.003(b) expressly states that the FP's possession need not be uninterrupted or continuous and at the time of the intervention, FP had been in possession of the child for 23 months and the 5 month interruption did not frustrate standing. AS to consolidation, the COA determined that with common question of law and fact it was property to try the cases together. As to the denial of a jury however, the COA found that the jury demand filed by FP was timely and could not be denied. Although jury demands made at least 30 days prior to trial are considered timely, in the CPS case the scheduling order required the demand 60

days before trial. The COA determined that at the consolidation hearing on August 2, 2019 (which was the date the CPS case was set for final trial), the trial court reset trial to September 30, 2019. This reset in effect made the jury demand filed in the SAPCR case on July 25, 2019, timely as it was filed more than 60 days prior to the 9/30/19 trial. Further the Department offered no evidence as to how they would be injured by a jury trial and the trial court had stated on the record that it could handle a jury on the trial date without interrupting its docket. Mandamus denied as to consolidate but granted as to FP's request for a jury.

7. ***Highsmith v. Highsmith,*** **2019 Tex. LEXIS 1091 (Tex. Supreme Court October 25, 2019) (Cause No. 18-0262)**

H and W married in 2004 and thereafter had two children. Contemplating a divorce, the parties entered into pre-suit settlement discussions and in February 2015 signed an agreement entitled "Mediated Settlement Agreement" which included terms dividing real and personal property and containing a parenting plan. The document and attached exhibits provided that W would file for divorce and would appear in court to present evidence to obtain rendition of judgment on the parties' agreement after May 1. The agreement further provided language in several places that is was not subject to revocation Shortly after the agreement was signed, H filed suit for divorce. W initially signed a waiver of citation (but did not waive notice of hearing or making of a record). Later W filed an original answer. On May 1 H appeared in court without notice to W and obtained rendition of a divorce and approval of the settlement agreement terms. W, through new counsel, filed a motion to set aside the rendition and to revoke the settlement agreement. Ultimately the trial court denied W's motions and signed a final decree. W appealed. The COA determined that the agreement did not comply with Family Code provisions governing mediated settlement agreements because the agreement in this case was executed prior to suit ever being filed. The COA determined that, the agreement, while not enforceable as an MSA, might have been enforceable as a contract but this would also subject it to contract defenses and further subject it to revocation. Further the COA held that because W did not waive notice of hearings and filed an original answer, she had a fundamental right to notice of any setting. There was no dispute that W did not receive notice of H's court appearance on May 1. This error was not harmless because it was likely that W would have voiced her objection to the entry of judgment (based on her actions actually revoking the agreement) and she was denied the opportunity to do so. The COA reversed and remanded for a new trial. H filed a petition for review in the Supreme Court. The Supreme Court now determines that TFC 6.602(a) merely grants the court discretion to refer parties to mediation once suit has been filed, but the statute does not create an additional requirement that suit MUST FIRST be filed as a prerequisite to an enforceable MSA. The Supreme Court specifies that the only requirements for enforceability of an MSA are those found in TFC 6.602(b) and to the extent that this MSA complied with those requirements, H was entitled to judgment on the MSA unless W offered viable arguments to set it aside. On that note, the Supreme Court agrees with the COA that W was entitled to notice of the court hearing at which judgment on the MSA was rendered. By filing a general denial, W made the case "contested" and due process entitled her to 45 days' notice of trial setting. Reversed and remanded to trial court with instructions that MSA is binding and enforceable absent W offering evidence and arguments supporting her claims which seek to set the MSA aside.