INTERESTING CASES: February 5, 2020
Sallee S. Smyth

1. ***In the Interest of H.L.B.,* 2020 Tex. App. LEXIS 233 (Tex. App. – Dallas January 9, 2020) (mem. op.) (05-18-01061-CV)**

H and W divorced in 2015. The decree provided terms designating the schools their two children would attend for a period of time into the future. It further specified that H would pay 100% of the children's private school tuition. In the section entitled "Child Support" the decree provided that no party would owe c/s to the other party. In 2018 H filed a motion to modify, asking that his private school obligation be terminated and that if W did not agree to pay it, that the children be enrolled in public school. H alleged a material and substantial change. W filed a plea to the jurisdiction, arguing that the tuition obligations were contractual and not subject to modification. H responded and argued that it was a c/s obligation and could not be enforced contractually. The trial court granted W's plea and determined it had no jurisdiction over the case. H appealed. The COA holds that regardless of what label parties may put on term within a decree, a parent's obligation to pay private school tuition for a minor child is "necessarily an obligation to provide child support." The COA states "Father's obligation to pay tuition is not a contractual debt owed to [W]; it is an obligation undertaken to fulfill a duty owed directly to the minor children and thus, a form of child support." Additionally, the COA notes that if the parties had tried to draft their decree so that the tuition obligation was classified as something other than c/s, therefore making it beyond the reach of the trial court, any such agreement would have been unenforceable. This is based on those principles which do not permit parties to contract in a way that deprives the court of addressing a child's best interest. The COA reverses and remand H's modification suit back to trial court. **COMMENT:** I don't necessarily disagree with the holding that H's specific obligation to pay tuition in this case was the equivalent of c/s since the decree expressly provided for the former and expressly omitted the latter. However, what about those decrees where the parties include both periodic c/s and other additional financial obligations which serve to fulfill the needs of the children, i.e. payment for cell phones, autos and gas, extracurricular activities, summer camp? Will this case create a situation where those obligors now add up all of their financial commitments and claim that their c/s is way beyond guidelines and should be reduced? In circumstances where these needs are pled for in addition to c/s, will the standards for over guideline c/s now always apply? Stay tuned.

2. ***In the Interest of Z.K.S.,* 2020 Tex. App. LEXIS 221 (Tex. App. – Corpus Christi January 9, 2020) (mem. op.) (Cause No. 13-19-00011-CV)**

M and F had a child. When the child was two months old, F filed a petition to adjudicate parentage and he sought to be named JMC with the exclusive right to determine the child's residence and requested equal possession of the child with M. M filed a counter suit and asked to be named primary JMC and for a domicile restriction to a specific town in North Carolina or alternatively to Nueces County or specified large cities within Texas. The case was tried to a jury who decided M should be named JMC with the right to establish residence but restricted domicile to Texas. The trial court awarded F possession on a week on/week off schedule. The child was then 18 months old and M and F lived 240 miles apart (F in Corpus and M in Spring). The decree further provided that F would begin operating under an SPO in 2022 when the child began school. M appealed, asserting that the possession order contravened the jury's verdict which allowed her to determine the child's residence. M sought to suspend the possession orders during appeal which the COA granted, abating the appeal and referring the issue back to the trial court to issue other orders for possession of the child during the appeal. The trial court ordered alternating 14 day periods of possession with exchanges of the child ½ way between the residences of both parties. The COA reinstated the appeal and then determined the merits. The COA notes that equal possession time for parents is neither forbidden nor required by the TFC. The COA looked at two cases where similar orders were appealed based on the same challenge. Ultimately, in this case, the COA decides that a week on/week off schedule for parents who lived so far apart under a domicile restriction that encompassed the entire state of Texas had the practical effect of limiting M's ability to live anywhere in TX and still comply with the possession schedule. As such, the COA determined that the possession order did contravene the jury's verdict. In addition, the COA found that possession orders which implemented an SPO when the child was 5 ½ violated the statutory mandate which provides that such orders should be implemented when a child turns 3. Finally, the COA found that the equal possession time in this case based on the facts was not in the child's best interest. Reversed and remanded.

3. ***Nellis v. Haynie,* 2020 Tex. App. LEXIS 278 (Tex. App. – Houston [1st Dist.] January 14, 2020) (Cause No. 01-18-00736-CV)**

M and F were named JMC of their child in a 2010 order. Subsequently, M died and the child began living with F who was eventually named his SMC. Thereafter, F and the child lived with F's parents (PGP). In 2016 PGP filed a suit to modify, seeking conservatorship of the child based on allegations of F's drug use and other issues. The suit was tried and F was removed as the SMC and PGP were named in his place. F was given only limited supervised access with the child 4 hours each month and ordered to pay c/s. Six months after this order was signed, F filed a suit to modify asking for more time with his son. He did not seek to alter the PGP's primary rights and thus his suit did not fall under TFC 156.102 obligating the need for an affidavit within one-year. Within 10 days of filing, PGP filed a motion to deny relief, asserting that there was no material and substantial change. The trial court held a hearing. Although witnesses were sworn in, the court heard legal arguments from counsel only before issuing its ruling granting the PGP's motion. This was despite the arguments of F's attorney that F was entitled to an evidentiary hearing on his modification suit. The court's order stated that the court found no material and substantial change and that no hearing would be set and that F's suit was dismissed. F appealed. The COA notes that whether there has been a material and substantial change is a question of fact. The COA notes that a "motion to deny relief" is not a motion recognized by the TRCP. To the extent that such a motion might be authorized under TRCP 91a, the COA notes that this rule is not applicable in cases brought under the Family Code. Further, the COA notes that sometimes a motion to dismiss might be construed as a motion for summary judgment but only in situations where SJ procedures are followed and everyone treats the proceeding as if it were following SJ rules. The COA notes that was not the case here. The COA held that a motion to deny relief was not a proper mechanism supporting dismissal and F was entitled to an opportunity to prove his case through witnesses and other evidence. Reversed and remanded for further proceedings "consistent with the rules of civil procedure."

4. ***Peredez v. Hussey,* 2020 Tex. App. LEXIS 427 (Tex. App. – Houston [1st] Dist. January 16, 2020 (mem. op.) (Cause No. 01-18-00803-CV)**

H and W divorced in 1995. The decree provided that W would receive 50% of "any and all sums accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom and any other rights related to any [listing of all possible employee benefit type plans] existing by reason of [H's] past, present or future employment …" At that time the court signed a QDRO awarding W 50% of the funds in H's Shell Provident Fund as of 3/1/95. The QDRO included findings which specified the parties' total interest in the plan benefits as of the date of divorce and specified that the QDRO would become an integral part of the decree of divorce. Neither party appealed from the decree or QDRO. W received approximately $50,000 by virtue of the QDRO. In 2014, almost 20 years later, W filed a petition seeking another QDRO affecting H's benefits in the Shell Pension Plan. The trial court signed a proposed order after a hearing that H did not attend. Then in 2015 W filed another petition to obtain a QDRO regarding the accumulated benefits in the Shell Provident Fund now valued at over $350K. The trial court again signed the QDRO and H did not participate. W had trouble recovering the funds and filed a third petition. The court refused to entertain W's request without proof of notice to H. H then filed a bill of review, asking the trial court to reform the applicable portions of the final decree to confirm that any and all amounts awarded to W from his employee benefits were only as of "the date of divorce." The court considered both the W's petition for a QDRO and the H's bill of review in one hearing. The court granted BOR, set aside all prior QDRO's it had signed and reformed the decree to specify that H's benefits were divided as of the date of divorce and signed an entirely new QDRO. W filed a motion to reconsider and 5 days after it's initial ruling the trial court rendered new orders denying BOR relief, setting aside all of the orders that it had just signed and denied all other relief. Thereafter, W filed another motion to sign a QDRO and it was set for hearing. H's counsel argued that the original decree already divided H's benefit and W had received her share. The trial court denied W's motion to sign QDRO. W filed a MNT which was denied. W appealed, arguing that denial of her motion for a QDRO effectively modified the property division. W claimed on appeal that she was entitled to 50% of all amounts H accrued through the "last date of his employment" since the decree awarded to her 50% of all amounts attributable to his "past, present and future employment." The COA determines that a QDRO is a final, appealable judgment, subject to the principles of res judicata just like any other final judgment. Here, W did not appeal the original QDRO and thus her subsequent efforts to obtain new and additional QDRO's effectively served as a collateral attack on the original

orders. The COA found that W's efforts sought to avoid the effects of the original 1995 QDRO, making it an impermissible collateral attack on both that QDRO and the final decree on which it was based. W further argued that she was entitled to QDRO's affecting new benefits H had also begun to participate in after the 1995 divorce. The COA determined that this too was a collateral attack on the original property division. Judgment denying relief affirmed.

5. ***Wagner v. Davis,* 2020 Tex. App. LEXIS 470 (Tex. App. – Fort Worth January 16, 2020 (mem. op.) (Cause No. 02-19-002493-CV)**

H and W married in 2010. The purchased a house in 2012 and made upgrades to the property. The refinanced the property in 2014 (leaving a debt of $232K). Shortly thereafter W filed for divorce. By agreement, the decree awarded W the house and divested H of his rights and interest to the property subject to an owelty lien for 50% of the equity. H was awarded (and W was divested of) 50% of the proceeds from the sale of the residence which represented his 50% of the equity. The decree obligated W to pay all debts associated with the residence and obligated W to pay H 50% of the equity in the homestead as of the date of the sale of the residence. W signed a deed of trust to secure payment of the owelty lien. Three plus years later, W filed a motion to clarify the decree, claiming that the language regarding the award of the residence and owelty was ambiguous. At the hearing, W's counsel argued that the decree should be clarified to state that H's award was to be valued at the date of divorce because W had paid down the debt and increased the equity over the 3+ years after divorce with her separate property funds. H's counsel argued that the court could not modify the division and that H's separate property interest in the residence simply grew in value post-divorce and the court could not divest him of that property. The trial court granted W's motion and clarified the decree to award H 50% of the equity in the residence as valued at the date of divorce. H appealed. On appeal, H argued that the increase in value of the property after divorce was not relevant to a decision interpreting and enforcing the plain meaning of the decree terms (which awarded him 50% of the equity as of the date the property was sold). The COA agrees with H that W, whether knowingly or not, bargained away part of her separate property when she agreed to a decree that awarded H 50% of the proceeds at the time of sale as representing his portion of the equity. Because the decree spelled out the who, what, when and how the partition would occur, it was not ambiguous. Reversed and trial court clarification order vacated.

6. ***Treto v. Treto,* 2020 Tex. App. LEXIS 569 (Tex. App. – Corpus Christi January 23, 2020) (13-18-00219-CV)**

Jennifer and Sandra married in New Mexico in 2014. At the time they married, Jennifer had a 1 year old child from another relationship. Before marriage they discussed having a family. After marriage, one of their male friends volunteered to be a sperm donor. They reached a verbal agreement to pay him $200 for each sperm donation. Sandra and Jennifer agreed that Sandra would carry any child and they began monitoring her menstrual cycle and ovulation and she started on prenatal vitamins. In October 2014 they contacted the sperm donor and invited him over to make a donation as Sandra was ovulating. He came over and ejaculated in a sterile cup in the bathroom and then Jennifer inseminated Sandra. Several weeks later her pregnancy was confirmed. During the pregnancy, Jennifer attended all doctor visits and participated in a baby shower. Jennifer was pregnant at the hospital for the birth and both women took maternity leave to take care of the newborn. In January 2016, Jennifer moved out and filed for divorce. Initially, the parties were divorced in an uncontested suit finalized in 2017 wherein Jennifer executed a waiver of citation. Jennifer then filed a MNT which was granted and the case proceeded on a contested basis. The trial court eventually issued a final decree which named Jennifer as a parent conservator of the child and obligated her to pay child support. Jennifer appealed. In a single issue she argues that the trial court erred in naming her a parent and obligating support because she has no biological relationship to the child. On appeal, Sandra argued that in light of *Obergefell,* ancillary marital benefits are extended to same-sex couples and this should include the presumption of parentage when a child is born during the marriage. Jennifer argued that the Family Code only addresses the situation between a man and woman and further that she is not included in the definition of parent. The COA notes that while Chapter 160 (parentage) does limit itself to situations involving mothers and fathers, TFC 160.106 specifies that provisions within the chapter which apply to a determination of paternity, apply equally to determinations of maternity. The COA Opinion spends time citing to decisions in other states which have established parentage in same sex marriages by virtue of the marriage itself. The COA notes that the only barrier to ignoring the presumption of parentage to a child born during the marriage is

the fact that Sandra and Jennifer are the same sex. Otherwise, their facts are no different from any other case where the presumption would apply, i.e. they legally married, a child was conceived, a child was born, and they embraced the child as their own. Determining that same sex marriages were deserving of equal protection as provided by *Obergefell,* the COA holds that the trial court did not abuse its discretion by giving cumulative effect to Family Code 160.204(a)(1) which creates a presumption of paternity to a man who is married to the mother when the child is born and Family Code 160.106 which provides that statutes determining paternity apply equally to determinations of maternity. The COA found no abuse of discretion in naming Jennifer as a parent and order her to pay child support. **COMMENT:** I just want to give a shout out to Ellen Yarrell for her progressive thinking. Ellen made the TFC 160.106 "gender neutral" argument in a trial court proceeding in 2013 and it was ultimately rejected by the trial court and the 14th COA at 429 SW3 389 wherein the COA stated "we construe section 160.106 to mean that the procedures applicable to adjudicating paternity are equally applicable when it is necessary to adjudicate maternity [but] Section 160.106 does not mean that the situations establishing paternity, including that certain provisions are presumptions rebuttable by genetic testing, also apply to establishing maternity." We've come a long way since then. Perhaps one day the Texas Legislature will be as forward thinking as Ellen and actually pass Family Code amendments that catch up to the U.S. Supreme Court's 2015 decision in *Obergefell.* Until then we will simply plod along and prosecute appeals which seek to protect families and children equally in accordance with constitutional mandates.

7. ***Guion v. Guion,*** **2020 Tex. App. LEXIS 750 (Tex. App. – Houston [1st Dist.] January 28, 2020) (01-18-00386-CV)**

H and W divorced in 2016 and W was named SMC pursuant to a jury verdict. In 2017 H filed a motion to modify asking that the court impose a geographic restriction to Dallas, Travis or Harris County. H also asked for modifications to exchange locations for possession and access, terms for long distance visitation and for international travel. W filed a motion to dismiss, arguing that there had been no material and substantial change. W asserted a frivolous filing and requested fees and sanctions. At the hearing H's counsel argued that changes existed and stated that H was present to offer testimony on those matters. The trial court declined to hear evidence and stated that it was the court's position that the law did not allow the imposition of a geographic restriction on a SMC. Based on that position, the trial court dismissed H's suit and awarded W $5K in fees. H filed a motion to reconsider, citing case authority establishing the court's authority to modify. The trial court denied the motion and H appealed. The COA examined the nature of W's motion as procedurally authorizing dismissal. The COA notes that it could not be a TRCP 91a dismissal motion because that rule does not apply in cases under the Family Code. The COA further examined whether the motion could have been considered a summary judgment motion but found that no summary judgment procedures had been followed. The COA concluded that if H's claims were allowed by law, H was entitled to an evidentiary hearing and dismissal of his claims was therefore improper. Thereafter the COA examined the trial court's legal determination that it had no authority to impose a domicile restriction on an SMC. The COA examined other existing cases to the contrary and agreed with those noting that while TFC 153.132 identifies the rights of a SMC it specifies that these are the rights "unless limited by court order." The COA holds that a trial court is permitted to limit or restrict any right which might otherwise exclusively belong to a SMC. Because the court was authorized to impose a geographic restriction if H met his burden of proving material and substantial change and best interest, the trial court abused its discretion and the award of attorney fees was premature. The trial court erred in dismissing all the other modification requests without a hearing. Reversed and remanded.