

**SPEAKING IN CODES:
WHAT EVERY FAMILY LAWYER SHOULD KNOW ABOUT
THE CIVIL PRACTICES & REMEDIES CODE,
PROPERTY CODE,
AND BUSINESS & COMMERCE CODE
(And Throw in the Finance Code and Penal Code)**

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**ADVANCED FAMILY LAW COURSE
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San Antonio, Texas
CHAPTER 26**

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Advanced Family Law Course, State Bar of Texas, 1983
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**ARTICLES/
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- 2000 Speaker, "Alternate Dispute Resolution" Dallas Society of Retired Executives
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ARTICLES/ SPEECHES

“Working As An Expert Witness in Family Law Matters,” Dallas Chapter Texas Society of CPA’s Divorce Conference; September 1997; with Thomas P. Goranson

“Yours, Mine and Ours: Asset Protection in the Family Law Context,” Dallas Chapter of Texas Society of CPA’s Continuing Professional Education, co-authored with Paula Larsen, December 1997

“Handling the Divorce Involving Constructive and Actual Fraud, Claims Against Third Parties, and Attacking and Defending Gifts To or From Spouses,” Marriage Dissolution Institute, State Bar of Texas 1998, co-authored with Angeline L. Bain

People’s Law School; November 1998; Dallas Association of Young Lawyers; Presentation on Family Law

“The Next Millennium: 2000 Ways to Dramatically Present Your Case!” Advanced Family Law Course, State Bar of Texas; August 1999; co-presenter with Thomas P. Goranson and K. Dennise Garcia

“Voluminous Document Control,” Advanced Family Law Course, State Bar of Texas; August 2000; co-authored with Angeline L. Bain

“Tax Traps/Tax Tricks and The Complex Property Case,” New Frontiers in Marital Property Law, State Bar of Texas, October 2000; co-authored with Paula Larsen

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. 9

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. 1

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Williams v. Patton, 821 S.W.2d 141, 145 (Tex. 1991) 34

Wood v. Wood, 320 S.W.2d 807, 813 (Tex. 1959) 24

Zarsky, 829 S.W.2d at 399-400 6

Zieba v. Martin, 928 S.W.2d 782 (Tex. App.--Houston [14th Dist.] 1996, no writ) 50

SPEAKING IN CODES: WHAT EVERY FAMILY LAWYER SHOULD KNOW ABOUT THE CIVIL PRACTICES & REMEDIES CODE, PROPERTY CODE, AND BUSINESS & COMMERCE CODE

I. INTRODUCTION

The divorce lawyer is really the Renaissance Lawyer. You must know a lot about a lot of different areas of the law. But that was not always the case. In the old days the silk stocking firms thought that divorce law was the proctology of the law. In recent years, the specialization of the practice, particularly in the metropolitan areas and with specialized courts, this Renaissance practice seems to have lost some of its roots. There actual is law outside the family code that has meaning. The purpose of this outline is to help find some of those parts of the law that may help you in your practice. The outline is not intended to be a comprehensive exhaustion of all of the nuances of the codes, but as a resource tool to help the Renaissance lawyer find the statutorily hidden truths needed for truth, justice and the American way.

II. CIVIL PRACTICES & REMEDIES CODE

A. Overview

On September 1, 1985 the Civil Practices and Remedies Code became law. This code was part of a massive effort to make the Texas statutes “...more accessible, understandable and usable’ without altering the sense, meaning or effect of the law.” (Foreword to Proposed Code 9 Revisor’s Report, April, 1984, 1 V.T.C.A. Civ. Prac. & Rem. Code, ix). The Code was intended to be a nonsubstantive revision of the Texas statutes relating to civil procedure and civil remedies and liabilities.

B. Title 2 Trial Judgment and Appeal

1. §5.01 Rule of Decision

(Tex. Civ. Prac. & Rem. Code Ann. §5.01). Hereafter, in this section II, references will simply be to the Code, chapter or a section or “§” number.

“The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state.”

a. In *Miller v. Whittlesey*, 562 S. W. 2d 904, 906 (Tyler Civ. App. 1978, affirmed 572 S.W.2d 665 (Tex. 1978), third party attempted to claim that wife did not have right to sue for loss of consortium because such a right did not exist at common for women. The Tyler Court agreed that wife did not have this right at common law but that the husband did. The Court then applied the Texas Equal Rights Amendment (Art. 1, Sec. 3a of the Texas Constitution), stating that it had modified the common law to such an extent that it would be improper to deny a cause of action based upon the sex of the party bringing the action. Interestingly, the Texas Supreme Court affirmed on the basis of keeping pace with a “modern society” but did not address the equal rights amendment argument.

2. §7.011. Attorney’s Liability for Costs

a. “An attorney who **is not a party** to a civil proceeding is not liable for payment of costs incurred by a party to the proceeding.” Emphasis added.

b. Do not get too excited - this simply means that a court can not order an attorney to pay court costs. *Lowrance v. Horton*, 959 S. W. 2d 620 (Tex. 1998). An attorney can still be liable for these fees if he “expressly or impliedly assumes that liability.” *Murphy v. Cain*, 711 S. W. 2d 302, 304 (Tex. App. - Dallas 1986, no writ).

c. But what if you sue for attorney fees as part of the divorce?

C. Chapter 9 - Frivolous Pleadings and Claims

This chapter needs to be read along with Chapter 10 of the Code and Tex.. R. Civ. P. 13. Chapter 9 was enacted in 1987 when the legislature was operating either to preserve the state from attack by hordes of plaintiff’s attorneys or as front persons for the insurance industry (multiple choice). This Chapter is limited to cases where someone is

being sued for damages - either to the person or to property. Chapter 10 was enacted in 1995 and applies to all civil actions. Tex. R. Civ. P. 13 applies to motions, pleadings or other papers signed by a party or attorney. See Hewlett, Sydney B., *New Frivolous Litigation Law in Texas: The latest development in the Continuing Saga*, 48 Baylor L. Rev. 421 (1966); Colby, Chris, *There's a New Sheriff In Town - The Texas Vexatious Litigants Statute and Its Application to Frivolous and Harassing Litigation*, 31 Tex. Tech. L. Review 1291 (2000).

1. §9.001 - Definitions:

- (1) "Claimant" - means a party (including plaintiff, counter claimant, cross-claimant, third party plaintiff, intervenor - someone seeking recovery of damages).
- (2) "Defendant" - also means a party including counterdefendant, cross-defendant or third party defendant - from whom a claimant seeks relief.
- (3) "Groundless"- "means (A) no basis in fact; or (B) not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
- (4) "Pleading" includes a motion.

2. §9.002 - Applicability

Chapter 9 applies to (1) an action where a claimant seeks damages for personal injury, property damage, or death, regardless of the legal theories or statutes on the basis of which recovery is sought, including an action based on intentional conduct, negligence, strict tort liability, products liability (whether strict or otherwise) or breach of warranty; or (2) damages other than for personal injury, property damage, or death resulting from any tortious conduct, regardless of the legal theories or statutes on the basis of which recovery is sought, including libel, slander, or tortious interference with a contract or other business relation.

3. §9.002 (c)

If an action under Chapter 9 applies, the provisions of the chapter **prevail over all other law** to the extent of any conflict.

4. §9.011 - Signing of Pleadings

You are certifying that to your best knowledge, information and belief, formed after reasonable inquiry, the pleading is not: "(1) groundless and brought in bad faith; (2) groundless and brought for the purpose of harassment; or (3) groundless and interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation."

5. § 9.012. Violation; Sanction

(Emphasis has been added.)

- (1) Only after reasonable notice, "...the court **may** on its own motion, or **shall on the motion of any party to the action**, determine if a pleading has been signed in violation of the standards prescribed in Section 9.011."
- (2) Factors the court **shall** take into account: the multiplicity of parties, the complexity of the claims and defenses, the length of time available to investigate and conduct discovery; and the affidavits, depositions, and **any other relevant matter**.
- (3) If a court determines that a pleading has been signed in violation of any one of the standards prescribed, the court **shall** "...not earlier than 90 days after the date of determination, at the trial or hearing or at a separate hearing following reasonable notice to the offending party, impose an appropriate sanction on the signatory, a represented party, or both."
- (4) If, before the 90th day after the court makes a determination that the pleading was signed in violation of the section, the offending party withdraws the pleading or amends the pleading to the satisfaction of the court or moves for dismissal of the pleading or the offending portion of the pleading, then the court may not

order an offending party to pay the incurred expenses of a party.

- (5) Sanctions can include the striking of a pleading or the offending portion thereof; the dismissal of a party; or an order to pay to a party who stands in opposition to the offending pleading the amount of the reasonable expenses incurred because of the filing of the pleading, including costs, reasonable attorney's fees, witness fees, fees of experts, and deposition expenses.
- (6) If a court imposed sanctions on a party with respect to the same subject matter pursuant to the Texas Rules of Civil Procedure (Not defined but could include Rule 13 and Rule 215 re: discovery), they cannot impose a sanction under Chapter 9.

6. §9.013 Report to Grievance Committee

If a court imposes a sanction on a party who has an attorney, and the court finds that the attorney "...has consistently engaged in activity that results in sanctions under Section 9.012, ..." the court shall report its finding to the appropriate grievance committee.

7. §9.014 Pleading not Frivolous

Pleading a general denial or requesting damages in a pleading does not constitute a violation of any of the standards stated in § 9.011.

8. The Supremes v. the Legislature

At the same time as the enactment of Chapter 9, the Texas Supreme Court enacted Tex. R. Civ. P. 13. §9.003 indicates that Chapter 9 does not alter the Texas Rules of Civil Procedure and Rule 13 is stricter. It is unlikely that one should ever attempt to use Chapter 9 if Rule 13 is also available. Also, if someone makes an accusation under this chapter, always remember that there is a safe harbor - if the court determines that they pleading does offend the statute, the ninety day safe harbor (withdrawal of the pleading) still exists.

9. Does Withdrawing Your Pleadings Provide a Safe Harbor?

The 90 day rule for withdrawal of the pleadings/motion does not apply to a case where

sanctions are also based on Tex. R. Civ. P. 13 or Chapter 10 of the Code. See *Booth v. Malkan*, 858 S.W.2d 641, 644 (Tex. App. - Fort Worth, 1993 writ denied).

10. Effect on divorce cases:

In *Schneider v. Schneider*, 5 S.W.3d. 925,932 (Tex. App.-Austin 1999, no writ), trial and appellate court denied claim by one of the parties that the other party's claims violated §9.012 sanctions. Original case was for court to protect armed forces member from claims against his retirement and spouse asserted that claims were brought in bad faith under the statute. No analysis regarding the application of Chapter 9 to this type of divorce action.

In *Goad v. Goad*, 768 S.W.2d 356, 358 (Tex. App.-Texarkana 1989, writ denied), the court makes a distinction between Rule 13 and Chapter 9 - that Rule 13 (a rule of procedure) overruled Chapter 9 (a statute). Language to that effect appeared in the "Notes and Comments" of the Rule. In 1990 the Rule was amended and no mention of this "overruling" was included in the comments.

- a. Theory: Since there seems to be a rise in the number of tort claims being asserted along with the divorce action, just another statute that needs to be consulted when asserting a claim or defending one.

D. Chapter 10 - Sanctions for Frivolous Pleadings and Motions.

In an effort to provide even more effective means of dealing with frivolous litigation, the Texas Legislature enacted Chapter 10 - Sanctions for Frivolous Pleadings and Motions. It applies to motions and pleadings, does not have a safe harbor provision and has a different damage provision and standard. It does not exempt general denials, and does not mention that it does not apply to discovery.

1. §10.001 - Signing of Pleadings and Motions

The signing of a pleading or motion certifies that, to the signatory's "best knowledge, information and belief, formed after reasonable inquiry":

- a. That it is not being presented "for any improper purpose, including to harass or to cause

unnecessary delay or needless increase in the cost of litigation”;

- b. Each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or be a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- c. “Each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;” **and**
- d. “Each denial in the pleading or motion of a factual contention is warranted on the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.”

This chapter took effect on September 1, 1995 and applies only to cases commenced on or after September 1 of that year. *Laub v. Pesikoff*, 979 S. W.2d 686 (Tex. App.–Houston [1st. Dist.] 1998, review denied), was originally a divorce case. The wife, filed a response to husband’s partial motion for summary judgment including with her response two affidavits from doctors. The husband then included the doctors into the divorce action claiming numerous torts had been committed. The appellate court refused to apply Chapter 10 to pleadings filed after that September 1, 1985 because the original divorce case had been filed prior to the effect of the statute. Does this mean that in cases of continuing jurisdiction, that the chapter does not apply?

2. §10.002 -Motion for Sanctions

Either a party or the court may file use the chapter. If the court initiates the complaint, it is required to “enter an order describing the specific conduct that appears to violate” the chapter and direct the alleged violator to show cause why the conduct has not violated §10.001.

- a. “The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney’s fees incurred in

presenting or opposing the motion, and **if no due diligence is shown** the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation.” (Emphasis added).

- b. The term due diligence was not defined in the statute.
- c. In a ‘failure to deliver telegram’ case, an old Texas case defined ‘due diligence’ as follows: “In connection with the above special issue you are instructed that by the term ‘due diligence’ is meant such diligence as an ordinarily prudent person would have exercised under the same or similar circumstances.” *Western Union Telegraph v. Taylor*, 253 S.W. 549, 550 (Tex. Civ. App. - El Paso 1923, no writ).

3. §10.003 Notice and Opportunity to Respond

The court shall provide a party with notice and “a reasonable opportunity to respond to the allegations.”

4. §10.004 - Violation: Sanctions

If the court determines that the chapter has been violated, the person signing the pleading or motion, a party represented by such person or both can be sanctioned. The sanction shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated and can include the following:

- a. a directive to perform or refrain from performing specific acts,
- b. an order to pay a penalty into court; (this sanction is limited only to the signatory), and
- c. an order to pay to the other party the amount of the reasonable expenses incurred by the other party because of the filing of the pleading or motion, including reasonable attorney’s fees.

5. §10.005 - Order

The order must include a description of the conduct that violated the chapter and explain the basis for the sanction imposed.

6. §10.006 - Conflict

“Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter.”

a. Necessary Findings?

One commentator states that for a Rule 10 sanction to survive appeal, the order should include the conduct constituting the violation, how the sanction fits the violation, and why the court found the sanction to be the least severe means necessary to deter that party and others similarly situated. Hewlett, 48 Baylor Law.

b. Query: What is the effect on a law firm for a partner signing a pleading?

Pleadings are signed in two ways: Ms. A of the law firm of A, B & C., or Law Firm A, B & C by Mr. G (either a partner or associate). If more than one firm is employed, it is not uncommon for a pleading to be filed by one lawyer for the other. Also, sometimes an attorney signs for another lawyer. In *Pavelic & Lefore v. Marvel Entertainment Group*, 493 U.S. 120, 125 (1989), the Supreme Court said that there was no joint liability for the law firm of the signer of the document that was held to have violated Rule 11, FRCP. That rule is very similar to Chapter 10 and also Rule 13 of the T.R.C.P. The drafters of the federal rule amended it to specifically include the law firm (figuring that only young associates would be signing any pleadings in the future) absent exceptional circumstances. The Texas statute and rule have not made this addition.

c. Effect on divorce cases:

(1) In *Spiller v. Spiller*, 21 S.W. 3d 451 (Tex. App. - San Antonio 2000, no writ) the court entered sanctions against the plaintiff. The court provided the history of the Spiller family suing each other over a land/estate dispute (“over a parcel of land that the parties endearingly refer to as a “cow pasture.”). The

defendants alleged that the plaintiff had violated Tex. R. Civ. P. 13 and the Code, Chapter 10. The trial court did not make the findings seemingly required by the Rule and the Chapter. The Court stated: “Considering his experience with these parties and his knowledge of the prior litigation, the trial judge did not abuse his discretion by concluding that the fraud claim against Mosty was frivolous.” *Spiller* at 456.

The Spillers had a history of litigation involving four cases over about 24 years. The case(s) sound a little like a custody matter, don’t they?

(2) In *Alexander v. Alexander*, 956 S.W.2d 712 (Tex. App.-Houston [14 Dist.] 1997, review denied) the ex-wife filed in response to the ex-husband’s motion to modify a request for sanctions under Rule 13 and Chapter 10. The court made no specific findings as required by the rule and chapter. The appellate court stated:

“Shanna does not dispute that the trial court's failure to specify the offending conduct in the sanctions order constitutes error. Rather, she claims that Mark, by failing to object to the form of the order or request that the grounds be specified therein, has not preserved this issue for appellate review under TEX. R. APP. P. 52(a) (now Tex.R. App. P. 33.1(a)). Numerous appellate courts have held that a complaining party waives error by failing to object to the form of the sanctions order. *Land v. AT & S Transp., Inc.*, 947 S.W.2d 665, 667 (Tex. App.--Austin 1997, no writ.); *Campos v. Ysleta Gen. Hosp., Inc.*, 879 S.W.2d 67, 70 (Tex. App.--El Paso 1994, writ denied); *McCain v. NME Hosp., Inc.*, 856 S.W.2d 751, 755 (Tex. App.--Dallas 1993, no writ); *Bloom v. Graham*, 825 S.W.2d 244, 247 (Tex. App.-Fort Worth 1992, writ denied).

“Mark responds that he was not required to object to the form of the order because the Rule 13 directive that the court specify

the basis for sanctions is mandatory. See *Tarrant County v. Tammy Chancey*, 942 S.W.2d 151, 155 (Tex. App.--Fort Worth 1997, no writ); *Friedman & Assoc., P.C. v. Beltline Road, Ltd.*, 861 S.W.2d 1, 3 (Tex. App.--Dallas 1993, writ dismissed). Although the authorities cited by Mark do hold that the language of Rule 13 is mandatory and failure to comply is an abuse of discretion, the issue of whether or not such error may be waived was not addressed. See also *Zarsky*, 829 S.W.2d at 399-400; *Watkins*, 795 S.W.2d at 260-61. We agree with the courts requiring that the appellant object to a lack of particularity in the trial court before raising the complaint on appeal. Because Mark did not object to the trial court's lack of particularity, he has failed to preserve this complaint for review. “

There appears to be a split in authority regarding the requirement to specify the reasons for the sanctions. Good form would mean that an objection should be made to the form of the order no matter what!

E. The Second Chapter 11 - Vexatious Litigants

1. Effective on September 1, 1997.
2. The statute's qualifications summarized:
A litigant is subject to the statute if:
 - a. he/she has filed five law suits in the last seven years that have been determined adversely to him, or permitted to remain pending at least two years without having been brought to trial, or been determined by a trial or appellate court to be frivolous or groundless; or
 - b. after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, *in propria persona*, either the validity of the determination against the same defendant or the cause of action, claim controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant

- c. as to whom the litigation was finally determined; or
- c. the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transaction or occurrence. Code §11.054.
- d. Any application to family law: No cases have yet made Westlaw but on information and belief, expect that where disgruntled spouses continue to file litigation, this chapter of the Code will be used more frequently.

3. §11.055 - Security

If the trial court finds that the plaintiff is a vexatious litigant. The amount of the security is determined in an amount to “assure payment to the moving defendant of their reasonable expenses incurred” including costs and attorney’s fees.

4. §11.056 Dismissal for Failure to Furnish Security

The matter can be dismissed if the plaintiff fails to furnish the security within the time frame specified in the order.

5. §11.057 Dismissal on the Merits

If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

A large number of the cases citing this statute are unpublished (7 out of 9).

6. §11.051 - Motion for Order Determining Plaintiff A Vexatious Litigant and Requesting Security

You must file on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order determining the plaintiff is a vexatious litigant and requiring the plaintiff to furnish security. *Spiller v. Spiller*, 21 S.W.3d 451 (Tex. App.-San Antonio 2000, no writ). In *Spiller*, a case filed before the statute took effect, but, because the pro se did not preserve the matter properly, the court pointed out the necessity to meet the filing deadline. *Spiller* at 454.

Spiller also mentions the meaning of the term “in propria persona”: “In propria persona is synonymous with pro se; it refers to a situation in which a litigant represents himself or herself without the benefit of a lawyer. *Spiller* at 454.

F. Chapter 12 - Liability Related to a Fraudulent Court Record or a Fraudulent Lien or Claim Filed Against Real or Personal Property

This is the chapter in the Code dealing with the Republic of Texas - the ROT’s were granting judgments against judges and other state officials and the county clerks were recording them because of some defects in the recording rules.

The matter can have some effect on a divorce practice if one of the spouses tries to use a false document.

1. §12.002 - Liability

A person may not make, present, or use a document or other record with “knowledge that the document or other record is a fraudulent court record or a fraudulent lien or claim against real or personal property or an interest in real or personal property(.)” with:

- a. The intent that the document or other record be given the same legal effect as a court record or document of a court created by or established under the constitution or laws of this state or the United States or another entity listed in Section 37.01 of the Penal Code evidencing a valid lien or claim against real or personal property or an interest in real or personal property; and
- b. Intent to cause another person to suffer physical injury, financial injury or mental anguish or emotional distress.

A person who violates this code subsection is liable to each injured person for the greater of \$10,000 or actual damages caused by the violation, court costs, reasonable attorney’s fees, and exemplary damages in an amount determined by the court.

2. §13.03 - Cause of Action

The laundry list of persons who can sue include most state agencies - the district attorney, county attorney, municipal attorney, and attorney general. The list also includes in the case of a fraudulent judgment lien, the person against whom the judgment is rendered.. The list also includes in a case of fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor or a person who owns an interest in the real or personal property.

The lien from these purported judgments or other documents is “void and has no effect in the determination of any title or right to the property.

3. §12.006 - Plaintiff’s Costs

Costs are defined to include all court costs, attorney fees, and related expenses of bringing the action, including investigative expenses.

4. §12.007 - Effect on Other Law

This statute is cumulative of other law under which a person may obtain judicial relief with respect to a recorded document or other record.

5. Cases

As of the date of the preparation of this outline, no cases have cited this chapter of the Code.

G. Chapter 13 - Affidavit of Inability to Pay Costs

(This chapter is misnamed--really should be titled, “How to Dismiss a Matter That Has Been Filed Under An Affidavit of Inability to Pay.)

H. Chapter 14 - Inmate Litigation

This chapter was intended to provide rules for actions filed by persons housed in a secure correctional facility.

1. §14.002 (b) - Scope of Chapter

Note: this chapter does not apply to an action brought under the Family Code.

2. Interesting Note: §14.014 - Conflict with Texas Rules of Civil Procedure

“Notwithstanding Section 22.004, Government Code, the chapter may not be modified or repealed by a rule adopted by the supreme court.”

If anyone tries to use this chapter in any family law litigation, remember, that it does not apply!

I. Chapter 15 - Venue

1. §15.035 - Contract in Writing

a. If person contracts in writing to perform an obligation in a particular county, then venue is proper in either that county or the county where the defendant resides.

b. If an action is founded on a contractual obligation arising out of or based on a consumer transaction for goods, services....intended primarily for personal, family...use, suit be a creditor on or by reason of the obligation may be brought against the defendant either in the county in which defendant in fact signed the contract or in the county where he/she resides. No term or statement contained in an obligation described in this section shall constitute a waiver of these provisions.

c. Attorney fee contracts:

(1) Make sure that you contract is signed in your office if you want to enforce it in that county. Otherwise, venue will be in the county of residence of the client. If it is your practice to send the contract to the client for signature, venue may end up in a county you did not intend

d. Settlement Agreements

If they do not have either a general venue provision or, as to specific obligations, specific location of performance statements, then you have to sue in defendant's county. *Busbey v. Busbey*, 619 S. W. 2d 472 (Tex. Civ. App. -Houston [14th Dist.] 1981, no writ). But if you join in your contract claim a claim for contempt, you can sue in the county where the divorce was granted because the court had inherent power to enforce its prior judgment. *Gardner v. Gardner*, 622 S.W.2d 654,655 (Tex. App.- Eastland 1981, writ dismissed).

2. §15.062. Counterclaims, Cross Claims, and Third Party Claims

Venue of the main action shall establish venue against those have been properly joined.

a. Failure to controvert allegations in a venue pleading can result in losing the right to be sued in the county of your choice. Properly pleaded venue facts are taken as true unless specifically denied. *GeoChem Tech Corp. v. Verseckes*, 962 S.W. 2d 541, 543 (Tex. 1998); and *Sanes v. Clark*, 3 S. W. 3^d 800, 803 (Tex. App. -Waco 2000, review denied).

J. Chapter 16 - Limitations

Types of limitations that might be of some applicability in a family law situations have been highlighted in bold. Also, if a statute of limitations is pled as a defense, normally the burden of proof is on the plaintiff to show that the statute of limitations is not applicable. *Porter v. Charter Medical Corp.*, 957 F. Supp. 1427 (N.D. Tex. 1997).

See *S.V. v. R. V*, 933 S.W.2d 1 (Tex. 1996). The Supreme Court provides an in dept discussion of the application of the discovery to many different types of cases. Must read for anyone asserting the discovery rule in opposition to a limitations plea.

1. §16.001 - Effect of Disability

One of the disabilities is age - 18. Statute does not run while operating under the disability.

a. See *S.V. v. R. V*, 933 S.W.2d 1 (Tex. 1996) - applies statute to claim asserted by adult that allegedly arose during minority.

2. §16.002 - One Year Limitations

malicious prosecution, libel, slander, or breach of promise of marriage - from day the cause of action accrues.

3. §16.003 - Two Year Limitations

trespass for injury to the estate or property, conversion, taking of personal property, forcible entry and detainer, action for injury resulting in death.

The statute of limitations for civil conspiracy is two years. *In re Estate of Herring*, 970 S.W.2d 583, 586 (Tex. App.-Corpus Christi 1998, no writ); *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex. App.-San Antonio 1994, writ denied).

4. §16.004 - Four Year Limitations

Specific performance of a contract to convey realty, penalty or damages on the penal clause of a bond to convey realty, **debt, fraud or breach of fiduciary duty**, suit on bond of an executor, administrator or **guardian** (after death, resignation, removal or discharge), or for **settlement of a partnership** account.

When there has been breach of fiduciary duty, statute does not begin to run until claimant knew or should have known of facts that in exercise of reasonable diligence, would have led to discovery of wrongful act. *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997).

Four-year residuary statute applied to claims by alleged illegitimate adult children seeking to inherit from decedent's estate. *Cantu v. Sapenter*, 937 S.W.2d 550, 553 (Tex. App. - San Antonio 1996, writ denied).

In divorce-related partition actions not governed by the two-year statute in the Family Code, the trigger for the running of the four-year limitations period is one spouse's unequivocal repudiation of the other spouse's ownership interest in particular property, and absent unequivocal repudiation, a partition suit can be filed long after the divorce. *Sagester v. Waltrip*, 970 S.W.2d 767, 769 (Tex. App. - Austin 1998, review denied).

Ex-wife was not entitled to reimbursement under divorce decree, for one-half of children's higher education expenses that fell outside the breach of contract limitations period of four years. The Court observed that regarding contracts, the statute of limitation begins to run when the contract was breached. *Carlson v. Carlson*, 983 S.W.2d 304, 307 (Tex. App. - Houston [1st Dist.] 1998, no writ).

Limited partners claims against the general partners for breach of fiduciary duty were subject to two-year statute of limitation for tort claims, rather than four-year statute for settlement of partnership accounts or four-year residual statutes, though claims related in part to partnership accounting. *Maxson v. Travis County Rent Account*, 21 S.W.3d 311,318-319, (Tex. App. - Austin 1999, writ dismissed).

Ordinarily, a claim for fraud or misrepresentation is governed by a four-year statute

of limitations. *Williams v. Khalaf*, 802 S.W.2d 651, 656-57 (Tex.1990). Because a breach of fiduciary duty subsumes a claim of constructive fraud, it is also governed by the four-year statute of limitations. *Estate of Herring*, 970 S.W.2d 583, 587 (Tex. App.-Corpus Christi 1998, no writ).

5. §16.0045 - Five-Year Limitations

A person must bring suit for personal injury not later than five years after the day the cause of action accrues if the injury arises as a result of conduct that violates Sections 22.011, Penal Code (sexual assault) or 22.021, Penal Code (aggravated sexual assault). The limitations period is tolled if lawsuit filed as John or Jane Doe.

6. §16.007 - Return of Execution

For a cause of action against the sheriff, et al, you have five years from date execution was returnable to institute your law suit.

7. §16.010 - Misappropriation of Trade Secrets

three years after the misappropriation is or should have been discovered. A misappropriation that continues over time is a single cause of action and begins when discovered.

K. Subchapter B

1. §§16.021 to 16.037 relate to the statutes of limitation for real property

The statutes describe the adverse possession rules. The major time periods are three years (§16.024), five years (§16.025), 10 years (§16.026) and twenty-five years (§§16.027 and 16.028).

To satisfy a limitation period, peaceable and adverse possession does not need to continue in the same person, but there must be privity of estate between each holder and his (her) successor. (§16.023).

Reasonable attorney fees are provided the prevailing party in some disputes regarding possession of real property (§16.034).

A person who claims a lien on real property (or for foreclosure of a lien), must bring the cause of action not later than four years after the day the cause of action accrues. §§16.035 and 16.036.

2. §16.051 - Residual Limitations

Every action for which there is not express limitations period, except an action for the recovery of real property, must be brought no later than four years after the day the cause of action accrues.

3. §16.062. Death

Suspends the running of an applicable statute of limitations for 12 months after the death except, when the administrator and/or executor qualifies, the statute begins to run again at the time of the qualification. Suggestion - if the running of the statute is of concern, make sure that the administrator/ executor does not qualify before you are ready to file suit.

4. §16.063 - Absence From State

The absence from the state of Texas of a person against whom a cause of action may be maintained suspends the running of the applicable statute for the period of the person's absence.

5. Cases:

- a. For limitations purposes, time of person's absence from state includes each departure from state and total time of each absence. *Ray v. O'Neal*, 922 S.W.2d 314, 316-317 (Tex. App. - Fort Worth 1996, no writ).
- b. If claim is against a non-resident and the cause of action accrued when non-resident was not present in state, then this statute does not apply and normal limitations statutes will continue to run. *Guardia v. Kontos*, 961 S.W.2d 580, 584 (Tex. App. - San Antonio 1997, no writ).
- c. If statute of limitations is plead, then the burden is shifted to the plaintiff to prove that there is some exception to the running of the statute. It is also necessary for the plaintiff to plead and prove any exceptions. *Jones v. Huffaker*, 701 S.W.2d 935, 937 (Tex. Civ. App. - Beaumont 1985, no writ).

6. §16.064 - Effect of Lack of Jurisdiction

The statute of limitation period is suspended from time first case is filed until second filing of case in a different court if the case was dismissed for lack of jurisdiction or the judgment was set aside or

annulled in a direct proceeding and, not later than 60 days after the date of the dismissal, the action is commenced in the court of proper jurisdiction. This suspension does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

7. §16.065 - Acknowledgment of Claim

An acknowledgment of the justness of a claim that appears to be barred by limitation is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged.

- a. Query?? When a spouse lists an obligation that is stale because of the statute of limitations in their inventory, is this a sufficient acknowledgment of the obligation???? See *Allied Chemical Corp. v. Koonce*, 548 S.W.2d 80, 81 (Tex. Civ. App. - Houston [1st Dist] 1977, no writ) - Debtor's acknowledgment of justness of a debt which is time barred must, in order to be sufficient as an implied promise to pay the barred debt, be made to or for the benefit of the party to whom the debts is due. In *Mandola v. Oggero*, 508 S.W.2d 861, 863 (Tex. Civ. App. - Houston [14th Dist.] 1974, no writ), an agreement between the widow of one alleged debtor and the other alleged debtor whereby she assumed the obligations and expressly acknowledged that the other party and the decedent 'had or may have had certain liabilities or obligations' to several named persons, including the plaintiff, was insufficient acknowledgment to toll statute.
- b. Query 2??? If such a listing is a sufficient acknowledgment and the creditor subsequently forgives the obligation (assume that he/she was a family member), is that taxable income to the spouse who was allocated the obligation in a divorce? Query 3???? Isn't there a finder's fee for snitching to the IRS for unreported income?

8. §16.066 - Action on a Foreign Judgment -

- a. Is barred if it was barred in the state where rendered, and

- b. An action against a person who has resided in this state for 10 years prior to the action may not be brought on a foreign judgment rendered more than 10 years before the commencement of the action in this state.
- c. The ten-year statute of limitations applies equally to proceedings to enforce foreign judgment under the Texas Uniform Enforcement of Foreign Judgments Act (See *infra*) as it does to common-law actions for enforcement of foreign judgments. *Carter v. Jimerson*, 974 S.W.2d 415, 418 (Tex. App. - Dallas 1998, no writ (Note: Former wife was trying to collect alimony payments) and *Lawrence Systems, Inc. By and Through Douglas-Guardian Warehouse Corp. v. Superior Feeders, Inc.*, 880 S.W.2d 203,208 (Tex. App. - Amarillo 1994, writ denied).

9. §16.068 - Amended and Supplemental Pleadings

New pleadings not subject to plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.

Case law centers around two distinct areas of concern - misnaming a party and, in medical malpractice cases, listing a second (or third or more) claims after case has started.

- a. Parties: Is it a new and different party or simply a party who was misnamed? When a party is misnamed, but no one has been misled or disadvantaged by the error in pleading, the relation-back doctrine operates to preserve the claim against a bar of limitations. *Foust v. Estate of Walters ex rel. Walters*, 21 S.W.3d 495, 501 (Tex. App. - San Antonio 2000, review denied). But if the plaintiff was mistaken as to which of two defendants was the correct one and named the wrong one, then limitations is not tolled. *Pierson v. SMS Financial II, L.L.C.*, 959 S.W.2d 343, 347 (Tex. App. - Texarkana 1998, no writ).
- b. Ex-wife's third amended motion for contempt for failure to make monthly payments to her did not allege wholly new, distinct or different

transaction and occurrence from original motion of contempt and thus trial court could order ex-husband to pay to the ex-wife her share of retirement benefits more than two years past due, notwithstanding fact that the third motion for contempt was filed after the effective date of §3.70 (c) of the Family Code (imposing two-year limitation period on motions to enforce division of future property). *Ex Parte Goad*, 690 S.W.2d 894, 896 (Tex. 1985).

- c. In *Stevenson v. Koutzarov*, 795 S.W.2d 313 (Tex. App. - Houston[1st Dist] 1990, writ denied), husband sued two of wife's friends for invasion of privacy, intentional infliction of emotional distress, and conspiracy to invade privacy and inflict emotional distress in his third and fourth amended petitions. The friends claimed that these causes were time barred by the two-year statute of limitations. The court observed that no Texas court had decided the statute of limitations for intentional infliction of emotional distress and they applied the two year statute to the tort of intentional infliction of emotional distress. The husband argued that the two amended pleadings related back to the second amended petition, and therefore, the new claims were not barred by limitations. Finding that the purpose of §16.068 was to limit the application of the statutes of limitations to amended pleadings the appellate court applied the following test: if the amended pleading does not allege a wholly new, distinct, or different transaction, then it relates back to the original filing, and is not subject to a limitations defense citing *Ex parte Goad*, 690 S.W.2d 894, 896 (Tex.1985). Even if the amended petition contained a new causes of action, the new cause(s) would not be barred by the statute of limitations unless they arose from a wholly different transaction. The court stated that the husband's third and fourth amended petitions alleged new causes of action. The question then become one of whether these new causes of action were based on new, distinct, and different transactions. The transaction referred to in the husband's second amended petition was "using their own personal banks and bank accounts to launder and hide money." In the

husband's fourth amended petition, the transactions were "physical surveillance," "harassing telephone communications," and "harassing physical encroachments." The court found that these claims did not arise out of the same transactions between the Stevensons and the wife as did the causes of action in the second amended petition. There was no relation back to the second amended petition. The court stated that each new cause of action alleged in the third and fourth petition must satisfy the two-year statute of limitations. The husband further argued that the new claims were a mere amplification of his claim for mental anguish in the second amended petition. The mental anguish alleged in the second petition was not cited as a transaction or occurrence, but as an element of damage--the "result" of the Stevensons' alleged conduct of conspiring to secret funds and defraud the community estate. The court then reversed and rendered a \$900,000 plus judgment.

- d. Query: a "normal" divorce case is filed and everyone states that the case will be settled. Two years and one day later, the attorneys are all fired, new attorneys are hired to "do something legal" to the other side. Can you now start pleading tort claims??? Part of the answer is: It may depend on which party you are?

10. §16.069 - Counter or Cross Claim

If a counterclaim or cross claim arises out of the same transaction or occurrence that is the basis of an action, a party to the action may file the counterclaim or cross claim even though as a separate action it would be barred by limitation on the date the party's answer is required. But, the counterclaim or cross claim must be filed not later than the 30th day after the date on which the party's answer is required.

Purpose for this statute was to prevent a plaintiff from waiting until the adversary's valid claim arising from the same transaction was barred by limitation before asserting his own claim.

- a. In *Oliver v. Oliver*, 889 S.W.2d 271, 272 (Tex. 1994), husband obtained a secret divorce from wife while the parties were living in New Mexico. He filed for a divorce one year after their return to Texas. He claimed that almost all of his property was separate because it was acquired before their common law marriage in Texas (New Mexico did not recognize common law marriages). Wife filed an answer and included allegations of actual and constructive fraud. She later amended and filed a counterclaim for fraud. The Supreme Court stated that:

"The basis of Sam's divorce petition was the marital relationship between the parties. The duration of that relationship was central to Sam's cause of action, as reflected by the petition's allegations regarding the first marriage and divorce. Rita's fraud counterclaim also arose out of the facts that determined the duration of the relationship: namely, the New Mexico divorce Sam obtained in 1979, and the continuing acts that led Rita to remain with Sam until after the couple had moved back to Texas. We hold, therefore, that the fraud counterclaim arose out of the same transaction or occurrence that was the basis of Sam's divorce action."

11. §16.070 - Contractual Limitations

You can contract for a shorter limitation period for contracts, but that can not be shorter than two years or they are void.

This section does not apply to the sale or purchase of a business entity if the consideration is more than \$500,000.

Query: Has anyone attempted to contract for a shorter statute of limitations in a premarital agreement, partition agreement, any agreement incident to divorce or the contract portions of a divorce decree/settlement?? If so, do not make it any shorter than two years!

- a. Notice Requirement

a contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not

valid unless the stipulation is reasonable. Any notice requirement less than 90 days is void.

- b. In any suit covered by this section or §16.070 (contract limitation period), it is presumed that the notice was given unless lack of notice is specifically pleaded under oath.
- c. This section does not apply to the sale or purchase of a business entity if the consideration is more than \$500,000.

12. §16.072 - Saturday, Sunday or Holiday

If the last day of a limitations period under any statute of limitations falls on a Saturday, Sunday, or holiday, the period for filing suit is extended to include the next day that the county offices are open for business.

L. Chapter 17 - Parties; Citation; Long-Arm Jurisdiction

Subchapter A. Parties to the Suit:

1. §17.001 - Suit on Contract with Several Obligors or Parties Conditionally Liable

Requirement that normally judgment can not be rendered against a party not primarily liable unless principal obligor is judgment is rendered against principal obligor. The section requires by implication that the non-primary obligor (guarantor for example) cannot be sued unless the primary obligor is sued.

- a. Exceptions are if the principal obligor is a non resident, or resides where he cannot be reached by ordinary process of law, resides in a place that is unknown and cannot be ascertained by use of reasonable diligence, is dead or is actually or notoriously insolvent.

2. §17.002 - Suit Against Estate for Land Title

In a suit against the estate of a decedent involving the title to real property, the executor or administrator, if any, and the heirs must also be made parties.

Subchapter B. Citation Generally:

3. §17.022. Service on Partnership

Citation served on one member of a partnership authorizes a judgment against the partnership and the partner actually served.

- a. The non-served partners are not personally liable unless they make an appearance. See *Shawell v. Pend Oreille Oil & Gas Co.* 823 S.W. 336, 338 (Tex. App. - Texarkana 1991, error denied).

- b. The served partner still has the right of contribution from his other partners. See *Culp v. Browne*, 235 S.W. 675, 678 (Tex. Civ. App. - Fort Worth 1921, no writ).

4. §17.026 - Service on Secretary of State

In an action in which citation may be served on the secretary of state, service may be made by certified mail, return receipt requested, by the clerk of the court in which the case is pending or by the party or the representative of the party. This method of service is in addition to any other method authorized by statute or the Tex. R. Civ. P.

Subchapter C. Long-Arm Jurisdiction in Suit on Business Transaction or Tort:

5. §§17.041-17.045

Provides the mechanism for service of process against non-resident individuals and/or businesses.

Subchapter D. Long-Arm Jurisdiction Over Nonresident Motor Vehicle Operator:

6. §§17.061-17.069

Provides the mechanism for service of process in any suit that grows out of a collision or accident in which the person or his agent is involved while operating a motor vehicle in Texas.

Subchapter E. Citation of Nonresidents - Miscellaneous Provisions.

7. §§17.091-19.093

How to serve someone in a delinquent tax case, a non-resident utility supplier or a foreign railway.

M. Chapter 18 - Evidence

Subchapter A - Documentary Evidence:

1. §18.001 - Affidavit Concerning Cost and Necessity of Services

This section applies to civil actions only but not an action on a sworn account. Unless an controverting affidavit is filed timely, an affidavit that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary.

2. §18.002 - Forms of Affidavit

Forms are set out in the chapter - see Appendix A and B herein for the forms.

Subchapter B. Presumptions:

3. §18.031 - Foreign Interest Rate

Unless the interest rate of another state or country is alleged and proved, the rate is presumed to be the same as that established by law in Texas and may be recovered without allegation or proof.

Subchapter C - Admissibility:

4. §18.061 - Communications of Sympathy

A court in a civil action may not admit a communication that expresses sympathy or a general sense of benevolence relating to the pain, suffering, or death of an individual **involved in an accident** if offered to prove liability.

Provided however, if the statement, including an excited utterance, which also includes a statement or statements concerning negligence or culpable conduct pertaining to an **accident or event**, is admissible to prove liability of the communicator.

No cases were found that have cited this statute (new as of 1999). Query: Why not see if it has impact in a tort action of a divorce case? Remember, the statute seems to be limited to cases involving an accident as opposed to intentional conduct. But the “notwithstanding” paragraph

address not only accidents but “events” and “culpable conduct.”

Culpable conduct has not been successfully defined in civil cases in Texas (see *Wal Mart Stores, Inc. v. Sturges*, 2001 WL 228139, 44 Tex. Sup. Ct. J. 486 (Tex., Mar 08, 2001) (NO. 98-1107) It is a common term in criminal cases and has been defined in one instance as: “Therefore, in order to show culpable conduct, the State would have to show that (1) a third party transferred to another (2) a controlled substance (3) over which the defendant had control, (4) at the instance or direction of the defendant.” *Grace v. State*, 1998 WL 390824, No Publication, (Tex. App.-San Antonio, Jul 15, 1998) (NO. 04-97-00925-CR). Perhaps a simple definitions is best - if used in a definition with negligence, culpable conduct means intentional conduct. Otherwise, its meaning would be redundant.

N. Chapter 19 - Lost Records

This chapter applies to deed, bond, bill of sale, mortgage, deed of trust, power of attorney, or conveyance that is required or permitted by law to be acknowledged or recorded and that has been acknowledged or record, or is a judgment, order, or decree of a court of record in Texas.

1. §19.002 - Parol Proof

A person may supply a lost, destroyed, or removed record by parol proof of the record's content.

2. §19.003 - Application for Relief

A written application must be made with the district clerk of the count in which the record was lost, destroyed or removed or with the clerk of the court to which the record belonged. The application must set forth the facts that entitle the applicant to relief.

3. §19.004 - Citation

The Citation must go, as applicable, to the each grantor, interested party, or party adversely interested.

4. §19.005 - Order

On hearing of the application. If the court is satisfied from the evidence of the previous existence

and content of the record and of its loss, destruction or removal, the court shall enter on its minutes an order containing its findings and a description of the record and its contents. A certified copy the order may be recorded in the proper county.

5. §19.006 - Effect of Order

The order supplying the record stands in place of the original record, has the same effect as the original record, if recorded, may be used as evidence in a court of the state as though it were the original record; and carries the same rights as the original record, including, preserving liens from the date of the original record and giving parties the right to issue execution under the order as under the original record.

6. §19.007 - Method Not Exclusive

The method provided by this chapter for supplying a record is in addition to other methods provided by law.

7. Case:

In *Jauregui Partners, Ltd. v. Grubb & Ellis Commercial Real Estate Services*, 960 S.W.2d 334, 335 (Tex. App.-Corpus Christi 1997, review denied), the plaintiff attempted to use the statute to prove the existence of an order entered on a motion for new trial. In that case, the court orally stated that it granted the motion, but the order was never found. Apparently, this complex method of establishing lost records is not often used in Texas. See Tex. R. Civ. P., Rule 77 and Tex. R. Evid., Rule 1004.

O. Chapter 20 - Depositions

This is a little cited chapter in the code dealing with who is permitted to take depositions and, if a foreign deposition (state or international), a provision for compelling appearance as if the cause of action was filed in this state.

1. §20.001 - Persons Who May Take a Deposition

a. If the deposition is by written questions who is alleged to reside or to be in Texas, then a clerk of a district court, a judge or clerk of a county court or a notary public of the state may take.

b. If one wishes to take the deposition of a witness who is alleged to reside or to be outside this state, but inside the United States, then it may be taken in the other state by a clerk of a court of record having a seal, a commissioner of deeds appointed under the laws of Texas or by a notary public.

c. If one wishes to take the deposition of someone who is alleged to reside or to be outside the United States, it can be taken by a minister, commissioner, or charge d'affaires of the United States who is a resident of and is accredited in the country where the deposition is take; a consul general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul, or consular agent of the United States who is a resident of the country where the deposition is taken, or any notary public.

d. A deposition of a witness who is alleged to be a member of the United States Armed Forces or of a United States Armed Forces Auxiliary or who is alleged to be a civilian employed by or accompanying the armed forces or an auxiliary outside the United States may be taken by a commissioned officer in the United States Armed Forces or United States Armed Forces Auxiliary or by a commissioned officer of the United States Armed Forces Reserve or an auxiliary of it.

e. Cases of interest:

(1) *Smith v. Smith*, 720 S.W.2d 586, 598 (Tex. App.-Houston [1 st Dist.] 1986, no writ). Interference with child custody case where objection was made to the fact that on the day of the taking of the depositions in Scotland and England, that the commission had not been issued before the taking of the depositions (note: case was decided on law before the Tex. Civ. Prac. Rem. Code.) Although the taking of the depositions was not technically correct, they were permitted into evidence: "Since the requirements of Rule 188 and art. 3746 were **substantially complied with**, the objective of the rules of civil procedure were satisfied. Tex. R. Civ. P. 1."

(2) In *Garza v. Serrato*, 699 S.W.2d 275 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.), the court stated: "It is well settled that the taking of testimony by deposition is a departure from the common law rules of evidence and that the right to so take a deposition depends entirely upon statutory provisions therefor. Thus, the rule in Texas is that the right to take the deposition of a witness depends entirely on the statutes, and the provisions of the statutes must be strictly complied with. *Ex parte Stiles*, 136 Tex. 211, 150 S.W.2d 234 (1941)." The court then disallowed the use of a deposition taken by a court reporter in Mexico because of a failure to comply with this statute (court reporters were not authorized by the statute to take depositions in foreign countries). This statute has never been repealed.

Does this mean that the new discovery rules are not effective? Tex. R. Civ. P. 199.1 states that a deposition can be taken before any person authorized **by law** to take depositions. Can you make the argument that a court reporter is not authorized by law to take a deposition in a foreign country?

Tex. R. Civ. P. 201.1 purports to allow the taking of depositions in other jurisdictions by any person authorized to take oaths. The comments to the new rules state that section 20.001 is a "nonexclusive list" of persons who are qualified to take depositions. That observation is not in compliance with *Garza v. Serrato*, 699 S.W.2d 275 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.). Only one case has commented on the provision of the new discovery rules relating to foreign depositions and it does not address the issue. *Feltham v. Bell Helicopter Textron, Inc.*, 41 S.W.3d 384 (Tex. App.-Fort Worth 2001, n.w.h.).

2. §20.002 - Testimony Required by Foreign Jurisdiction

(See also Tex. R. Civ. P 201.2 - almost, but not quite, the same language) - this is the procedure to use if a deposition is needed in Texas for a case pending in another state or foreign country.

a. If a court of record in any other state or foreign jurisdiction issues a mandate, writ, or

commission that requires a witness' testimony in Texas, either to written questions or by oral deposition, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in Texas.

b. Cases: *Warford v. Beard*, 653 S.W.2d 908 (Tex. App.-Amarillo 1983, no writ). Case where the deposition of two people in Lubbock was requested regarding civil litigation in Hawaii.

Query: How do you style the case when you are trying to enforce the taking of the deposition from a foreign state? To whom do you give notice?

P. Chapter 20 - Interpreters

Subchapter A - Interpreters for the Deaf :

Rules regarding the appointment of an interpreter when a party, witness or juror is deaf.

1. §21.006 - Cost

The cost is to be paid from the general fund of the county, but \$3.00 can be charged as a court cost.

Subchapter B - Spanish Language Interpreters in Certain Border Counties:

2. §21.021

Provision for appointments on full or part time basis for interpreters for district courts that fit the definition as provided.

Subchapter C - Interpreters for County Courts at Law:

3. §§21.031 and 21.032

The judge of a county court at law may appoint an official interpreter (presumably of any language) for that court and may terminate that interpreter's employment at any time. The commissioners court shall prescribe the duties of the official interpreter.

Subchapter D - Interpreter Fee:

4. See §21.006 Above

limited to \$3.00 per case where an interpreter is used and shall be deposited in the counties general fund.

Q. Chapter 22 - Witnesses

1. §22.001 - Witness Fees

A witness is entitled to 10 dollars **for each day the witness attends court**. The party who summons the witness shall pay that witness's fee for one day, at the time the subpoena is served. The fee must be taxed in the bill of costs as other costs.

a. In the case of *In re Carter*, 958 S.W.2d 919, 922-3 (Tex. App. - Amarillo 1997, no writ), an abused/abuser litigant filed a mandamus proceeding (on one of many grounds) because he claimed that the wife "failed to tender a witness fee or reimburse him for mileage as per § 22.001(a) of the Texas Civil Practice and Remedies Code. [FN2] The fee purportedly required by the provision was ten dollars. Tex. Civ. Prac. & Rem. Code Ann. § 22.001(a) (Vernon 1997). In effect, Mr. Carter seeks the extraordinary writ of mandamus merely because he did not receive ten dollars. Yet, how his failure to obtain the *de minimus* sum harmed him is unexplained. Assuming arguendo that he was indeed entitled to it, he nevertheless says nothing about how the denial of ten dollars impedes his ability to conduct discovery, develop his case, or protect any other substantial right. Given this, he has not carried his burden of establishing the absence of adequate legal remedy by appeal."

2. §22.002 - Distance for Subpoenas

A witness who is represented to reside 150 miles or less from a county in which a suit is pending or who may be found within that distance at the time of trial on the suit may be subpoenaed.

a. No cases interpreting this section that was added to the Code in 1993.

b. Distance is from county and not county seat.

c. Query - how do you measure the mileage?

3. §22.004 - Fee for Production or Certification of Documents

This section allows the custodian of a record to receive only \$1.00 for production or certification of a record - it applies to subpoenas, a request for production or "other instrument issued under the authority of a tribunal that compels production or certification of a record. **A custodian of a record who produces or certifies a record under this section but who is not required to appear in court is not entitled to a witness fee (The \$10 on required in §22.01).** The \$1.00 shall be paid by party requesting at the time of the subpoena, request or other service. **The fee is in addition to any other fee imposed by law for the production or certification of a record.**

a. Query: Does this Statute limit the amount of fee that can be assessed by a court when an objection is made to discovery because of the cost involved?

b. No cases have cited this statute since its enactment in 1995.

4. §22.011 - Privilege from Arrest

A witness is privileged from arrest while attending, going to, and returning from court - one day of travel for each 100 miles of distance from courthouse to residence. The section does not apply to an arrest for a felony, treason or breach of peace.

a. No cases have cited this section since at least 1911.

R. Chapter 23 - Juror Continuance

1. §§23.001 and 23.002

a provision that a juror can use to obtain a recess while the juror observes a religious holy day as defined by statute.

a. No cases have cited these sections.

If you think you might need a day or two of preparation, try to get juror's who are members of minority religions with a lot of holy days.

S. Chapter 30 - Miscellaneous Provisions

1. §30.001 - Instrument to Waive Service or Confess Judgment

In an instrument executed before suit is brought, a person may not accept service and waive process, enter an appearance in open court, or confess a judgment.

a. In *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 392 (Tex. 1982), the majority upheld the Family Code provision that permitted the signing of an irrevocable affidavit. When the mother of the child appealed, she claimed that the waiver violated this section of the code. The Court stated: "To the contrary, this general prohibition in Texas jurisprudence against pre- suit waiver, is not a mandate of either the Texas Constitution or the Constitution of the United States. The constitutionality of this type provision was approved by the U. S. Supreme Court in *National Equipment Rental Ltd. v. Szukhent*, 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed.2d 354 (1964), which held that a party may agree in advance to submit to a jurisdiction of a given court, to permit service by the opposing party, or even waive service altogether. The criteria for constitutionality set out by the U. S. Supreme Court is: the party voluntarily, intelligently, and knowingly waived their rights to notice and hearing with full awareness of the legal consequences. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed.2d 124 (1972)." Other than this quote, the decision by the Texas Supreme Court does not explain why the statute was ignored.

b. In *Deen v. Kirk*, 508 S.W.2d 70 (Tex. 1974), the Texas Supreme Court acknowledges that in a divorce action that this statute as well as Tex. R. Civ. P. Rule 119 apply - that you can not execute a wavier prior to the filing of the case. This case shows though what can happen to you if you fail to follow the correct appellate procedure - in this case the bill of review - to

protect the client's rights. See also *Gonzales v. Gonzales*, 494 S.W.2d 655 (Tex. Civ. App. - El Paso 1973, no writ) and *Faglie v. Williams*, 569 S.W.2d 557 (Tex. Civ. App. - Austin 1978, writ ref'd n.r.e.).

2. §30.002 - Expiration of Judge's Term; Death of Judge

a. If a district or county judge's **term of office expires before the adjournment** of the court term in which a case may be tried or during the period prescribed for filing a statements of facts and a bill of exceptions or findings of fact and conclusions of law, the judge may approve the statement of facts and bill of exceptions or file findings of fact and conclusions of in law in the case.

b. If a district or county judge **dies before he approves** the statement of facts and bill of exceptions or files findings of fact and conclusions of law in a case pending at his death, they may be approved or filed by the judge's successor as provided by Rule 18, Texas Rules of Civil Procedure.

c. Query: What happens if an appointed judge loses the next election before he or she approves the findings of fact, conclusions of law and/or the statement of facts?

d. In *Stronck v. Stronck*, 538 S.W.2d 854, 856 (Tex. Civ. App. -Houston [14 Dist.] 1976, writ ref'd n.r.e.), the judge resigned before the statement of facts was prepared. The new judge was unable to approve. The appellate court applied Tex. R. Civ. P. 18 and stated that newly appointed judge must be the one to sign.

3. §30.003 - Legislative Continuance

The section applies to any criminal or civil suit and to any matters ancillary to the suit that require action by or the attendance of an attorney but not including temporary restraining orders. The "pass" lasts from 30 days before the date when the legislature is to be in session until 30 days after the session ends. If the attorney who is a member of the legislature **was employed 10 days before the**

date on which the suit is set for trial, the legislative pass is discretionary with the court. The attorney/legislator shall file an affidavit stating the grounds for the continuance and it must contain a declaration that it is the attorney's intention to participate actively in the preparation or presentation of the case and that he/she has not taken the case for the purpose of obtaining a continuance. The continuance is one "of right" and may not be charged against the party receiving it on any subsequent application for continuance.

- a. The continuance is mandatory except in those cases in which party opposing continuance alleges that substantial existing right will be defeated or abridged by delay; in cases of this type, trial court has duty to conduct hearing on such allegations, and if allegations are shown to be meritorious, court should deny continuance.

In *Waites v. Sondock*, 561 S.W.2d 772 (Tex. 1977), an ex-wife filed a motion for contempt against her former husband for failure to make child support payments. The contemner was alleged 46 months behind in his payments. He hired a state legislator to defend him who filed a motion for continuance urging the legislative continuance. The ex-wife opposed stating that she was in 'dire need of support payments and that she had been forced to take a second job against her physician's advice. The Court held that the mandatory continuance violated the due process clause of the 14th amendment of the United States Constitution and Article 13 and 19 of the Texas Constitution and that it was the duty of the trial court to hold a hearing on the matter.

- b. In *Schwartz v. Jefferson*, 520 S.W.2d 881 (Tex. 1975), an original mandamus proceeding was brought by state senator seeking for himself and his client a writ compelling a district judge to grant continuance for the legislator-attorney from a hearing on certain post judgment motions relating to enforcement of a divorce decree. The Supreme Court held that suit between client and her former husband had been terminated by trial and final judgment prior to the senator's employment; that the client's post judgment motion to stay and former

husband's motion to enforce related solely to enforcement of a judgment and were not ancillary to any pending suit and thus were not separate pending suits within scope of statute providing for continuance for legislator-attorney in all suits pending and in all matters ancillary to such suits; but that contempt proceeding initiated by former husband seeking to have client and her current husband held in contempt of prior court orders was in nature of separate suit filed after employment of legislator attorney and thus should be continued.

- c. Query: Does the legislative continuance apply to depositions or complying with discovery requests?
- d. No cases specifically address the question.
- e. The statute does apply to arbitration hearings. *First Interstate Bank of Texas, N.A. v. Burns*, 951 S.W.2d 237 (Tex. App.-Austin 1997, no writ)
- f. A legislative continuance was granted by a hearing examiner in a hearing before the Texas State Board of Medical Examiners. *Guerrero-Ramirez v. Texas State Bd. of Medical Examiners*, 867 S.W.2d 911, 914 (Tex. App.-Austin 1993 no writ)

4. §30.005 - Religious Holy Day

If a party or an attorney representing a party in a civil action is required to appear at a court proceeding on a religious holy day observed by the party or attorney, the court shall continue the civil action. An affidavit must be filed stating the grounds for the continuance and that the party or attorney holds religious beliefs that prohibit him from taking part in a court proceeding on the day for which the continuance is sought. The affidavit is proof of the facts stated and need not be corroborated.

5. §30.007 - Production of Financial Institution Records

This is a statute that says that civil discovery of a customer record maintained by a financial institution is governed by Tex. Fin. Code Ann. §59.006 [see additional comments on this code

section below]. It was amended in 1999 and appears that the purpose of the amendment was to provide a road map to show where the previous statute on the production of financial records had been moved.

6. §30.010 - Personal Identifying Information Privileged from Discovery by Inmate

Provision prohibiting an inmate from obtaining personal information from employees of any correctional facility.

7. §30.011 - Electronic Subpoena Application

In addition to any other procedure permitted under state law or by court rule, an application for issuance of a subpoena may be made by electronic means.

a. Added in 1999

b. No cases have cited this statute.

8. §30.015 - Provision of Current Address of Party in Civil Action

In a civil action filed in a district court, county court, statutory county court, or statutory probate court, each party or the party's attorney must provide the clerk of the court with written notice of the party's name and current residence or business address. The notice must be filed with the initial pleading but not later than the 7th day after the date the clerk of the court requests the information. If the party's address changes during the course of the action, the notice must be updated. The court can assess a fine of not more than \$50 if the party or the party's attorney fails to provide the notice. It is a defense to the fine "that the party or the party's attorney could not reasonably obtain and provide the information..."

a. No cases have cited this provision of the code.

b. This statute may be in conflict with the new amendments to the Family Code (as it has been amended in 2001) regarding not providing the addresses of parties who have good reason not to reveal their addresses-- for example, revised Texas Family Code §82.004 regarding protective orders.

9. §30.016 - Recusal or Disqualification of Certain Judges

This statute deals with "tertiary recusal" motions. If a third motion for recusal or disqualification is filed against a district, probate court or statutory county court judge by the same party in a case, the judge, if he declines to recuse, still has the right to reside over the case, sign orders and move the case to final disposition. A judge hearing a tertiary recusal motion who denies the motion shall award reasonable and necessary attorney's fees and costs to the party opposing the motion. The party making the motion and the attorney for the party are jointly and severally liable for the award of fees and costs. The fees and costs must be paid before the 31st day after the date the order denying the motion is rendered. The denial of a tertiary recusal motion is only reviewable on appeal from final judgment. If the motion is finally sustained, the new judge for the case shall vacate all orders signed by the sitting judge during the pendency of the tertiary recusal motion.

a. The applicable law regarding disqualification of judges is found in the Government Code. In an unpublished opinion, the Dallas Court states the applicable law for disqualification (*Flores v. Velasco, II*, No. 05-98-01928-CV (Tex. App. Dallas, June 1, 2001, n.w.h.) (Not designated for publication): "The Texas Government Code provides that judges "may be assigned in the manner provided by this chapter to hold court when necessary to dispose of accumulated business in the region." Tex. Gov't Code Ann. § 74.052 (Vernon 1998); *Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 887 (Tex. App.- El Paso 1993, orig. proceeding). However, "[a] former judge or justice who was not a retired judge may not sit in a case if either party objects to the judge or justice." Tex. Gov't Code Ann. § 74.053(d) (Vernon 1998). A party must file her objection before the assigned judge conducts the first hearing. *Id.*; *Flores*, 932 S.W.2d at 501; *Baskin*, 855 S.W.2d at 887; *Starnes v. Chapman*, 793 S.W.2d 104, 107 (Tex. App.-Dallas 1990, orig. proceeding); *Lewis v. Leftwich*, 775 S.W.2d 848, 850-51 (Tex. App.-Dallas 1989, orig. proceeding) (objecting

before an assigned judge takes the bench to preside over first hearing is timely as a matter of law). A timely objection mandates a former judge's disqualification. See Tex. Gov't Code Ann. § 74.053(d) (Vernon 1998); *Flores*, 932 S.W.2d at 501; *Starnes*, 793 S.W.2d at 107. If the assigned judge overrules a timely section 74.053 objection, that judge's subsequent orders are void. *Flores*, 932 S.W.2d at 501; *Starnes*, 793 S.W.2d at 107.”

b. No cases have cited this statute.

10. §30.017 - Claims Against Certain Judges

A claim against a district, statutory probate or statutory county judge that is added to a case pending in the court to which the judge was elected or appointed must be made under oath, may not be based solely on the ruling in the pending case but must plead specific facts supporting each element of the claim in addition to the rulings in the pending case; and is automatically severed from the case. It gets a new cause number, and the party making the claim shall pay the filing fees. The presiding judge in the region or the presiding judge of the statutory probate court shall assign the severed claim to a different judge. The judge shall dismiss the claim if the claim does not satisfy the requirements of this statute.

a. No cases have cited this statute.

T. Chapter 31 - Judgments

1. §31.001 - Passage of Title

A judgment for the conveyance of real property or the delivery of personal property may pass title to the property without additional action by the party against whom the judgment is rendered.

a. In *Matter of Marriage of Wily*, 934 S.W.2d 175, 177 (Tex. App.-Amarillo 1996, writ denied), disgruntle spouses could not agree to the sale of the certain real property. After a few attempts to judicial force the sale both sides moved for summary judgment. The losing side appealed arguing that the other side's case should have been dismissed because they took too long to get to court. The losing party stated that either the two year statute of limitation in

what is now Tex. Fam. Code § 9.003 or the four year statute of limitation found in the Tex. Civ. Prac. & Rem. §16.04 applied. The appellate court stated:

“Likewise, section 16.004 (*of the Civil Practices and Remedies Code*), supra, is inapplicable. This is so, because chapter 31 of the Texas Civil Practice & Remedies Code Annotated (Vernon 1986), applies to judgments rather than the general statutes of limitations. *Beaumont Irrigating Co. v. De Laune*, 173 S.W. 514, 517 (Tex. Civ. App.--Galveston 1915, no writ).” At p. 175. (Insert added for clarification).

(1) In *Allen v. Allen*, 751 S.W.2d 567, (Tex. App.-Houston [14 Dist.] 1988, writ denied) a husband and wife had agreed in a divorce decree that wife would share in certain royalty payments. Wife sued and it turned out that the husband had failed to reveal royalty payments in two other counties. The jury and judge awarded wife her interest and the judge ordered husband to sign a warranty deed. Husband appealed on 16 different grounds, the last one being that the court should not have ordered him to sign any deeds. Citing this section of the code, the court stated: “ In point of error fourteen appellant argues the trial court erred in ordering Ronnie to execute any conveyances to any royalty interests recovered by Lorraine and in ordering that any conveyances be with a general warranty. Appellee correctly concedes this point of error. Tex. Civ. Prac. & Rem. Code Ann. § 31.001 provides as follows: A judgment for the conveyance of real property or the delivery of personal property may pass title to the property without additional action by the party against whom the judgment is rendered.” At page 578.

2. §31.002 - Collection of Judgment Through Court Proceeding

This is the statute commonly called the “Turnover” statute. The purpose of the turnover statute is to aid a diligent judgment creditor in reaching the property of the judgment debtor that the

creditor cannot readily attach or levy on by ordinary process. The property must not be exempt from attachment, execution, or seizure for the satisfaction of liabilities. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex. App.--Dallas 1992, no writ) and *Thomas v. Thomas*, 917 S.W.2d 425, 429 (Tex. App.-Waco 1996, no writ).

The provisions of the statute allow a court to assist a judgment creditor through injunction or other means in order to reach property or obtain satisfaction on a judgment if the debtor owns property that cannot easily be attached or levied on by ordinary legal process; and is not exempt from attachment, execution, or seizure. The court may order the judgment debtor to turn over nonexempt property that is in his possession or subject to his control, together with all documents or records related to the property, to a designated sheriff or constable for execution, otherwise apply the property to the satisfaction of the judgment or appoint a receiver with the authority to take possession of the nonexempt property, sell it, and pay the proceeds to the judgment creditor to the extent required to satisfy the judgment. The court may also enforce the order by contempt proceedings or by other appropriate means in the event of refusal or disobedience. The judgment creditor can move the court for assistance under this section in the same proceeding where the judgment is rendered or in an independent proceeding. The judgment creditor is entitled to recover reasonable costs, including attorney fees. The court cannot enter an order to turn over exempt property. If the order requires a financial institution to turnover assets of a customer, there are specific notices that must be given by this statute and also §32.010.

- a. A turnover order is a final, appealable judgment. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (Vernon 1986 & Supp.1997); *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*, 909 S.W.2d 505 (Tex.1995); *Schultz v. Fifth Judicial Dist. Court of Appeals*, 810 S.W.2d 738 (Tex.1991).
- b. Exempt property may not be ordered to be turned over to the judgment creditor pursuant to the Property Code, §42.0021). In *Burns v. Miller, Hiersche, Martens & Hayward, P.C.*,

948 S.W.2d 317 (Tex. App.-Dallas 1997, review denied), the Dallas Court determined that a beneficiary could not be ordered to turn over distributions from a spendthrift trust: “In 1989, the legislature overruled this line of cases by amending the turnover statute to provide that a court may not enter or enforce an order that requires a judgment debtor to turn over the proceeds of, or disbursements of, property that is exempt under any statute (except to enforce child support obligations). See Tex. Civ. Prac. & Rem. Code Ann. § 31.002(f) (Vernon Supp.1997). This amendment was intended, in part, to prevent turnovers of paychecks, retirement checks, and other similar types of assets after a judgment debtor received them. House Comm. on the Judiciary, Bill Analysis, Tex. H.B. 1029, 71st Leg., R.S. (1989). Thus, even when property is no longer exempt under any other statute, if it represents proceeds or disbursements of exempt property, it is not subject to a turnover order. See *Caulley v. Caulley*, 806 S.W.2d 795, 798 (Tex.1991); *Bergman v. Bergman*, 888 S.W.2d 580, 586 (Tex. App.--El Paso 1994, no writ).”

- c. but the prohibition regarding exempt property does not apply to the collection of current or past due child support (see subsection 31.002(f)).
- d. Attorney fees ordered paid in a child support collection matter are also exempt from the exemption. In *Ex parte Wessell*, 807 S.W.2d 17, 20 (Tex. App.-Houston [14 Dist.] 1991, no writ), it was stated that “... attorney's fees awarded in a paternity suit where child support is granted is a child support obligation for purposes of the Texas Turnover Statute. See *Ex parte Helms*, 152 Tex. 480, 259 S.W.2d 184, 188 (1953).”
- e. The turnover statute can not be used to get to an interest in an estate of a third party if the debtor disclaims his interest. *Parks v. Parker*, 957 S.W.2d 666 (Tex. App.-Austin 1997, no writ).

- f. In *Lozano v. Lozano*, 975 S. W. 2d.63 (Tex. App. - Houston [14th Dist.] 1998, review denied), the court was presented with a number of questions dealing with a turnover order: Did it apply to IRA's or rollover IRA's, could it order the turnover of real property in a foreign country, and who has the burden of proof when a question arises regarding the nature of an exemption.
- g. Burden of Proof: The Court stated it was the obligation of the person claiming the exemption to prove it. But, once the nature of the exemption became apparent, then the burden shifted to the judgment creditor to show that the exemption did not apply. "...we believe that the plain meaning of this language imposes a burden upon the debtor to show only that the plan or account is of a type listed in that section but not to also affirmatively prove that it qualifies under the IRC. Instead, the burden is then on the creditor to show that the plan or account does not qualify under the IRC. " At page 66.
- h. IRA's: "In addition to the exemption prescribed by Section 42.001, a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity ... is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. " At page 66.
- i. Foreign Realty: The court allowed the turnover statute to be applied against real property in Mexico. The court stated: "the turnover statute allows a court to reach assets owned by and subject to the control of a judgment debtor,

even if those assets are in the hands of a third party.... In *Reeves*, the appellees sued the appellant in Texas to execute on a Maryland judgment, and the trial court ordered the appellant to turn over to a receiver "all indicia of ownership" in certain nonexempt real property in Portugal subject to the appellant's control. See *Reeves v. Federal Sav. and Loan Ins. Corp.*, 732 S.W.2d 380, 381 (Tex. App.--Dallas 1987, no writ). The appellant argued that the trial court lacked jurisdiction to adjudicate title to the realty or compel him to turn over foreign realty, that the title could only be determined according to Portuguese law, that a close corporation was the record title holder, and that his mother in law held an undivided one-half interest in the property.... In affirming the turnover order, the court of appeals observed that the receiver might have to comply with Portuguese law in order to convey the property to satisfy the judgment, and that it might well be difficult to do so. ... However, those considerations did not affect the jurisdiction of the trial court over the person of appellant or its authority under section 31.002 to compel him to turn over any muniment of title he had in his control to the court appointed receiver." At 68.

3. §31.0025 - Authority of Court to Order Turnover of Wages

Notwithstanding any other law, a court may not, at any time before a judgment debtor is paid wages for personal services performed by the debtor, enter or enforce an order that require the debtor or any other person to turn over the wages for the satisfaction of the judgment.

The section applies to wages in any form, including paycheck, cash or property.

This section **does not** apply to the enforcement of a child support obligation or a judgment for past due child support.

- a. Note: see cases in §31.002 analysis also.
- b. Query: Unless corrected by legislature, what about alimony payments that are paid pursuant to statute?????

c. Cases:

No cases have cited this statute (well one case did, but only to observe that it did not apply to the case before the court - *Schultz v. Fifth Judicial Dist. Court of Appeals at Dallas*, 810 S.W.2d 738, 739 (Tex. 1991).

4. §31.003 - Judgment Against Partnership

No personal judgment or execution against any partner who was not served. Judgment valid against partnership when at least one of the partners has been served. The partner served can also have judgment against him individually.

5. §31.006 - Revival of Judgment

A dormant judgment may be revived by scire facias or by an action of debt brought not later than the second anniversary of the date that the judgment becomes dormant.

a. *Matter of Marriage of Ward*, 806 S.W.2d 276 (Tex. App.-Amarillo 1991, writ denied). Parties were divorced in 1974. Ex-Husband began receiving retirement payments in 1987. Ex-Husband failed to forward to ex-wife her share of the payments. She filed suit in 1989 complying with the time restrictions in Tex. Fam. Code §9.003(b). Ex-Husband claimed that ex-wife failed to reinstate the judgment within the 10 year time frame and did not revive the judgment timely. Court held that ex-wife could recover for any payments that were due within the 10 year period. Not clear what 10 year period the court was referencing since the payments did not become due to ex-husband until 1987 and she filed suit within the two year period. This case indicates that the 10 year statute of limitations relating to judgments does apply to divorce cases as well as the two year statute in Tex. Fam. Code §9.003.

b. Look at the child support review case, *In re S.S.*, NO. 14-00- 00060-CV (Tex. App.-Houston [14 Dist.], May 31, 2001, n.w.h) (not designated for publication), for a history of how the “statute of limitation” problem has been bounced back and forth in Texas for the last 10 years. An argument can be made that

the 10 year time period (see Tex. Civ. Prac. & Rem. Code §34.001) does not start for any one payment until that payment is missed.

6. §31.007 - Parties Responsible for Accounting for Own Costs

a. Each party shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit. If a judgment awards costs, the costs may include: fees of the clerk and service fees due the county, fees of the court reporter for the original stenographic transcripts necessarily obtain for use in the suit, masters, interpreters, and guardian ad litem appointed pursuant to these rules and state statutes; such other costs and fees as may be permitted by “these rules and state statutes.”

Also review Tex. R. Civ. P. 125 - 145 for other rules dealing with court costs.

b. *Dallas County v. Sweitzer*, 881 S.W.2d 757 (Tex. App.- Dallas 1994, writ denied) - The court is not required to have a hearing regarding costs before it allocates the costs in its ruling.

c. Court costs are typically fixed amounts, such as filing fees, court reporter fees, transcript fees, subpoena and citation fees, and deposition costs. See *Allen v. Crabtree*, 936 S.W.2d 6, 8 (Tex. App.-Texarkana 1996, no writ); *Shenandoah Assocs. v. J & K Properties, Inc.*, 741 S.W.2d 470, 487 (Tex. App.-Dallas 1987, writ denied).

d. Taxing such costs against the dismissing party is a ministerial act which can be performed by the court clerk without the exercise of any discretion. See *Wood v. Wood*, 320 S.W.2d 807, 813 (Tex. 1959); *Hartzell Propeller, Inc. v. Alexander*, 517 S.W.2d 455, 456 (Tex. Civ. App. -Texarkana 1974, no writ).

e. The clerk of a court, however, may not adjudicate costs. That task is reserved for the trial court. See *Reaugh v. McCollum Exploration Co.*, 167 S.W.2d 727, 728 (Tex. 1943); *Hartzell Propeller*, 517 S.W.2d at 456.

- f. The failure of the trial court to adjudicate costs is judicial error which, if not corrected by the trial court in a timely manner, must be asserted as error on appeal like any other alleged error. See *Smith v. State*, 500 S.W.2d 682, 684 (Tex. Civ. App.-Corpus Christi 1973, no writ).
- g. The determination of the amount of attorney's fees awarded to an ad litem and the assessment of those fees against a party are matters which must be adjudicated by the trial court before the clerk may tax the fees as court costs. *Simon v. York Crane & Rigging Co., Inc.*, 739 S.W.2d 793 (Tex.1987).
- h. What expenses are not considered costs?
- (1) Rule 902(10)(a) provides that a party must bear its own copying costs if it chooses to inspect and copy records attached to affidavits filed by another party to the action. Tex. R. Civ. Evid. 902(10)(a).
- (2) Traveling expenses, *Wallace v. Briggs*, 348 S.W.2d 523, 527 (Tex. 1961);
- (3) Premium for supersedeas bond, *Hammonds v. Hammonds*, 313 S.W.2d 603, 605 (Tex. 1958);
- (4) Delivery services, such as Federal Express, travel, long- distance calls, bond premiums, postage, reproduction expenses, binding of briefs, transcripts of testimony elicited during trial, office air- conditioning on weekends, and secretarial overtime, *Shenandoah Associates v. J & K Properties*, 741 S.W.2d 470, 487 (Tex. App.--Dallas 1987, writ denied);
- (5) The fee of an expert surveyor, appointed under Tex. R. Civ. P. 796 and testifying solely on the plaintiff's behalf, and the cost of certified copies of deeds are not recoverable; also "the power to tax costs, otherwise than by Rule 131 for good cause shown, does not include the power to tax, as costs, items which are not normally allowed" because, as a matter of law they are not proper court costs. *Whitley v. King*, 581 S.W.2d 541, 544-45 (Tex. Civ. App.--Fort Worth 1979, no writ);
- (6) Because no statutory authority exists for charging the costs of obtaining certified copies of deeds used in both a summary judgment hearing and at trial, this item is not allowed. *Phillips v. Wertz*, 579 S.W.2d 279, 280 (Tex. Civ. App.--Dallas 1979, writ ref'd n.r.e.);
- (7) Attorney's fees, costs of expert witnesses, and "other expenses in preparation for trial" *City of Houston v. Biggers*, 380 S.W.2d 700, 705 (Tex. Civ. App--Houston 1964, writ ref'd n.r.e.).
7. §31.010 - Turnover by Financial Institution
A financial institution that receives a request to turn over assets or financial information of a judgment debtor to a judgment creditor or a receiver under a turnover order or receivership under Section 31.002 (Tex. Civ. Prac. & Rem. Code) shall be provided and may rely on:
- a. a certified copy of the order or injunction of the court;
- b. a certified copy of the order of appointment or a receiver under Section 64.001, including a certified copy of any document establishing the qualification of the receiver, the sworn affidavit and the bond as provided in Sections 64.021, .022 and .023
- c. A financial institution that complies with this section is not liable for compliance with a court order, injunction or receivership to a judgment debtor; a party claiming through the judgment debtor; a co-depositor with the judgment debtor or a co-borrower.
- d. **A financial institution that complies with this section is entitled to recover reasonable costs, including copying costs, research costs, and , if there is a contest, reasonable attorney's fees.**
- e. In this section, financial institution means a state or national bank, state or federal savings and loan association, state or federal savings bank, state or federal credit union, foreign bank; foreign bank agency or trust company.

f. Cases - No cases have cited this statute.

U. Chapter 32 - Contribution

1. §32.001 - Application

The chapter only applies to tort actions. This chapter does not apply if a right of contribution, indemnity, or recovery between defendants is provided by other statute or by common law.

2. §32.002 - Right of Action

If a person against whom a judgment is rendered has paid the judgment, he has a right of action to recover contribution from each co-defendant against whom judgment is also rendered.

3. §32.003 - Recovery

You divide the damages by the number of defendants.

a. This chapter was enacted in 1985 and there appear to be no cases citing it.

V. Chapter 33 - Proportionate Responsibility

1. §33.001 - Proportionate Responsibility

A claimant in an action to which this chapter applies may not recover damages if his percentage of responsibility is greater than 50%

2. §33.002 - Applicability

Except as provided to the contrary in this section, this chapter applies to any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought. If a defendant who, with specific intent to do harm to others, acts in concert with another person to engage in conduct described in certain specific sections of the Penal Code (see below), they shall be joint and severally liable with such person for the damages legally recoverable by the claimant that were proximately caused by such conduct (i.e., a claimant can be more than 50% responsible and still recover).

a. The penal sections cited include murder, capital murder, aggravated kidnaping, aggravated assault, sexual assault, aggravated sexual assault, injury to child, elderly individual, or disabled individual, forgery, commercial bribery, misapplication of fiduciary property or property

of a financial institution, securing execution of document by deception, fraudulent destruction, removal or concealment of writing (Chapter 31 of Penal Code).

b. See *North American Van Lines, Inc. v. Emmons*, 2001 WL 726297 (Tex. App.-Beaumont, Jun 28, 2001) (NO. 09-00-073CV) (Note: Opinion not released for publication), for discussion of how the statute works and what it is not - "The proportionate responsibility statute did not do away with the application of partnership and agency theories, nor did it replace equitable doctrines imposing liability on one corporation for the acts of another."

c. In another as yet to be published opinion, the dissent by Justice Hankinson, provides a view of the meanings of the statute. *Utts v. Short*, 2000 WL 1784846, 44 Tex. Sup. Ct. J. 134 (Tex., Dec 07, 2000) (NO. 99-0366) (at page 18 as it appears in Westlaw).

d. See *Drilex Systems, Inc. v. Flores*, 1 S.W.3d 112, 123 (Tex. 1999). In that case, the Court was trying to allocate the recovery among various members of the same family, when one member was found by the jury to be 10% contributorily negligent and each had settled with other defendants. At page 123 the court provides a chart that shows how the court allocated the recovery.

e. It does not appear that there are any cases applying this chapter to any divorce litigation including intentional infliction.

W. Chapter 34 - Execution on Judgments

1. §34.001 - No execution on Dormant Judgment

If a writ of execution is not issued within 10 years after the rendition of a judgment of a judgment, the judgment is dormant and execution may not be issued on the judgment unless it is revived (see above for method to revive dormant judgments).

If a writ of execution is issued within 10 years after the rendition of a judgment but a second writ is not issued within 10 years after issuance of the first

writ, the judgment becomes dormant. A second writ may be issued at any time within 10 years after issuance of the first writ.

a. There is currently a dispute as to the interaction of this section and the family code regarding collection of child support. The majority opinion in the case of *In re S.S.*, (Tex. App.-Houston [14 Dist.], May 31, 2001, n.w.h.) (NO. 14-00-00060-CV) (Not designated for publication) states that the family code provisions dealing with collection of child support control vs. the 10 year statute dealing with dormant judgments. The dissent (apparently an unsigned dissent - at least by Westlaw standards) applies the 10 year statute to declare that the attempt to collect the past due child support was dormant.

2. §34.002 - Effect of Plaintiff's Death

Provision dealing with how to handle an execution if the plaintiff dies before the writ is issued, dies during the process of the writ being issued or dies after the writ is issued.

3. §34.003 - Effect of Defendant's Death

of the defendant after a writ of execution is issued stays the execution proceedings, but any lien acquired by levy of the writ must be recognized and enforced by the county court in the payment of the debts of the deceased.

4. §34.004 - Levy on Property Conveyed to Third Party

A third party purchaser of property of a judgment debtor can avoid seizure of the property if they can point out other property of the debtor in the county that is sufficient to satisfy the execution (say the bank account where the judgment creditor deposited the sale proceeds).

5. §34.021 - Recovery of Property Before Sale

A judgment creditor is entitled to recover his property that has been seized through execution of a writ if the judgment on which the execution is issued is reversed or set aside and the property has not been sold at execution.

6. §34.022 - Recovery of Property Value After Sale

If the judgment is reversed or set aside but the seized property has been sold, then the judgment debtor can recover from the judgment creditor the fair market value of the property sold determined at the time of the sale of the property.

7. §§34.041 - 34.044 - Sale - Types of Property Being Sold

Provisions dealing with sales of city lots, land, and shares of stock.

8. §34.045 - Conveyance of Title After Sale

In Section §34.045, the language to convey title is "...the office shall execute and deliver to the purchase a conveyance of **all right, title, interest and claim** that the defendant had in the property sold. Why not use that same language in our divorce decrees and settlement agreements (the forms only divest the other spouse of all right, title, interest and claim)?

9. §§34.046 - 34.067

Provisions dealing with a purchaser being considered innocent, how to distribute the sale proceeds, how an officer can void a sale by buying the property being sold, and the duties and liabilities of the executing office.

X. Chapter 35 - Enforcement of Judgments in Other States

1. §35.03 - Filing and Status of Foreign Judgments

Provides the procedure to file a judgment of a state court in Texas. Once filed, the foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing or satisfying a judgment as a judgment of the court in which it is filed.

2. §35.006 - Stay

Provides the method to stay the foreign state judgment - basically, appeal, bond or other proceeding in the foreign state that suspends the judgment.

a. In *Reading & Bates Const. Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702, 715 (Tex. App.-Houston [1 Dist.] 1998, review denied), a Canadian party recorded a judgment in Louisiana. Then they tried to record that state judgment in Texas. The Texas court held that you had to file the foreign judgment in Texas (See next chapter - 36) and that you could not “through the back door”.

Y. Chapter 36 - Enforcement of Judgments in Other Countries

1. §36.001 - Definitions

Included in the definitions: A foreign country judgment” means a judgment of a foreign country granting or denying a sum of money **other than** a judgment for taxes, a fine or other penalty or **support in a matrimonial or family matter**.

In *Gustilo v. Gustilo*, (NO. 14-93-00941-CV) (Tex. App.-Houston [14 Dist]1996) (not designated for publication), shows an example of Philippine judgment that was not for “a sum of money” - a probate proceeding to determine heirs.

2. §36.002 - Applicability

Applies to foreign judgments that are final and conclusive even though an appeal is pending or the judgment is subject to an appeal. It does not apply to judgments rendered prior to June 17, 1981.

3. §36.0041 Filing

Permits the filing of a foreign judgment that is authenticated with the clerk of a court in the county of residence of the party against whom recognition is sought.

4. §36.0044 Contesting Recognition.

Provisions detailing how a party can contest the recognition of the judgment.

- a. Must file motion and serve opposing party with copy of motion no later than the 30th day after date of service of the notice of filing. 60 days if the party is domiciled in a foreign country.
- b. Included with the motion must be any briefs, supporting affidavits and other documentation.

c. The party opposing the motion must file any response, including supporting affidavits, briefs and other documentation not later than the 20th day after the date of service on that party of a copy of the motion for nonrecognition.

d. On motion and notice, a court may grant an extension of time not to exceed 20 days on good cause shown for the filing of a response or any document that is required to establish a ground for nonrecognition but that is not available within the time for filing the document.

e. An evidentiary hearing is permitted but not required.

5. §36.005 - Grounds for Nonrecognition

A foreign judgment is not conclusive if:

- a. no impartial tribunal or procedure compatible with the requirements of due process of law
- b. no personal jurisdiction
- c. no subject matter jurisdiction
- d. A foreign judgment need not be recognized if one of seven criteria not met including:
 - (1) no notice in sufficient time to defend
 - (2) judgment obtained by fraud
 - (3) cause of action is repugnant to the public policy of Texas
 - (4) the foreign country does not recognize judgments rendered in this state that “...but for the fact that they are rendered in this state, conform to the definition of ‘foreign country judgment’”

6. §36.008 Other Foreign Country Judgments

This chapter does not prevent the recognition of a foreign country judgment in a situation not covered by this chapter: for example, a matter covering support in a matrimonial or family matter

- a. Remember §16.066 of the Code (Action on Foreign Judgments) applies a 10 year statute of

limitations for the collection of foreign judgments.

Z. Chapter 37 - Declaratory Judgments

1. 37.002 - Short Title, Construction, Interpretation

This is a Uniform Act. The chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered. The chapter shall be so interpreted and construed as to effectuate its general purpose.

The purpose of a declaratory action is to establish existing rights, status, or other legal relation. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex.1995).

2. §37.003 - Power of Court to Render Judgment; Form and Effect

A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. The declaration may be either affirmative or negative in form and effect and the declaration has the force and effect of a final judgment or decree. The general powers conferred by the Chapter are to terminate controversy or remove an uncertainty.

3. §37.004 - Subject Matter of Relief.

The section details certain specific types of cases that can be subject to declaratory judgments - deeds, wills, written contracts, other writings, ordinance, or other legal relations are stated. The list is not intended to be exclusive (See §37.003).

4. §37.005 - Declarations Relating to Trust or Estate

A section dealing with use of declaratory judgments involving trusts, administrations, or other types of estates.

5. §37.006 - Parties

All persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party.

6. §37.007 - Jury Trial

Jury is permitted on an issue of fact.

7. §37.009 - Costs

A court may award costs and reasonable and necessary attorney's fees as are equitable and just.

A party who seeks to recover attorney's fees in a declaratory judgment action under Section 37.009 must prove that the fees are reasonable and necessary. A party who claims attorney's fees under Section 37.009 enjoys neither the presumption of reasonableness nor the availability of judicial notice as does one who claims under Tex. Civ. Prac. & Rem. Code § 38.001 et seq. (Attorney Fees). Chapter 38 (see next section of the outline) provides for attorney's fees in certain enumerated cases. Declaratory judgment actions do not fall under the provisions of Chapter 38. The Chapter 38 provisions presume attorney's fees to be reasonable and also allow a trial court to take judicial notice that attorney's fees are reasonable. In a declaratory judgment action, there are no such provisions. *Gorman v. Gorman*, 966 S.W.2d 858 (Tex. App.-Houston [1st Dist.] 1998, review denied).

Additionally, the court is not required to award the fees. The statute entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law. It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principle, or to rule without supporting evidence. In reviewing an attorney fee award under the statute, the court of appeals must determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees. This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the statute. *Bocquet v. Herring*, 972 S.W.2d 19 (Tex.).

8. §37.011 - Supplemental Relief

The act allows the trial court to provide further relief whenever necessary or proper

Cases using declaratory judgments include:

- a. common law marriage. *Jordan v. Jordan*, 938 S.W.2d 177 (Tex. App.-Houston [1 Dist.] 1997, no writ).
- b. Person inheriting the ex-husband's home sought to sell the home and brought suit for a declaratory judgment against former wife to clear title. *Wilde v. Murchie*, 949 S.W.2d 331 (Tex. 1997).
- c. Woman sought a declaratory judgment declaring her to be the widow, rather than the divorcee - the husband having died before the divorce decree was signed. *Dearing v. Johnson*, 947 S.W.2d 641 (Tex. App.-Texarkana 1997, no writ).
- d. Bank's effort to collect from assets awarded to wife in divorce. *Williams v. Norwest Bank Montana*, (NO. 09-99-096 CV) (Tex. App.-Beaumont, Aug 26, 1999 no writ) (not designated for publication).
- e. premarital and post marital agreements - *Koch v. Koch*, 27 S.W.3d 93 (Tex. App.-San Antonio, Jun 30, 2000).
- f. Whether ex-wife was entitled to the proceeds from an insurance policy on ex-husband's life. *Copeland v. Alsobrook*, 3 S.W.3d 598 (Tex. App.-San Antonio 1999, review denied).
- g. Former husband filed action seeking declaratory judgment and other relief, challenging validity of divorce decree and payment of part of his military retirement benefits to former wife. *Chandler v. Chandler*, 991 S.W.2d 367 (Tex. App.-El Paso 1999 review denied), cert. denied, 529 U.S. 1054, 120 S.Ct. 1557, 146 L.Ed.2d 462).
- h. A cause of action to declare that a Mexican divorce was invalid and the "husband's"

marriage in Mexico to a third party was void. *Roberson v. Roberson*, 420 S.W.2d 495 (Tex. Civ. App.-Houston [14 Dist.] 1967 no writ).

Declaratory judgments may not be used for:

- i. Courts generally disfavor petitions for declaratory relief that seek to "interpret" a prior judgment. See, e.g., *Cohen v. Cohen*, 632 S.W.2d 172, 173 (Tex. App.--Waco 1982, no writ); *Speaker v. Ladler*, 463 S.W.2d 741, 742-43 (Tex.Civ.App.--Beaumont 1971, writ ref'd n.r.e.).
- j. As our supreme court has noted, "A suit to 'interpret' a judgment is usually a guise to obtain review or modification of a judgment outside of the appellate process or an attempt to collaterally attack a judgment." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 468 (Tex.1995).
- k. declaratory judgment may not be used to collaterally attack final divorce decree. *Segrest v. Segrest*, 649 S.W.2d 610, 611-12 (Tex.1983).
- l. declaratory judgment may not be used to change terms of decree. *Lee v. Johnson*, 858 S.W.2d 58, 61 (Tex. App.--Houston [14th Dist.] 1993, no writ).

AA. Chapter 38 - Attorney Fees

1. §38.001 Recovery of Attorney Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:

Services rendered, performed labor, furnished material, freight or express overcharges, lost or damaged freight or express, killed or injured stock, a sworn account, **or an oral or written contract.**

2. §38.002 - Procedure for Recovery of Attorney's Fees

To recover attorney's fees under this chapter, the claimant must be represented by an attorney,

must present the claim to the opposing party or to a duly authorized agent of the opposing party; and payment of the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

3. §38.003 - Presumption

It is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable. The presumption may be rebutted.

4. §38.004 - Judicial Notice

The court may take judicial notice of the usual and customary attorney's fees and the contents of the case file without receiving further evidence in a proceeding before the court or a jury case in which the amount of attorney's fees is submitted to the court by agreement.

5. §38.005 - Liberal Construction

This chapter shall be liberally construed to promote its underlying purposes.

6. §38.006 - Exceptions

This chapter does not apply to contract issued by an insurer that is subject to certain specified provisions of the Insurance Code.

a. When a cause of action has multiple claims, some that allow for recovery of attorney fees by statute and some that do not, normally the attorney fees for the various claims need to be segregated. But the determination of whether attorney's fees can be segregated between various claims or defenses is a question for the court. *Aetna Cas. & Sur. v. Wild*, 944 S.W.2d 37 (Tex. App. - Amarillo 1997, writ denied). Segregation of attorney fees is not required where the services rendered relate to (1) multiple claims arising out of the same facts or transaction and (2) prosecution or defense entails proof or denial of essentially the same facts, so as to render attorney's fees inseparable.

b. A client was entitled to a statutory award of attorney fees for breach of contract in action against attorney, though client recovered only

for breach of fiduciary duty and did not recover on her breach of contract claim, where the acts of attorney constituting a breach of fiduciary duty also constituted a breach of contract. *McGuire v. Kelley*, 41 S.W.3d 679 (Tex. App.-Texarkana 2001, n.w.h).

c. The question of judicial notice of the reasonableness of the fees does not apply to cases outside the scope of the statute - for example, family law matters. For example, in *Bebeau v. Bebeau*, (NO. 09-97-517 CV) (Tex. App.-Beaumont, Sep 23, 1999, no writ) (not designated for publication) the question of judicial notice came up in a family law context:

“Since the causes of action listed in § 38.001 do not include suits affecting the parent-child relationship, the judicial notice authorized by § 38.04 furnishes no basis for the support of attorney's fees in this family law proceeding. Thus, by its very nature, the mere statement in a contested child-support proceeding that a specified sum for attorney's fees is reasonable does not, standing alone, constitute "facts" of which judicial notice may be taken.” *id.* at page 5.

d. See also *Gorman v. Gorman*, 966 S.W.2d 858 (Tex. App.-Houston [1 Dist.] 1998, review denied) discussed above (dealing with declaratory judgments).

BB. Chapter 39 - Default Judgments in Certain Cases Defended by Attorney General

If you have a cause of action against the state, a state agency or a party in a civil case for which Chapter 104 of the Code authorizes representation by the attorney general, you need to read the two sections of this chapter, particularly if you intend to take a default judgment. At the time of the writing of this outline, no cases cited this chapter in matters dealing with family law.

CC. Chapter 41 - Exemplary Damages

1. §41.001 - Definitions

Subsection (2) states that “clear and convincing” means “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” [Same definition as found in Tex. Fam. Code §101.007.]

Subsection (4) states that “economic damages” means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

Subsection (5) states that “exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages include punitive damages.

Subsection (6) states that “fraud” means fraud other than constructive fraud.

Subsection (7) states that “malice” means: (A) a specific intent by the defendant to cause substantial injury to the claimant, or (B) an act or omission which, when viewed objectively from the standpoint of the actor at the time of its occurrence, involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety or welfare of others.

2. §41.002 - Applicability

This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action. The chapter establishes the maximum exemplary damages that may be awarded in an action subject to the chapter including an action for which exemplary damages are awarded under another law of this state. The chapter does not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim. The chapter does not apply to:

a. Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983)

b. Deceptive Trade Practices consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code except as specifically provided in Section 17.50 of that act; and

c. Chapter 21, Insurance Code.

3. §41.003 - Standard for Recovery of Exemplary Damages

If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state. See Subsection (c) of §41.003.

Otherwise exemplary damages may be recovered only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice or “willful act or omission or gross neglect in wrongful death actions ...” See Subsection (a) of §41.003.

a. The claimant must prove by clear and convincing evidence the elements of exemplary damages. The burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice. See Subsection (b) of §41.003.

4. §41.004 - Factor Precluding Recovery

a. If malice (see definition in §41.001(7)(A)) proved by clear and convincing evidence, then one can recover exemplary damages even if actual damages are minimal.

b. Exemplary damages may not be awarded if claimant elects to have his recovery multiplied under another statute.

c. The definition of malice has two definitions and only “A” is included in this section.

d. Otherwise, no recovery for exemplary damages if actual damages are nominal.

DD. Chapter 51 - Appeals

Subchapter A covers certain specific rules regarding appeals from justice court. Subchapter B covers appeal from county or district court.

1. §51.013 - Time for Taking Writ of Error to Court of Appeals

In a case in which a writ of error to the court of appeals is allowed, the writ of error may be taken at any time within six months after the date the final judgment is rendered.

2. §51.014 - Appeal from Interlocutory Order

Section that specifies when an appeal can be taken from an interlocutory order of a district, county court at law or a county court may be taken. Included are:

- a. orders that appoint a receiver;
- b. overrides a motion to vacate an order that appoints a receiver or trustee;
- c. grants or denies a special appearance of a defendant under Tex. R. Civ. P. 120a except in a suit brought under the Family Code.

3. §51.015 - Costs of Appeal

In the case of appeal brought pursuant to Section 51.014(6) (denial of motion for summary judgment involving the electronic or print media and arising under the free speech or free press clause of the First Amendment to the United States Constitution or Article I, Section 8 of the Texas Constitution or Chapter 73 of the Code (Libel)), if the order appealed from is affirmed, the court **shall order** the appellant to pay all costs and **reasonable attorney fees of the appeal**; otherwise, each party shall be liable for and taxed its own costs of the appeal..

4. Chapter 52 - Security for Judgments Pending Appeal

Five sections dealing with the posting of bonds including review for sufficiency and excessiveness.

5. §52.005 - Conflict with Texas Rules of Appellate Procedure

This section states that the chapter controls if there is any conflict with the Texas Rules of Appellate Procedure, and, notwithstanding Section

22.004 of the Government Code, the supreme court may not adopt rules in conflict with this chapter.

EE. Title 3 - Extraordinary Remedies

FF. Chapter 61 - Attachment

A number of sections dealing with the issuance of a writ of attachment against property (as opposed to a writ of attachment for a person which is not addressed by this chapter). Remember, Attachment is also addressed in the Rules of Civil Procedure, Rules 592-609. The statute and rules must be read together.

The writ is used to seize property during the pendency of a cause of action but before a judgment has been rendered.

1. §61.001 - General Grounds

A writ of original attachment is available to a plaintiff in a suit if the defendant is justly indebted to the plaintiff; the attachment is not sought for the purpose of injuring or harassing the defendant, the plaintiff will probably lose his debt unless the writ is issued and specific grounds for the writ exist under Section 61.002.

2. §61.002 - Specific Grounds

The specific grounds include where a defendant has hidden or is about to hide his property or remove it from the county in which the suit is brought for the purpose of defrauding his creditors.

3. §61.004 - Pending Suit Required.

A writ may not be issued before a cause of action has been filed.

4. §61.023 - Bond

A bond is required!

5. §61.041 Subject Property

A writ may be levied only on property that by law is subject to levy under a writ of execution.

6. §61.042 Attachment of Personalty

Unless the property is perishable, it shall be retained by the officer attaching until final judgment unless it is replevied or claimed by a third party who posts bond and tries his right to the property.

7. §61.045 Attachment of Personalty Held by a
Financial Institution

Service of a writ of attachment on a financial institution relating to personal property held by the financial institution in the name of or on behalf of a customer of the institution is governed by Section 59.008 of the Finance Code.

- a. Our Supreme Court in *Williams v. Patton*, 821 S.W.2d 141, 145 (Tex. 1991) recognized that an attachment could be used enforce a judgment for past due child support (although they did not mention the actual attachment statute in their opinion):

“Once the court confirms the amount in arrears and renders judgment for the amount owing, the obligee can enforce that judgment by any of the means available for the enforcement of judgments for debts, such as garnishment or attachment.”

GG. Chapter 62 - Sequestration

Sequestration is another extraordinary remedy used to acquire property that may be destroyed or removed during litigation. Again, the Texas Rules of Civil Procedure also have rules that govern this type of action - Rules 696-716.

1. §62.001 Grounds

A writ of sequestration is available to a plaintiff against personal property under certain conditions if there is an immediate danger that the defendant or party in possession of the property will conceal, dispose of, ill-treat, waste, or destroy the property or remove it from the county during the suit. The cause of action must be for title or possession of the personal property or for foreclosure or enforcement of a mortgage, lien or security interest on the property.

2. §62.041 Motion for Dissolution; Stay

The defendant may seek dissolution of an issued writ by filing a written motion with the court. The right to seek dissolution is cumulative of the right of replevy.

3. §62.044 Compulsory Counterclaim for
Wrongful Sequestration

If a writ is dissolved, any action for damages for wrongful sequestration must be brought as a compulsory counterclaim. Additionally, the party who sought dissolution of the writ may recover reasonable attorney’s fees incurred in the dissolution of the writ.

HH. Chapter 63 - Garnishment

Garnishment is another extraordinary remedy - this one to seize property after an attachment has issued, a plaintiff sues for a debt and makes an affidavit in compliance with the statute or a plaintiff has a valid subsisting judgment and makes an affidavit that the defendant does not possess property in Texas subject to execution sufficient to satisfy the judgment. Again, the Texas Rules of Civil Procedure also have rules that govern this type of action - Rules 657–679.

1. §63.003 Effect of Service

After service of a writ of garnishment, the garnishee may not deliver any effects or pay any debt to the defendant. If the garnishee is a corporation or joint-stock company, the garnishee may not permit or recognize a sale or transfer of shares or an interest alleged to be owned by the defendant. If a payment, delivery, sale or transfer is made in violation of the section, it is void as to the amount of the debt, effects, shares, or interest necessary to satisfy the plaintiff’s demand.

2. §63.004 - Current Wages Exempt

Except as otherwise provided by state or federal law, current wages for personal service are not subject to garnishment. The garnishee shall be discharged from the garnishment as to any debt to the defendant for current wages.

Exceptions include the Texas Family Code, §§8.009 and 154.007 and Chapter 158 .

3. §63.008 financial Institution as Garnishee

Service of a writ of garnishment on a financial institution names as garnishee in the writ is governed by Section 59.008 of the Finance Code.

- a. Remember that in a garnishment procedure, the garnishee may be entitled to reasonable

compensation (Tex. R. Civ. P. 677). This compensation is taxed as costs and can be assessed against the plaintiff (if garnishee is discharged) or by the defendant (where garnishee is “held thereon.”)

II. Chapter 64 - Receivership

Receivership is another extraordinary remedy that requires joint reading - this chapter and Tex. R. Civ. P. 695 and 695a. In Rule 695a it is stated: “In a divorce case the court or judge, as a matter of discretion, may dispense with the necessity of a bond. The Family Code also has statutory authority for granting the appointment of a receiver “for the preservation and protection of the property of the parties: (Tex. Fam. Code §6.502 (5). The appointment of a receiver in a temporary order is also subject to an interlocutory appeal. Tex. Fam. Code §6.507. See also Tex. Fam. Code §§6.709 and 201.013.

a. It is common practice to provide for a receiver in a divorce action - at the end of the case particularly when specific assets are to be sold.

2. §64.001 Availability of Remedy

A court of competent jurisdiction may appoint a receiver as provided by this statute - the laundry list includes an action between partners or others jointly owning or interested in any property or fund and also in any other case in which a receiver may be appointed under the rules of equity.

For an application dealing with an ‘action between partners or others jointly owning or interested in any property or fund’, a party must have a “probable interest in or right to the property or fund and the property or fund must be in danger of being lost, removed or materially injured”.

3. §64.002 Persons Not Entitled to Appointment

A court may not appoint a receiver for a corporation, partnership or individual on the petition of the same corporation, partnership or individual. This section does not prohibit an appointment of a receiver over all or part of the marital estate in a suit filed under Title 1 or 5, Family Code.

4. §64.004 Application of Equity Rules

Unless inconsistent with this chapter or other general law, the rules of equity govern all matters relating to the appointment, powers, duties and liabilities of a receiver and to the powers of a court regarding a receiver.

5. §64.021 Qualifications

Must be a citizen and qualified voter of Texas and must not be a party, attorney, or other person interested in the action for appointment of a receiver. The appointment of a receiver who is disqualified under this subsection (a citizen and qualified voter) is void as to property in the state. Additionally, during the receivership, the receiver must maintain an actual residence in Texas.

6. §64.022 Oath

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

7. §64.023 Bond

Before a person assumes the duties of a receiver, he must execute a good and sufficient bond that is approved by the court in an amount fixed by the court and conditioned on faithful discharge of his duties as receiver in the named action and obedience to the orders of the court.

8. §64.036 Receivership Property Held by Financial Institution

Again, if the receiver is attempting to recover property held by a customer in a financial institution, Section 59.008 of the Finance Code governs.

9. §64.032 Inventory

A receiver shall prepare an inventory of all property received as soon as possible after the appointment.

Interestingly, there is no specific statute section dealing with the payment of the receiver.

A number of cases are cited because the appointment of a receiver is such a caustic event in any divorce.

a. Appointment of trustee over portion of husband's separate estate of \$10,000 for support of two minor children, whose custody

- was given wife in divorce, where wife had no separate property was not error, though wife prayed in her petition for a receiver; term "trustee" in its broad sense including assignees, guardians, and receivers. *Lewis v. Lewis*, 287 S.W. 139 (Tex. Civ.App. 1926).
- b. Refusal to appoint receiver to take charge of a sufficient amount of property of plaintiff to insure support and maintenance of minor children awarded to defendant by divorce judgment was not an abuse of discretion under circumstances. *Mitcham v. Mitcham*, 202 S.W.2d 947 (Tex. Civ.App. 1947).
- c. It is well settled in Texas that the appointment of a receiver is a harsh remedy and should only be exercised in extraordinary circumstances. *Rogers v. Rogers*, 150 S.W.2d 139 (Tex.Civ.App. Dallas, 1941, no writ); *Texas Consolidated Oils v. Hartwell*, 240 S.W.2d 324 (Tex.Civ.App. Dallas 1951, mand. overr.); *Gunther v. Dorff*, 296 S.W.2d 638 (Tex.Civ.App. Waco 1956, writ dismiss'd).
- d. Only where the evidence shows some serious injury will result to the applicant, or is threatened, will the drastic remedy of receivership be applied. *Texas Consolidated Oils v. Hartwell*, 240 S.W.2d 324 (Tex.Civ.App. Dallas 1951, mand. overr.); *Hughes v. Marshall*, 538 S.W.2d 820 (Tex.Civ.App. Tyler 1976, writ ref'd n. r. e.).
- e. A receiver should be appointed only in those situations where the property involved is in present danger of being lost, removed or materially injured and should never be ordered if another remedy, less harsh, is available which will afford the needed protection. *Rogers v. Rogers*, 150 S.W.2d 139, 140-141 (Tex.Civ.App. Dallas, 1941, no writ); *Texas Consolidated Oils v. Hartwell*, 240 S.W.2d 324 (Tex.Civ.App. Dallas 1951, mand. overr.); *Parr v. First State Bank of San Diego*, 507 S.W.2d 579 (Tex.Civ.App. San Antonio 1974, no writ).
- f. In *Parness v. Parness*, 560 S.W.2d 181 (Tex.Civ.App.-Dallas 1977), the trial court entered an order appointing a receiver to sell the homestead during the pendency of the divorce action. The appellate court overruled, stating: "Here no showing was made by appellee that if a receiver is not appointed to sell the home, the property will be lost. Nor is there a showing of any urgency requiring sale of the house. The real estate broker testified at the hearing that in his opinion the property was not in eminent danger of destruction by deterioration. Appellee's testimony is that it is difficult for him financially to keep up the house payments, the maintenance on the house and temporary child support and that the sale of the house would ease his situation. There is no evidence that the house payments were delinquent or that foreclosure was imminent, but, there is evidence that appellee, a physician, can borrow the money for house payments. Presumably he could likewise borrow funds for other necessities, pending a final decree. This evidence is insufficient to show that the property itself was in danger of being lost, destroyed or materially altered."
- g. In *Harmon v. Schoelpple*, 730 S.W.2d 376 (Tex. App.--Houston [14th Dist.] 1987, no writ) the wife joined in her divorce action corporations and one of the shareholders of one of the corporations - i.e. the husband's business partner. The trial court entered an order appointing the wife as receiver of one of the corporations. The business partner appealed and the appellate court reversed the creation of the receivership: "The three sections are clear. Section 64.021 states a receiver must not be a party to the action pursuant to which the receivership arose. Schoelpple is undisputably a party. Moreover, she has been appointed receiver of the property of Harmon, a third party. Section 64.022

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

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

- h. In *Rusk v. Rusk*, 5 S.W.3d 299, 306 (Tex. App.-Houston [14th Dist.] 1999, review denied), the receivership issue was discussed in great detail (cites have been mainly omitted). Although the quote is exceedingly long, if you are dealing with, or thinking about dealing with a receivership in a divorce case, or have a case involving third parties and receivership issues, a careful review of *Rusk* will provide you a good starting place:

“We address in order, the legal requirements of receivership in a final divorce decree setting, notice requirements, and pleadings here presented.

Receivership is an extraordinarily harsh remedy and one that courts are particularly loathe to utilize....

“Judicial seizure and court management of any asset should be a last resort. This is emphatically true when dealing with the separate property of a spouse. As noted, separate property is constitutionally protected. Even an equitable lien, ungoverned by statute, may be narrowly imposed on separate (homestead) property only to secure the reimbursement for community improvements made to that property.... We find no Texas authority allowing the imposition of a receiver upon separate property in the final division of assets. We note the Dallas Court of Appeals somewhat reluctantly allowed a receivership in a temporary order of a "many chaptered," contemptuous divorce. ...The statutory underpinnings of temporary orders do not pertain here.”

“Section 7.001 of the Family Code grants a trial court broad authority to divide marital property in a manner it deems just and right upon the dissolution of marriage.... That broad authority sometimes includes the power to enlist the aid of a receiver to effectuate the trial court's orders and judgments....The appointment of a receiver may be left to the sound discretion of the trial court... These authorities, however, do not deal with separate property, and the underlying statutory justification is noteworthy. The Texas Family Code's broad grant of discretion, concerning a final property division, relates to marital property held or claimed by the spouses and does not extend to the constitutionally- protected class of separate property, nor to the appointment of receivers over such property.... The trial court has no inherent or other authority to divide separate property, only non-separate or marital property. We must also cautiously view the case law development, indicating a legislative grant of discretion in division of property vis a vis the more specific legislative mandates for receiverships.... see also note 10, *infra*.

“The underlying authority [FN8] for appointment of a receiver in the final divorce decree setting finds support from a 1960 Supreme Court case. There the court held that the trial court has a duty to initially determine if the *parties' community property* is subject to partition in kind. *Haile v. Haile*, 160 Tex. 372, 331 S.W.2d 299, 303 (1960) (emphasis added). If the court determines that it is, then it shall equitably divide the community property between the parties. *Id.* If it is not subject to partition in kind, the trial court can appoint a receiver and order so much of the property as is incapable of partition to be sold and the proceeds divided between the parties in such portions as, in the discretion of the court, may be a just, fair and equitable partition, having in mind the rights of the parties and the children. *Id.* Here, the parties' community assets (marital property) were subject to an in kind distribution. [FN9] Consequently, we hold that the trial court exceeded its authority and abused its discretion in appointing a receiver in this case even over community assets. [FN10] See *id.*

FN8. The old red Texas Jurisprudence books seem to be the original authority!

FN9. Because of our disposition, we need not fully engage the dissent's assertion the property is not subject to in kind division. A review of the property placed in receivership reveals otherwise.

FN10. Although several courts of this state have held that section 64.001 of the Civil Practice & Remedies Code is not applicable to divorce proceedings, the better practice would be for trial courts to adhere to that section when appointing receivers. See *Vannerson*, 857 S.W.2d at 673; *Young*, 765 S.W.2d at 444. Section 64.001 requires that a receiver may be appointed by the trial court only if it finds that the property or fund is "in danger of

being lost, removed, or materially injured.".... In this case, no such finding was entered by the trial court. We also note that creditors are effected by virtue of their prior lien positions on some properties. The dissent notwithstanding, we are not holding section 64.001 applicable to division of the community estate because we are bound by *Haile*, *supra*. In our view, *Haile* should be limited to its narrow holding when dealing with community property that is not divisible in kind, given the express receivership statute ordained by the legislature and the trial courts authority to divide only the marital estate. To reiterate, we are not dealing with a temporary order situation but final judgment following a trial. When dealing with separate property, a trial court could avail itself of the receivership statute, when applicable.”

JJ. Chapter 65 - Injunction

See also Tex. R. Civ. P. 680-693a for additional rules governing the issuance of a Restraining Order and/or Injunction. Rule 693a provides that In a divorce case the court in its discretion may dispense with the necessity of a bond in connection with any ancillary injunction in behalf of one spouse against the other.

1. §65.001 Application of Equity Principles

The principles governing courts of equity govern injunction proceedings if not in conflict with this chapter or other law.

2. §65.002 Restraining Order of Injunction Affecting Customer of Financial Institution

Section 59008 of the Finance Code applies to service or delivery of a restraining order or injunction affects property held by a financial institution.

3. §65.013 and 65.014 - Stay of Judgment or Proceeding and Limitations on Stay of Execution of judgment

Provisions dealing with dealing attempts to use injunctions to stay off the execution of judgments.

4. §65.031 Dissolution - Award of Damages

If the court finds that the injunction enjoining the collection of money was obtained for delay, the court may assess damages in the amount equal to 10% of the amount released by dissolution of the injunction, exclusive of costs.

5. 65.045 Conflict with Texas Rules of Civil Procedure

To the extent that this subchapter conflicts with the Texas Rules of Civil Procedure, this subchapter controls. Notwithstanding Section 22.04, Government Code, the supreme court may not amend or adopt rules in conflict with this subchapter. The district courts and statutory county courts may not adopt local rules in conflict with this subchapter.

- a. Note: cases dealing with bonds rely on the Texas Rules of Civil Procedure and not this subchapter.
- b. Rule providing that, in divorce case, court may dispense with necessity of bond in connection with ancillary injunction on behalf of one spouse against the other was inapplicable to proceeding on former wife's motion for temporary injunction and orders for discovery and an accounting with respect to former wife's cause of action against former husband for breach of fiduciary duty as trustee of her one-half interest in his retirement plan under divorce decree. *Eichelberger v. Hayton*, 814 S.W.2d 179 (Tex. App. - Houston [1 Dist.] 1991, writ denied).

KK. Title 4 - Liability In Tort

LL. Chapter 71 - Wrongful Death; Survival; Injuries Occurring Out of State

1. §71.005 - Evidence Relating to Marital Status-

In an action under this subchapter (Wrongful Death), evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if it is true, but the defense is prohibited from directly or indirectly mentioning or alluding to a common-law marriage, an extramarital relationship, or the marital prospects of the surviving spouse.

2. §71.011 - Damages Not Subject to Debts

Damages recovered in an action under this subchapter (Wrongful Death) are not subject to the debts of the deceased.

Query? Is there a distinction made between “debts” and “obligations?”

MM. Chapter 72 - Liability of Motor Vehicle Owner or Operator to Guest

1. §72.001 - Limited Liability

A person related by second degree of consanguinity or affinity as determined under Chapter 573 of Government Code can recover only if the owner or operator of motor vehicle acted intentionally or the injury was caused by his heedlessness or reckless disregard of the rights of others.

2. §72.003 - Effect on Other Liability

The chapter does not affect judicially developed or developing rules under which a person is or is not totally or partially immune from tort liability by virtue of the family relationship.

NN. Chapter 73 - Libel

1. §73.001 Elements of Libel

Libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living persons reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.

2. §73.002 Privileged Matters

The publication by a newspaper or other periodical of a matter covered by the section is privileged. The privilege does not extend to the republication of a matter if it is proved that the matter republished with actual malice after it had ceased to be of public concern. The section then goes on to provide other relief to newspapers or other periodicals - what part of “privileged and not a ground for a libel action” did the legislature not understand?

3. §73.004 Liability of a Broadcaster

A broadcaster is not liable for defamatory statement unless the broadcaster failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

4. §73.005 Truth a Defense

The truth of the statement in the publication on which an action for libel is based is a defense to the action.

5. §73.006 Other Defenses

This chapter does not affect the existence of common law, statutory law, or other defenses to libel

**OO. Chapter 81 - Sexual Exploitation by
Mental Health Services Provider**

1. §81.009 - Limitations

This is a special limitations section. The section does not apply to a patient or former patient who is a child or a minor as defined by Section 101.003 of the Family Code, until the child has reached the age of 18. If the action is brought by a parent, guardian, or other person having custody of the child or minor, it must be brought within the period as provided by this section.

- a. The period is before the third anniversary of the date the patient or former patient understood or should have understood the conduct was in violation of the chapter - basically sexual contact, exploitation or therapeutic deception as defined in §81.001.

PP. Chapter 85 - Liability for Stalking

1. §85.001 - Definitions

- a. Claimant includes person seeking recovery for another person
- b. Family has the meaning assigned by Section 71.01 of the Family Code
- c. Harassing behavior - means conduct by the defendant directed specifically toward the claimant, including following claimant, that is reasonable likely to harass, annoy, alarm, abuse, torment, or embarrass the claimant.

2. §85.002 - Liability

A defendant is liable to a claimant for damages arising from stalking of the claimant by the defendant.

3. §85.003 - Proof

Stalking is proved by showing that the defendant engaged in harassing behavior that caused the claimant to fear for the safety of claimant or a member of his/her family. Additionally, if a defendant violates a restraining order prohibiting harassing behavior - (check and see if standard family law restraining order does prohibit harassing behavior - perhaps we should change our standard language.

4. §85.004 - Damages

A claimant who prevails in a suit under this chapter may recover actual and, subject to Chapter 41, exemplary damages.

**QQ. Chapter 96 - False Disparagement of
Perishable Food Products**

1. §96.003 - Proof

In determining if information is false, the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts or data.

Query - how would an expert qualify to testify?

**RR. Title 6 - Miscellaneous Provisions
SS. Chapter 121 - Acknowledgments and
Proofs of Written Instruments**

An acknowledgment is a swearing by a designated person that a person, either individually or on behalf of an organization, signed a document. Normally, the acknowledgment for an individual will be for "...the purposes and consideration therein expressed." but there are short forms of acknowledgments that are referred to as 'statutory forms' that are also acceptable. See §§121.007 and 121.008 for the forms. As noted in §121.006 an acknowledgment form provided for in the chapter may be altered as circumstances require. The authorization of a form does not prevent the use of other forms.

1. §121.012 - Record of Acknowledgment
the officer taking the acknowledgment must enter in a well-bound book and officially sign a short statement of each acknowledgment.

2. §121.013 - Subpoena of Witness
On a sworn application of a person interested in the proof of an instrument.

- a. An acknowledgment is not verification. An acknowledgment is the method for authenticating an instrument by showing it was the act of the person executing it, while a verification is a sworn statement as to the truth of the facts stated within an instrument.
- b. In an unpublished opinion, *Hathcox v. Shinke*, 2001 WL 650609, No Publication, (Tex. App.-Texarkana, Jun 13, 2001) (NO. 06-00-00013-CV), the court observed: “A verification is a sworn statement of the truth of the facts stated in the instrument verified. A verification differs from an acknowledgment in that the latter is a method of authenticating an instrument by showing that it was the act of the person executing it. *H.A.M.S. Co. v. Elec. Contractors of Alaska, Inc.*, 563 P.2d 258, 260 (Alaska 1977), opinion supplemented, 566 P.2d 1012 (Alaska 1977).

TT. Chapter 123 - Interception of Communications

1. §123.002 - Cause of Action
A party to a communication may sue a person who (1) intercepts, attempts to intercept or employs or obtains another to intercept or attempts to intercept the communication, (2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication, or (3) as a landlord, building operator, or communication common carrier, either personally or through an agent or employee, aids or knowingly permits interception or attempted interception of the communication.

2. §123.004 - Damages
injunction prohibiting further interception or divulgence or use of information obtained by an interception, \$1,000, actual damages, and punitive

damages in an amount determined by court or jury and reasonable attorney fees and costs.

a. Exemplary not defined as in other Chapters.

3. §123.001 - Definitions

An interception is defined to mean the aural acquisition of the contents of a communication through the use of an electronic, mechanical, or other device that is made without the consent of a party to the communication but does not include the ordinary use of a telephone, a hearing aid designed to correct subnormal hearing to not better than normal, a radio, television or other wireless receiver or a cable system.

UU. Chapter 124 - Privilege to Investigate Theft

1. §124.001 - Detention

A person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to investigate ownership of the property.

VV. Chapter 129 - Age of Majority

1. §129.001 - Age of Majority

The age of majority in this state is 18 years.

2. §129.002 - Rights, Privileges or Obligations

A law, rule, or ordinance enacted or adopted before August 27, 1973, that extends a right, privilege, or obligation to an individual on the basis of a minimum age of 19, 20, or 21 years shall be interpreted as prescribing a minimum age of 18.

3. §129.003. Alcoholic Beverage Code Prevails

The minimum age provisions of the Alcoholic Beverage Code prevail to the extent of any conflict with this chapter.

WW. Chapter 134 - Texas Theft Liability Act

Enacted in 1989 and amended in 1999.

1. §134.003 - Liability

A parent or other person who has the duty of control and reasonable discipline of a child is liable for theft committed by the child.

2. §134.005 - Recovery

For a parent or other person who has the duty of control and reasonable discipline of a child, for an action brought under the section, the amount of actual damages found by the trier of fact not to exceed \$5,000 plus costs and reasonable and necessary attorney fees .

- a. No cases have cited the part of this chapter dealing with a parent's (or other person who has a duty of control and reasonable discipline of a child) liability for theft committed by the child.

XX. Chapter 143 - Harmful Access by Computer

1. §143.001

A person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code (Computers) has a civil cause of action if the conduct prohibited was committed knowing or intentional.

- a. Only one case has cited the statute and it is an unpublished opinion (landlord seized some computers and tenant sued for damages - recover was for over \$240,000). *David Barr Realtors, Inc. v. Sadei*, NO. 03-97-00138-CV (Tex. App.-Austin Jun 25, 1998, no writ) (not designated for publication).

YY. Chapter 147 - Year 2000 Computer Date Failure

For those still concerned about Y2K problems, this is your chapter.

ZZ. Title 7 - Alternate Methods of Dispute Resolution

AAA. Chapter 151 - Trial by Special Judge

Basically, the parties can agree to have a retired or former district, statutory county court or appellate judge who has had at least 4 years experience and was not removed from office and annually demonstrates that he/she has completed at least five days of CLE annually to try all or party of the case.

1. §151.001 - Referral by Agreement
applies to family law matters.

2. §151.009 - Fees and Costs

The parties equally shall pay the special judge's fee and all administrative costs, including a court reporter fee. The cost of a witness called by a party and any other cost related only to a single party's case shall be paid by the party who incurred the costs.

3. §151.010 - Restrictions

A trial under this chapter may not be held in a public courtroom, and a public employee may not be involved in the trial during regular working hours.

4. §151.011 - Special Judge's Verdict

The verdict must comply with the requirement for a verdict by the court and stands as a verdict of the district court. And unless otherwise specified in an order of referral, the special judge shall submit the verdict not later than the 60th day after the day the trial adjourns.

5. §151.012 - New Trial

only if special judge did not submit the verdict within the time period.

6. §151.013 - Right to Appeal

The right to appeal is preserved.

BBB. Chapter 152 - Alternate Dispute Resolution System Established by Counties

CCC. Chapter 154 - Alternative Dispute Resolution Procedures

1. §154.003 - Policy

It is the policy of this state to encourage the peaceable resolution of disputes with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

2. §154.022 - Notification and Objection

- a. If a court determines that a pending dispute is appropriate for referral under section 154.021, the court shall notify the parties of its determination. Any party may, within 10 days after receiving the notice, file a written

objection to the referral. If the court finds that there is a reasonable basis for an objection filed, the court may not refer the dispute.

The types of ADR available under this section are:

3. §154.023 - Mediation

An impartial person facilitates communication between the parties to promote reconciliation, settlement, or understanding among them.

4. §154.024 - Mini - Trial

Only by agreement of the parties and is not binding on the parties unless they agree and enter into written settlement agreement.

5. §154.025 - Moderated Settlement Conference

Non binding arrangement where each party presents the position of the party to a panel of impartial third parties. The panel may issue an advisory opinion regarding the liability or damages of the parties or both.

Summary Jury Trial

Similar to Moderated Settlement Conference except that the presentation is to 6 jurors (or as many as the parties agree).

6. §154.026 - Arbitration

Can be binding by agreement, but if not, then only informational.

DDD. Chapter 171 - Arbitration

a. *Koch v. Koch*, 27 S.W.3d 93 (Tex. App.-San Antonio 2000, no writ), is a case that used arbitration to resolve a divorce matter. The parties had a premarital agreement and a partition agreement approved by declaratory judgment. Subsequently husband filed for divorce and requested the use of the arbitration clause. After the arbitrator rendered a decision, the wife filed a motion for entry of judgment and to enforce the arbitration award. Husband moved the trial court to set the arbitration award aside and to set the matter for trial. Husband prevailed at the trial level and the now ex-wife appealed. Appellate court upheld the arbitration award and found that the

trial court did not follow the correct procedures in vacating the arbitration award.

III. PROPERTY CODE

A. Overview

The Property Code was originally enacted by Acts 1983, 68th Legislature, ch. 576. Its purpose, as stated by Property Code §1.001 is to make property law more or less accessible and understandable by: rearranging statutes into a logical order; employing a formal numbering system; eliminating repealed, duplicative, unconstitutional, expired and otherwise ineffective provisions; and restating the law in “modern American English.”

B. Chapter 5 – Miscellaneous Real Estate Transaction Provisions.

1. Guardian of the Estate of the Child and the Sale of Real Estate – Prop. Code §5.008.

Typically a person who is selling real property is required to complete a Notice of Condition of Property for a purchaser of the property. Prop. Code §5.008(f). This is not the case if the person is a Guardian of the estate of the child. See Prop. Code §5.008(e)(f). To the extent that a Guardian ad litem from a family court finds himself or herself in the position of having to sell real property on behalf of a child, this section may come in handy.

2. Inception of Title Without a Contract for Sale of Real Property

It is generally accepted that the date of execution of a contract for sale of real estate is the date of inception of title. *Carter v. Carter*, 736 S.W.2d 775, 779-780. (Tex. App.—Houston [14th Dist.] 1987 no writ). In the event there is no preceding contract for sale, the date of inception of title then becomes the time that the grantor signs and delivers a deed to the property, intending the instrument as a conveyance. See Prop. Code §5.01.

3. Necessity for Legal Description in Transferring Real Property.

To satisfy the requirements of the statute of frauds, a property settlement agreement must contain, or incorporate by reference, a full legal description of all the real property to be conveyed or released. Bus. Comm. Code §26.01(b)(4); Prop.

Code §5.021. If a legal description is not available at the time of settlement, then the description of the property should detail who owns the property, and the amount of land involved. *See Wilson v. Fisher*, 188 S.W.2d 150, 152-154 (1945). These can be found on the internet through the appropriate appraisal district web site.

C. Chapter 12 – Effecting Transfers of Real Property – Recording Requirements

1. Effecting the Transfer of Real Estate.

Assuming the parties are amenable to settlement, division of property is a simple enough proposition. Effecting that division is another story. The transfer of real property requires thinking on the part of lawyers that involves more than reciting transfer language in an agreement or a decree.

2. 12.001 et. seq. The Requirement of Recording.

When dividing property between divorcing parties, sometimes the settlement agreement acts (or is intended to act) as a muniment of title for the transfer of property. Keep in mind that there are minimum requirements that must be met for the transfer of real property if you intend to rely on a settlement agreement alone for the transfer. For example, if real property is divided in an agreement, in order for it to act as the transferring document, it must be acknowledged before a notary public so it can be recorded. Prop. Code §12.001. If a notary is not available, then two credible subscribing witnesses will suffice. Prop. Code §12.002(b).

Once properly executed, the property settlement agreement or the actual document transferring ownership should be recorded in the deed records of the county where the real property is located. Prop. Code §12.002(a).

D. Failure to Record (Just a Tad of Chapter 13)

Failure to record a real property transfer document (settlement agreement, deed or otherwise) will result in the conveyance being void as against a creditor or subsequent purchaser without knowledge. Prop. Code §13.001(a). **DO NOT FORGET TO RECORD REAL ESTATE DOCUMENTS!**

E. Requirements for Recording Other Documents.

While it is not a requirement to record marital property agreements, recording of such agreements may be done. Tex. Fam. Code §4.106(b). If you seek to record marital property agreements, an acknowledgment is necessary in the document. *See* Prop. Code §12.001(a). If the agreement partitions or exchanges property the document may be recorded in the county where a party resides. Tex. Fam. Code §4.106(b). If the agreement concerns real property, it may be recorded in the county where the real property is located. Tex. Fam. Code 4.106(b); Prop. Code §12.001(a). If an agreement to convert separate property to community property involves real property, it may be recorded in the county where a party resides and in the county in which any real property is located. Tex. Fam. Code §4.203(b).

The same requirement of acknowledgment (for the purpose of recordation) applies to non-marital cohabitation agreements as well. *See* Prop. C. §12.001(a).

F. Chapter 23 – Post Decree Partition of Property (Or Just Plain Ol’ “Partition?”)

In the event there exists property to be divided by the court after rendition of a decree, a party may file a suit for partition. As with any other community property division, the court must make a just and right division of this property. Tex. Fam. Code §§ 9.203, 9.204. In this situation, the court will proceed as in any partition case under the property code. That is, the property may be partitioned in kind or ordered sold and proceeds divided between the parties. *See* Prop. Code §§ 23.001-23.005.

G. Chapter 41 – Exempt Property – Interests in Land

The provisions of Chapter 41 of the Property Code can find its origins in the Texas Constitution, Art. XVI, § 50, which provides protection of the homestead against creditors. This chapter should be carefully considered when dividing the marital estate of the parties, or enforcing child support liens.

1. §41.001 – Interests in Land Exempt from Seizure.

§41.001 of the Texas Property Code provides in part:

a. “A homestead and one or more lots used for burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.”

b. “Homestead” is defined as follows:

(1) For an urban home or an urban home and a place to exercise a calling or a business....

“not more than 10 acres of land which may or may not be in one or more lots, together with any improvements thereon.” Prop. Code §41.002(a).

(2) For a rural home for a family...

“not more than 200 acres, which may be in one or more parcels, with improvements thereon.” Prop. Code §41.002(b)(1).

(3) For a rural home for a single person (not a member of a family).

“not more than 100 acres, which may be in one or more parcels, with improvements thereon.” Prop. Code §41.002(b)(2).

Further, if the homestead is sold, the proceeds of the sale are not subject to seizure for a creditor’s claim for six months. Prop. Code §41.001(c).

H. Encumbrances Properly Fixed on a Homestead

Of the types of encumbrances properly fixed on homestead property, divorce money judgments and child support liens are not among them. *See* Prop. Code §41.001(b).

While money judgments may not properly encumber a homestead, a vendor’s lien imposed pursuant to a division of property in a decree may. *See Magallanez v. Magallanez*, 911 S.W.2d 91 (Tex. App. – El Paso 1995, no writ). Further,

§41.001 does permit certain encumbrances related to a divorce on a homestead. The are:

an owelty of partition imposed against the entirety of the property by a court order, or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding.”

I. Chapter 42 – Exempt Property – Personal Property

Chapter 42 of the Property Code exempts certain personal property from garnishment, execution or other seizure subject to certain requirements.

1. Personal Property that is Exempt.

The personal property that is exempt from seizure is property that is

a. For a Family:

(1) provided for a family, and has an aggregate value of \$60,000.00 or less (exclusive of liens, security interests, or other charges encumbering the property).

b. For a Single Person:

(1) is owned by a single adult (not a member of a family)

(2) has an aggregate value of \$30,000.00 or less (exclusive of liens, security interests, or other charges encumbering the property)

2. §42.001 (b) Property not Subject to Aggregate Limitations

The following personal property is exempt from seizure and is not included in the aggregate limitations above:

a. current wages, **except for child support**

b. professionally prescribed health aids

c. alimony, support separate maintenance received or to be received by the debtor for support of the debtor or a dependent of the debtor.

3. §42.002 – Specific Personal Property Exempt from Execution.

The following personal property (subject to the aggregate limitations prescribed in §42.001) is exempt under §42.001(a):

- a. home furnishings, including family heirlooms;
- b. provisions for consumption;
- c. farming or ranching vehicles and implements;
- d. tools, equipment, books, and apparatus, including boats and motor vehicles used in a trade or profession;
- e. wearing apparel;
- f. jewelry not to exceed 25 percent of the aggregate limitations prescribed by section 42.001(a)
- g. two firearms;
- h. athletic and sporting equipment, including bicycles;
- i. specific types of motor vehicles
- j. certain animals and forage on hand for their consumption; and
- k. household pets.

4. §42.0021 Additional Exemption for Retirement Plan

§42.0021 of the Property Code provides additional protection of retirement plans from execution.

5. §42.005 Child Support Liens

Perhaps the most important part of Chapter 42 is what otherwise exempt personal property is **not** protected against: child support liens established under Subchapter G, Chapter 157 of the Family Code.

a. More than one way to skin a cat....

It is important to remember that there is more than one way to obtain a child support lien. The most traditional way is through a court order subsequent to a hearing on a Motion to Enforce Child Support. The Family Code also provides for obtaining a child support lien through an administrative order. Tex. Fam. Code § 157.312 (d)(2) or through a Judicial Writ of Withholding.

An administrative order is obtained in a Title IV-D case where a Title IV-D agency determines the amount of arrearage owed by a child support obligor. Tex. Fam. Code §157.312(d)(2).

On the other hand, a judicial writ of withholding may be obtained when an obligee files and serves a notice of application for judicial writ of withholding, and no motion to stay has been filed by the obligor within a certain time limit. Tex. Fam. Code § 158.312. The unpaid support stated in the judicial writ is a statutory judgment, and may be secured by a child support lien Tex. Fam. Code § 157.261(a).

J. Chapter 52 – Enforcement of Money Judgments

While it is desirable to divide all property between the parties at the time of divorce and complete all transactions between them at or before that time, sometimes it is just not feasible. A judgment may be entered against a party, and eventually that party may fail to perform in conformity with the decree. In that event, it becomes necessary to enforce the judgment. The judgment should always be abstracted and recorded in any county in which the other party has real property. By filing an abstract of judgment in the county records, a lien may be imposed on the other party's nonexempt real estate. See Prop. Code §52.001. The attorney of the judgment creditor (or in the case of a child support lien – the obligee) may prepare the abstract in the form prescribed in §52.003 of the Texas Property Code.

**IV. TEXAS TRUST CODE – CHAPTER 111
–GENERAL PROVISIONS**

A. Why you should know about the Texas Trust Code

Some divorcing couples inevitably will have planned for their futures in the form of estate planning. Many types of estate plans involve trusts that hold significant portions of assets. Some families, in an effort to protect the separate character of their assets and subsequent income for their children, will make the children the beneficiaries of a family trust. Some of these children grow up, get married and get divorced. When handling an estate that involves trusts, it is imperative to understand some basic rules. The Texas Trust Code (Title 9, Subtitle B of the Texas Property Code) is where you should turn to learn some of these rules.

Furthermore, the Trust Code does not take into consideration that a couple preparing an estate plan might someday get a divorce. (See Prop. Code, Chapter 111). Unless the trust itself has provisions that deal with this contingency, then there is a need to review the terms of a revocable trust where one spouse is the grantor and the other spouse is a beneficiary. In any event, if there is a third party trustee, then that person must be informed that a divorce is occurring between the parties to determine what, if any, consequences of a divorce would be.

B. Trusts subject to the Texas Trust Code

The Texas Trust Code applies only to express trusts and does not apply to resulting trusts; constructive trusts; business trusts; or security instruments (such as a deed of trust, mortgage, or security interest defined by the Business & Commerce Code). Prop. Code §111.003.

C. Texas Trust Code – Chapter 112 – Creation, Validity, Modification, and Termination of Trusts

1. Does An Express Trust Exist?

The threshold question when dealing with trusts is whether an express trust actually exists. A trust that involves any real property at all is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. Prop. Code §112.004. If the trust only involves personal property, then it is also enforceable if created by 1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or 2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary. Prop. Code §112.004. If any of these requirements do not exist, then (depending on where you stand in relation to the trust) you will either have some problems defending it, or a way to defeat it. Either way, it is important to know what you are dealing with.

D. Revocation, Modification, and Termination of Trusts.

Title 9, Subchapter C of the Texas Property Code deals with the revocation, modification and termination of Trusts. Section 112.052 deals specifically with the termination of trusts, while section 112.054 deals with the judicial modification of trusts.

Section 112.054 grants authority to the court to modify the terms of the trust or terminate it all together if compliance with the terms of the trust would defeat or substantially impair the accomplishment of the purposes of the trust because of circumstances not known to or anticipated by the settlor. If a divorce was not anticipated by the settlor of the trust, this provision would be helpful to get to property otherwise out of reach of either spouse.

E. Chapter 141 – Transfers to Minors.

Chapter 141 of the Texas Property Code governs transfers of property to minors. To the extent that you represent children to protect their property interests, it is important to become familiar with the terms of Chapter 141. It is not unheard of for a party to fraudulently dispose of assets that belong to their children. This chapter contains provisions to protect children from this type of activity.

1. §141.020 Accounting by and Determination of Liability

A minor who is at least 14 or the minor's guardian or an adult member of the minor's family (among others) may petition the court for an accounting by the custodian or the custodian's legal representative. §141.020(a)(1).

V. BUSINESS & COMMERCE CODE

A. Title 1. Uniform Commercial Code (Bus. & Com. Code Chapters 1 - 11)

1. §§ 2.101 - 2.725 Sales

This chapter is a complete revision of the Uniform Sales Act and is more extensive than the old act. It governs contracts for sale and the various steps of the contract's performance.

2. §§ 2A.101 - 2A.532 Leases

This chapter (1) defines a lease as distinguished from a security interest, (2) distinguishes the warranty law with respect to leases from the express and implied warranties that apply to a sale, and (3) provides remedies available to a lessor upon the lessee's default.

B. Subchapter D Liability of the Parties - §§ 3.101 - 3.605 Negotiable Instruments

1. §§ 3.401 - 3.420

A person is not liable on an instrument unless the person or his agent signed the instrument. An unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value.

An unauthorized signature may be ratified for all purposes of this chapter.

2. §§ 9.101 - 9.507 Secured Transactions (Effective until July 1, 2001)

Be careful! These sections have been superseded (see below).

3. §§ 9.101 - 9.628 Secured Transactions (Effective after July 1, 2001)

There has been a substantial reorganization and renumbering of most sections. It still provides a comprehensive scheme for regulation of security interests in personal property and fixtures.

C. Title 2. Competition and Trade Practices (Bus. & Com. Code Chapters 15 - 20)

D. §§ 17.01 - 17.854 Deceptive Trade Practices

E. Subchapter E - Deceptive Trade Practices and Consumer Protection (§§ 17.41 - 17.63)

1. § 17.46 Deceptive Trade Practices Unlawful

"False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division...." The statute enumerates 25 acts which are among those

which will be considered "deceptive acts." The acts most likely to concern lawyers are:

- a. causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of.....services;
- b. causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- c. using deceptive representations...in connection with....services;
- d. representing thatservices have sponsorship, approval, characteristics,uses, benefits...which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;
- e. representing that ...services are of a particular standard [or] quality...if they are of another;
- f. disparaging theservices or business of another by false or misleading representation of facts;
- g. representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; and
- h. the failure to disclose information concerningservices which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

F. Title 3. Insolvency, Fraudulent Transfers, and Fraud (Bus. & Com. Code Chapters 23 - 27)

G. Chapter 23 - Assignments for the Benefit of Creditors (§§ 23.01 - 23.33)

1. § 23.09 Fraud Does Not Defeat Assignment

An assignment is not affected and a consenting creditor is not deprived of his proportionate share of the assigned estate by the fraudulent act of intent of

the assigning debtor or assignee. A consenting creditor is a proper party to a suit filed to enforce a right under an assignment, or to protect an interest in an assigned estate.

H. Chapter 24 - Uniform Fraudulent Transfer Act (§§ 24.001 - 24.012)

1. Actual Fraud in the Context of Divorce - Intent Required

Texas law allows recovery in tort for a spouse's fraudulent behavior. *Schlueter v. Schlueter*, 929 S.W.2d 94 (Tex. App.--Austin 1996, writ granted); *Vickery v. Vickery*, 1997 WL 751995 (Tex. App.--Houston [1st Dist.] 1997) (not designated for publication). Actual fraud requires an intent to harm by transferring or expending community property to deprive the other spouse of the use and enjoyment of the assets involved in the transaction. *In re the Marriage of DeVine*, 869 S.W.2d 415, 421 (Tex. App.--Amarillo 1993, writ denied). The Pattern Jury Charge states that actual fraud involves dishonesty of purpose or intent to deceive. Texas Pattern Jury Charge 206.02a.

a. Independent or Extrinsic Wrong

Actual fraud is an intentional tort permitted as an independent cause of action in a divorce suit. It is an extrinsic wrong for which recovery is allowed apart from an unequal disposition of the marital property. *Vickery v. Vickery*, 1997 WL 751995 (Tex. App.--Houston [1st Dist.] 1997) (not designated for publication).

b. Recoverable From the Separate Estate

Unlike fraud on the community, actual fraud is committed against a spouse individually. The case of *Vickery v. Vickery* held that in the case of actual fraud damages are recoverable by one party's separate estate in favor of the other party's separate estate. *Vickery* at 16. Therefore, the damages awarded for actual fraud are not considered in the just and right division of the community estate.

Third parties are held jointly and severally liable for actual fraud along with the fraudulent spouse if there is sufficient evidence to prove that they know about the spouse's fraudulent intent to injure the other spouse's rights. *Thomas v. Casale*, 924

S.W.2d 433, 437 (Tex. App.--Fort Worth, 1996, writ denied).

2. The Uniform Fraudulent Transfer Act

The Uniform Fraudulent Transfer Act protects creditors who have a claim for property that is fraudulently transferred. The Act provides that a transfer made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made, if the debtor made the transfer (1) with actual intent to hinder, delay, or defraud any creditor or (2) without receiving a reasonably equivalent value in exchange for the transfer, and the debtor (a) was engaged in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (b) intended to incur debts beyond the debtor's ability to pay as they became due. Tex. Bus. & Com. Code Ann. § 24.005 (Vernon 1987). The Act also provides that a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer. Tex. Bus. & Com. Code Ann. § 24.006 (Vernon 1987).

Although the definition of "creditor" in section 24.002(4) of the Act includes a spouse who has a claim for property fraudulently transferred by the other spouse, the transfer must be made to intentionally defraud the spouse, cause the transferor to become insolvent, or leave the transferor with "unreasonably small" assets or debts beyond his ability to pay. In the absence of such evidence, the Act does not apply. *Thomas v. Casale*, 924 S.W.2d 433, 437 (Tex. App.--Forth Worth 1996, writ denied).

3. § 24.008 - Remedies of Creditors

A creditor may:

- a. avoid the transfer or obligation to the extent necessary to satisfy the creditor's claim;
- b. attach the asset transferred or other property of the transferee;

- c. obtain an injunction against further disposition by the debtor or a transferee of the asset transferred or of other property;
- d. obtain the appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
- e. obtain such other relief the circumstances may require!

4. Constructive Fraud Distinguished

a. Equitable Theory

Constructive fraud does not constitute a tortious wrong, but it does give rise to an equitable right of reimbursement to the community of the property improperly transferred or alienated or a sum equal to the value of the property. *In re Marriage of Moore*, 890 S.W.2d 821 (Tex. App.--Amarillo 1994, no writ.). Many actions between spouses do not rise to the level of actual fraud because there is no intent to deceive. Constructive fraud is an equitable doctrine employed by courts to rectify an injury resulting from the breach of a fiduciary relationship. *Carnes v. Meador*, 533 S.W.2d 365 (Tex. Civ. App.--Dallas 1975, writ refused n.r.e.). It is constructively fraudulent for one spouse to dispose of the other spouse's interest in community property without the other's knowledge or consent. Both actual and constructive fraud have been awarded in a suit for divorce. *In re Marriage of DeVine*, 869 S.W.2d 415 (Tex. App.--Amarillo 1993, writ denied).

5. Spouse's Approval Bears on Court's Discretion

While a spouse's knowledge of an expenditure does not preclude a claim for reimbursement, the fact that a non-transferor spouse expressed approval may have a significant impact on the court's exercise of discretion in determining whether there is a right of reimbursement. *Zieba v. Martin*, 928 S.W.2d 782 (Tex. App.--Houston [14th Dist.] 1996, no writ). In *Zieba* the court concluded that despite evidence that a wife knew of her husband's withdrawal of funds and did not question him about it, this was "no evidence" of consent to the expenditure of the withdrawn funds. *Zieba*, 928 S.W.2d at 790.

In *DeVine*, the evidence showed that the husband knew of the transfers of money for ostensibly legitimate business investments. What he did not know was that the third party investor was his wife's paramour. Complete knowledge of the relationship of the transferee and the spouse is critical!

6. Pleadings

a. Plead Fraud With Specificity

A cause of action at law (e.g., fraud) consists of the existence of a right in the plaintiff and an invasion of that right by some act or omission on the part of the defendant, and, when necessary for recovery according to the substantive law, the consequent damages. William V. Dorsaneo, III & David Crump, *TEXAS CIVIL PROCEDURE: PRETRIAL LITIGATION* (3rd ed. 1989). Since facts must be alleged to establish the existence of the right and its violation, fraudulent acts or omissions must be contained in the pleading with enough specificity to establish the cause of action to claim the legal remedy of damages.

b. Notice Pleading for Constructive Fraud

In order to obtain an equitable right of reimbursement to the community estate, pleadings for constructive fraud (e.g., fraud on the community) need only contain enough facts to provide the defendant with fair notice of the claim involved and the relief requested.

I. Chapter 26 Statute of Frauds (§§ 26.01 - 26.02)

Certain promises or agreements (or a memorandum of the promise) must be in writing and signed by the person to be charged with the promise to be enforceable. Those likely to be of most interest to family lawyers are:

- a. a promise by one person to answer for the debt, default, or miscarriage of another person;
- b. an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;
- c. a contract for the sale of real estate;

- d. a lease of real estate for a term longer than one year;
- e. an agreement which is not to be performed within one year from the date of making the agreement; and
- f. a loan agreement in which the amount involved exceeds \$50,000 in value.
- h. sale after negotiations at a business establishment at a fixed location where goods or services are offered or exhibited for sale;
- i. sale of real property if the purchaser is represented by a licensed attorney;
- j. sale of real property negotiated by a licensed real estate broker; or

J. Title 4. Miscellaneous Commercial Provisions (Business & Commerce Code Chapters 33 - 42)

1. §§ 39.001-39.009 Cancellation of Certain Consumer Transactions

Can a spouse seek a cancellation of a purchase that he or she considers a waste of the community? In a divorce, very quick action could result in a court order requiring a spouse to cancel certain purchases, and the creditor must honor the cancellation under the Business and Commerce Code. “Consumers” may cancel certain “consumer transactions” by midnight of the 3rd business day after the date the consumer signs an agreement or offer to purchase if:

- a. there is a personal solicitation of a sale at a place other than the merchant’s place of business;
- b. the consumer’s agreement or offer to purchase is given to the merchant at a place other than the merchant’s place of business;
- c. the transaction is for goods or services to be purchased for more than \$25; or
- d. for the purchase of real property for more than \$100.

The cancellation provisions above specifically **do not apply** to the following transactions:

- e. purchase of farm equipment;
- f. an insurance sale regulated by the Texas Department of Insurance;
- g. sale of goods or services made under preexisting revolving or retail charge account;

- k. sale of real property if the transaction is negotiated at a place other than the consumer’s residence by the person who owns the property.

VI. FINANCE CODE

1. §59.006

The exclusive method to compel discovery of a record of a financial institution relating to one or more of its customers.

The financial institution shall produce a record in response to a record request only if:

- a. It is served with the record request at least 24 days before the date for production;
- b. It receives payment of the reasonable costs of complying with the record request including costs of reproduction, postage, research, delivery, and attorney’s fees, or the posting of a cost bond in the amount estimated by the financial institution to cover the costs;
- c. unless the customer is the one requesting the information, then the customer must also be given notice, a copy of the portion of the statute detailing the customers rights, and a copy of the request (pursuant to Rule 21, T.R.C.P., and also file a certificate of service with the court and the financial institution; and
- d. Request that the customer give written consent authorizing the financial institution to comply with the request.

Besides the 24 day notice requirement, the records may not be required to be produced prior to the 15th day after the date of receipt of a customer consent or the 15th day after the date a court orders

production of a record after any in camera inspections.

2. § 59.008. Claims Against Customers of Financial Institutions

- a. A claim against a customer of a financial institution shall be delivered or served as otherwise required or permitted by law at the address designated as the address of the registered agent of the financial institution in a registration filed with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution.
- b. If a financial institution files a registration statement with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, a claim against a customer of the financial institution is not effective as to the financial institution if the claim is served or delivered to an address other than that designated by the financial institution in the registration as the address of the financial institution's registered agent.
- c. The customer bears the burden of preventing or limiting a financial institution's compliance with or response to a claim subject to this section by seeking an appropriate remedy, including a restraining order, injunction, protective order, or other remedy, to prevent or suspend the financial institution's response to a claim against the customer.
- d. A financial institution that does not file a registration with the secretary of state pursuant to Section 201.102, with respect to an out-of-state financial institution, or Section 201.103, with respect to a Texas financial institution, is subject to service or delivery of all claims against customers of the financial institution as otherwise provided by law."

VII. PENAL CODE

With the assistance of an attorney versed in criminal law and also based on references to the Penal Code in the other Codes, the following excerpts from the Penal Code are relevant to being able to speak in codes.

A. Injury to a Person

1. §22.01. Assault, Texas Penal Code

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;
 - (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or
 - (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.
- (b) An offense under Subsection (a)(1) is a Class A misdemeanor, except that the offense is a felony of the third degree if the offense is committed against:
 - (1) a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; or
 - (2) a member of the defendant's family or household, if it is shown on the trial of the offense that the defendant has been previously convicted of an offense against a member of the defendant's family or household under this section.
- (c) An offense under Subsection (a)(2) or (3) is a Class C misdemeanor, except that an offense under Subsection (a)(3) is a Class A misdemeanor if the offense was committed against an elderly individual or disabled individual, as those terms are defined by Section 22.04.

- (d) For purposes of Subsection (b), the actor is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant.

In this section:

- (1) "Family" has the meaning assigned by Section 71.003, Family Code.
- (2) "Household" has the meaning assigned by Section 71.005, Family Code.

- (e) For the purposes of this section, a defendant has been previously convicted of an offense against a member of the defendant's family or a member of the defendant's household under this section if the defendant was adjudged guilty of the offense or entered a plea of guilty or nolo contendere in return for a grant of deferred adjudication, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the defendant was subsequently discharged from community supervision.

(Excerpt from: Tex. Penal Code § 22.01, pages 1 - 3.)

2. 20.04. Aggravated Kidnaping

- (a) A person commits an offense if he intentionally or knowingly abducts another person with the intent to:
 - (1) hold him for ransom or reward;
 - (2) use him as a shield or hostage;
 - (3) facilitate the commission of a felony or the flight after the attempt or commission of a felony;
 - (4) inflict bodily injury on him or violate or abuse him sexually;
 - (5) terrorize him or a third person; or
 - (6) interfere with the performance of any governmental or political function.
- (b) A person commits an offense if the person intentionally or knowingly abducts another

person and uses or exhibits a deadly weapon during the commission of the offense.

- (c) Except as provided by Subsection (d), an offense under this section is a felony of the first degree.
- (d) At the punishment stage of a trial, the defendant may raise the issue as to whether he voluntarily released the victim in a safe place. If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree.

(Excerpt from the Tex. Penal Code § 20.04, pages 1 - 2.)

3. 22.02. Aggravated Assault

- (a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:
 - (1) causes serious bodily injury to another, including the person's spouse; or
 - (2) uses or exhibits a deadly weapon during the commission of the assault.
- (b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if the offense is committed:
 - (1) by a public servant acting under color of the servant's office or employment;
 - (2) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; or
 - (3) in retaliation against or on account of the service of another as a witness, prospective witness, informant, or person who has reported the occurrence of a crime.
- (c) The actor is presumed to have known the person assaulted was a public servant if the person was wearing a distinctive

uniform or badge indicating the person's employment as a public servant.

(Excerpt from: Tex. Penal Code § 22.02, pages 1 - 2.)

4. 22.011. Sexual Assault

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;

(B) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(C) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(2) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of a child by any means;

(B) causes the penetration of the mouth of a child by the sexual organ of the actor;

(C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

(b) A sexual assault under Subsection (a)(1) is without the consent of the other person if:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

(2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge;

(7) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat;

(8) the actor is a public servant who coerces the other person to submit or participate;

(9) the actor is a mental health services provider or a health care services provider who causes the other person, who is a patient or former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor; or

(10) the actor is a clergyman who causes the other person to submit or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual adviser.

(c) In this section:

(1) "Child" means a person younger than 17 years of age who is not the spouse of the actor.

- (2) "Spouse" means a person who is legally married to another.
- (3) "Health care services provider" means:
- (A) a physician licensed under the Medical Practice Act (Article 4495b, Vernon's Texas Civil Statutes);
 - (B) a chiropractor licensed under Chapter 94, Acts of the 51st Legislature, Regular Session, 1949 (Article 4512b, Vernon's Texas Civil Statutes);
 - (C) a licensed vocational nurse licensed under Chapter 118, Acts of the 52nd Legislature, 1951 (Article 4528c, Vernon's Texas Civil Statutes);
 - (D) a physical therapist licensed under Chapter 836, Acts of the 62nd Legislature, Regular Session, 1971 (Article 4512e, Vernon's Texas Civil Statutes);
 - (E) a physician assistant licensed under the Physician Assistant Licensing Act (Article 4495b-1, Vernon's Texas Civil Statutes); or
 - (F) a registered nurse or an advanced practice nurse licensed under Chapter 7, Title 71, Revised Statutes.
- (4) "Mental health services provider" means an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a:
- (A) licensed social worker as defined by Section 50.001, Human Resources Code;
 - (B) chemical dependency counselor as defined by Section 1, Chapter 635, Acts of the 72nd Legislature, Regular Session, 1991 (Article 4512o, Vernon's Texas Civil Statutes);
 - (C) licensed professional counselor as defined by Section 2, Licensed Professional Counselor Act (Article 4512g, Vernon's Texas Civil Statutes);
 - (D) licensed marriage and family therapist as defined by Section 2, Licensed Marriage and Family Therapist Act (Article 4512c-1, Vernon's Texas Civil Statutes);
 - (E) member of the clergy;
 - (F) psychologist offering psychological services as defined by Section 2, Psychologists' Licensing Act (Article 4512c, Vernon's Texas Civil Statutes); or
 - (G) special officer for mental health assignment certified under Section 415.037, Government Code.
- (d) It is a defense to prosecution under Subsection (a)(2) that the conduct consisted of medical care for the child and did not include any contact between the anus or sexual organ of the child and the mouth, anus, or sexual organ of the actor or a third party.
- (e) It is an affirmative defense to prosecution under Subsection (a)(2) that:
- (1) the actor was not more than three years older than the victim and at the time of the offense:
 - (A) was not required under Chapter 62, Code of Criminal Procedure, as added by Chapter 668, Acts of the 75th Legislature, Regular Session, 1997, to register for life as a sex offender; or
 - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section; and
 - (2) the victim was a child of 14 years of age or older.
- (f) An offense under this section is a felony of the second degree.
- (Excerpt from: Tex. Penal Code § 22.011, pages 1 - 6.)
5. 22.021. Aggravated Sexual Assault
- (a) A person commits an offense:
 - (1) if the person:
 - (A) intentionally or knowingly:
 - (i) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;
 - (ii) causes the penetration of the mouth of another person by the

- sexual organ of the actor, without that person's consent; or
- (iii) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
- (B) intentionally or knowingly:
- (i) causes the penetration of the anus or female sexual organ of a child by any means;
- (ii) causes the penetration of the mouth of a child by the sexual organ of the actor;
- (iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
- (iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
- (v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and
- (2) if:
- (A) the person:
- (i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;
- (ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnaping will be imminently inflicted on any person;
- (iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnaping of any person;
- (iv) uses or exhibits a deadly weapon in the course of the same criminal episode;
- (v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or
- (vi) administers or provides flunitrazepam, otherwise known as rohypnol, or gamma hydroxybutyrate to the victim of the offense with the intent of facilitating the commission of the offense;
- (B) the victim is younger than 14 years of age; or
- (C) the victim is 65 years of age or older.
- (b) In this section, "child" has the meaning assigned that term by Section 22.011(c).
- (c) An aggravated sexual assault under this section is without the consent of the other person if the aggravated sexual assault occurs under the same circumstances listed in Section 22.011(b).
- (d) The defense provided by Section 22.011(d) applies to this section.
- (e) An offense under this section is a felony of the first degree.
- (Excerpt from Tex. Penal Code § 22.021, pages 1 - 3.)
6. 22.04. Injury to a Child, Elderly Individual, or Disabled Individual
- (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:
- (1) serious bodily injury;
- (2) serious mental deficiency, impairment, or injury; or
- (3) bodily injury.

- (b) An omission that causes a condition described by Subsections (a)(1) through (a)(3) is conduct constituting an offense under this section if:
- (1) the actor has a legal or statutory duty to act; or
 - (2) the actor has assumed care, custody, or control of a child, elderly individual, or disabled individual.
- (c) In this section:
- (1) "Child" means a person 14 years of age or younger.
 - (2) "Elderly individual" means a person 65 years of age or older.
 - (3) "Disabled individual" means a person older than 14 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.
- (d) The actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual.
- (e) An offense under Subsection (a)(1) or (2) is a felony of the first degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly it shall be a felony of the second degree.
- (f) An offense under Subsection (a)(3) is a felony of the third degree when the conduct is committed intentionally or knowingly. When the conduct is engaged in recklessly it shall be a state jail felony.
- (g) An offense under Subsection (a) when the person acts with criminal negligence shall be a state jail felony.
- (h) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either or both sections. Section 3.04 does not apply to criminal episodes prosecuted under both this section and another section of this code. If a criminal episode is prosecuted under both this section and another section of this code and sentences are assessed for convictions under both sections, the sentences shall run concurrently.
- (i) It is an affirmative defense to prosecution under Subsection (b)(2) that before the offense the actor:
- (1) notified in person the child, elderly individual, or disabled individual that he would no longer provide any of the care described by Subsection (d); and
 - (2) notified in writing the parents or person other than himself acting in loco parentis to the child, elderly individual, or disabled individual that he would no longer provide any of the care described by Subsection (d); or
 - (3) notified in writing the Department of Protective and Regulatory Services that he would no longer provide any of the care set forth in Subsection (d).
- (j) Written notification under Subsection (i)(2) or (i)(3) is not effective unless it contains the name and address of the actor, the name and address of the child, elderly individual, or disabled individual, the type of care provided by the actor, and the date the care was discontinued.
- (k) (1) It is a defense to prosecution under this section that the act or omission consisted of:
- (A) reasonable medical care occurring under the direction of or by a licensed physician; or
 - (B) emergency medical care administered in good faith and with reasonable care by a person not licensed in the healing arts.
- (2) It is an affirmative defense to prosecution under this section that the act

or omission was based on treatment in accordance with the tenets and practices of a recognized religious method of healing with a generally accepted record of efficacy. It is an affirmative defense to prosecution for a person charged with an act of omission under this section causing to a child, elderly individual, or disabled individual a condition described by Subsection (a)(1), (2), or (3) that:

(A) there is no evidence that, on the date prior to the offense charged, the defendant was aware of an incident of injury to the child, elderly individual, or disabled individual and failed to report the incident; and

(B) the person:

(i) was a victim of family violence, as that term is defined by Section 71.004, Family Code, committed by a person who is also charged with an offense against the child, elderly individual, or disabled individual under this section or any other section of this title;

(ii) did not cause a condition described by Subsection (a)(1), (2), or (3); and

(iii) did not reasonably believe at the time of the omission that an effort to prevent the person also charged with an offense against the child, elderly individual, or disabled individual from committing the offense would have an effect.

(Excerpt from the Tex. Penal Code § 22.04, pages 1 - 5.)

7. 22.041. Abandoning or Endangering Child

(a) In this section, "abandon" means to leave a child in any place without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability.

(b) A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm.

(c) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment.

(d) Except as provided by Subsection (e), an offense under Subsection (b) is:

(1) a state jail felony if the actor abandoned the child with intent to return for the child; or

(2) a felony of the third degree if the actor abandoned the child without intent to return for the child.

(e) An offense under Subsection (b) is a felony of the second degree if the actor abandons the child under circumstances that a reasonable person would believe would place the child in imminent danger of death, bodily injury, or physical or mental impairment.

(f) An offense under Subsection (c) is a state jail felony.

(g) It is a defense to prosecution under Subsection (c) that the act or omission enables the child to practice for or participate in an organized athletic event and that appropriate safety equipment and procedures are employed in the event.

(h) It is an affirmative defense to prosecution under Subsection (b) that the actor voluntarily delivered the child to an emergency medical services provider under Section 262.301, Family Code.

(Excerpt from Tex. Penal Code § 22.041, pages 1 - 3.)

8. 22.05. Deadly Conduct

(a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.

(b) A person commits an offense if he knowingly discharges a firearm at or in the direction of:

- (1) one or more individuals; or
- (2) a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied.

(c) Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded.

(d) For purposes of this section, "building," "habitation," and "vehicle" have the meanings assigned those terms by Section 30.01.

(e) An offense under Subsection (a) is a Class A misdemeanor. An offense under Subsection (b) is a felony of the third degree.

(Excerpt from Tex. Penal Code § 22.05, pages 1 - 2.)

B. Crimes Involving Property

1. 32.45. Misapplication of Fiduciary Property or Property of Financial Institution

(a) For purposes of this section:

- (1) "Fiduciary" includes:
 - (A) trustee, guardian, administrator, executor, conservator, and receiver;
 - (B) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 153.001, Tax Code; and
 - (C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) "Misapply" means deal with property contrary to:

- (A) an agreement under which the fiduciary holds the property; or
- (B) a law prescribing the custody or disposition of the property.

(b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

(c) An offense under this section is:

- (1) a Class C misdemeanor if the value of the property misapplied is less than \$20;
- (2) a Class B misdemeanor if the value of the property misapplied is \$20 or more but less than \$500;
- (3) a Class A misdemeanor if the value of the property misapplied is \$500 or more but less than \$1,500;
- (4) a state jail felony if the value of the property misapplied is \$1,500 or more but less than \$20,000;
- (5) a felony of the third degree if the value of the property misapplied is \$20,000 or more but less than \$100,000;
- (6) a felony of the second degree if the value of the property misapplied is \$100,000 or more but less than \$200,000; or
- (7) a felony of the first degree if the value of the property misapplied is \$200,000 or more.

2. §32.47 - fraudulent destruction, removal or concealment of writing

(Excerpt from Tex. Penal Code §§ 32.45 and 32.47, pages 1 - 4.)

C. Chapter 37. Perjury and Other Falsification

This is the chapter that deals with the following types of criminal "lying." You may find these Penal Code sections useful in some of your cases.

1. 37.01. Definitions
2. 37.02. Perjury
3. 37.03. Aggravated Perjury
4. 37.04. Materiality
5. 37.05. Retraction
6. 37.06. Inconsistent Statements
7. 37.07. Irregularities No Defense
8. 37.08. False Report to Peace Officer or Law Enforcement Employee
9. 37.081. False Report Regarding Missing Child or Missing Person
10. 37.09. Tampering With or Fabricating Physical Evidence
11. 37.10. Tampering With Governmental Record
12. 37.101. Fraudulent Filing of Financing Statement
13. 37.11. Impersonating Public Servant
14. 37.12. False Identification as Peace Officer: Misrepresentation of Property
15. 37.13. Record of a Fraudulent Court

(Excerpt from: Texas Statutes & Court Rules, pages 1 - 2.)

D. Wiretapping

1. §16.02. Unlawful Interception, Use, or Disclosure of Wire, Oral, or Electronic Communications

Article 18.20 of the Code of Criminal Procedure provides the definition of a "pen register" as: "a device that attaches to a telephone line and records or decodes electronic or other impulses to identify numbers dialed or otherwise transmitted on the telephone line." The statute specifically excludes "a device used by a ... customer of: "(b) a

wire communication service during the ordinary course of the ...customers business, including cost accounting and security control." Article 18.20, Code of Crim. Proc. §1 (14).

<Text of section effective until Sept. 1, 2005>

(a) In this section, "covert entry," "communication common carrier," "contents," "electronic, mechanical, or other device," "intercept," "investigative or law enforcement officer," "oral communication," "electronic communication," "readily accessible to the general public," and "wire communication" have the meanings given those terms in Article 18.20, Code of Criminal Procedure.

(b) A person commits an offense if he:

(1) intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication;

(2) intentionally discloses or endeavors to disclose to another person the contents of a wire, oral, or electronic communication if he knows or has reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(3) intentionally uses or endeavors to use the contents of a wire, oral, or electronic communication if he knows or is reckless about whether the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(4) knowingly or intentionally effects a covert entry for the purpose of intercepting wire, oral, or electronic communications without court order or authorization; or

(5) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when the device:

(A) is affixed to, or otherwise transmits a signal through a wire,

- cable, or other connection used in wire communications; or
- (B) transmits communications by radio or interferes with the transmission of communications by radio.
- (c) It is an affirmative defense to prosecution under Subsection (b) that:
- (1) an operator of a switchboard or an officer, employee, or agent of a communication common carrier whose facilities are used in the transmission of a wire or electronic communication intercepts a communication or discloses or uses an intercepted communication in the normal course of employment while engaged in an activity that is a necessary incident to the rendition of service or to the protection of the rights or property of the carrier of the communication, unless the interception results from the communication common carrier's use of service observing or random monitoring for purposes other than mechanical or service quality control checks;
 - (2) an officer, employee, or agent of a communication common carrier provides information, facilities, or technical assistance to an investigative or law enforcement officer who is authorized as provided by this article to intercept a wire, oral, or electronic communication;
 - (3) a person acting under color of law intercepts a wire, oral, or electronic communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception;
 - (4) a person not acting under color of law intercepts a wire, oral, or electronic communication if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of this state or for the purpose of committing any other injurious act;
- (5) a person acting under color of law intercepts a wire, oral, or electronic communication if:
- (A) oral or written consent for the interception is given by a magistrate before the interception;
 - (B) an immediate life-threatening situation exists;
 - (C) the person is a member of a law enforcement unit specially trained to:
 - (i) respond to and deal with life-threatening situations; or
 - (ii) install electronic, mechanical, or other devices; and
 - (D) the interception ceases immediately on termination of the life-threatening situation;
- (6) an officer, employee, or agent of the Federal Communications Commission intercepts a communication transmitted by radio or discloses or uses an intercepted communication in the normal course of employment and in the discharge of the monitoring responsibilities exercised by the Federal Communications Commission in the enforcement of Chapter 5, Title 47, United States Code;
- (7) a person intercepts or obtains access to an electronic communication that was made through an electronic communication system that is configured to permit the communication to be readily accessible to the general public;
- (8) a person intercepts radio communication, other than a cordless telephone communication that is transmitted between a cordless telephone handset and a base unit, that is transmitted:
- (A) by a station for the use of the general public;
 - (B) to ships, aircraft, vehicles, or persons in distress;
 - (C) by a governmental, law enforcement, civil defense, private land mobile, or public safety communications system that is

- readily accessible to the general public, unless the radio communication is transmitted by a law enforcement representative to or from a mobile data terminal;
- (D) by a station operating on an authorized frequency within the bands allocated to the amateur, citizens band, or general mobile radio services; or
- (E) by a marine or aeronautical communications system;
- (9) a person intercepts a wire or electronic communication the transmission of which causes harmful interference to a lawfully operating station or consumer electronic equipment, to the extent necessary to identify the source of the interference;
- (10) a user of the same frequency intercepts a radio communication made through a system that uses frequencies monitored by individuals engaged in the provision or the use of the system, if the communication is not scrambled or encrypted; or
- (11) a provider of electronic communications service records the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service towards the completion of the communication, or a user of that service from fraudulent, unlawful, or abusive use of the service.
- (d) (1) A person commits an offense if he:
- (A) intentionally manufactures, assembles, possesses, or sells an electronic, mechanical, or other device knowing or having reason to know that the device is designed primarily for nonconsensual interception of wire, electronic, or oral communications and that the device or a component of the device has been or will be used for an unlawful purpose; or
- (B) places in a newspaper, magazine, handbill, or other publication an advertisement of an electronic, mechanical, or other device:
- (i) knowing or having reason to know that the device is designed primarily for nonconsensual interception of wire, electronic, or oral communications;
- (ii) promoting the use of the device for the purpose of nonconsensual interception of wire, electronic, or oral communications; or
- (iii) knowing or having reason to know that the advertisement will promote the use of the device for the purpose of nonconsensual interception of wire, electronic, or oral communications.
- (2) An offense under Subdivision (1) is a state jail felony.
- (e) It is an affirmative defense to prosecution under Subsection (d) that the manufacture, assembly, possession, or sale of an electronic, mechanical, or other device that is designed primarily for the purpose of nonconsensual interception of wire, electronic, or oral communication is by:
- (1) a communication common carrier or a provider of wire or electronic communications service or an officer, agent, or employee of or a person under contract with a communication common carrier or provider acting in the normal course of the provider's or communication carrier's business;
- (2) an officer, agent, or employee of a person under contract with, bidding on contracts with, or doing business with the United States or this state acting in the normal course of the activities of the United States or this state; or
- (3) a law enforcement agency that has an established unit specifically designated to respond to and deal with life-threatening situations or specifically trained to install wire, oral, or electronic communications intercept equipment.
- (f) Except as provided by Subsections (d) and (h), an offense under this section is a felony of the second degree.

(g) For purposes of this section:

(1) An immediate life-threatening situation exists when human life is directly threatened in either a hostage or barricade situation.

(2) "Member of a law enforcement unit specially trained to respond to and deal with life-threatening situations" means a peace officer who has received a minimum of 40 hours a year of training in hostage and barricade suspect situations. This training must be evidenced by the submission of appropriate documentation to the Commission on Law Enforcement Officer Standards and Education.

(h)(1) A person commits an offense if, knowing that a government attorney or an investigative or law enforcement officer has been authorized or has applied for authorization to intercept wire, electronic, or oral communications, the person obstructs, impedes, prevents, gives notice to another of, or attempts to give notice to another of the interception.

(2) An offense under this subsection is a state jail felony.

(i) This section expires September 1, 2005, and shall not be in force on and after that date.

(Excerpt from Tex. Penal Code § 16.02, pages 1 - 9.)

E. Chapter 33 - (See Civ. P. Rem. C., §143.001 for civil claim)

(1) § 33.02. Breach of Computer Security

(a) A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

F. §37.01 Penal Code - See Tex. Civ. Prac. & Rem. Code Ann. §1202 (a)(2)

APPENDIX A

V.T.C.A., Civil Practice & Remedies Code § 18.002 Forms of Affidavit: “The form of an affidavit provided by this section is not exclusive and an affidavit that substantially complies with Section 18.001 is sufficient.”

An affidavit concerning cost and necessity of services by the person who provided the service is sufficient if it follows the following form:

No. _____

John Doe)	IN THE _____
(Name of Plaintiff))	COURT IN AND FOR
V.)	_____ COUNTY,
John Roe)	TEXAS
(Name of Defendant))	

AFFIDAVIT

Before me, the undersigned authority, personally appeared _____ (NAME OF AFFIANT), who, being by me duly sworn, deposed as follows:

My name is _____ (NAME OF AFFIANT). I am of sound mind and capable of making this affidavit.

On _____ (DATE), I provided a service to _____ (NAME OF PERSON WHO RECEIVED SERVICE). An itemized statement of the service and the charge for the service is attached to this affidavit and is a part of this affidavit. The service I provided was necessary and the amount that I charged for the service was reasonable at the time and place that the service was provided.

,Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20__.

My commission expires:

Notary Public, State of Texas

Notary's printed name:

APPENDIX B

An affidavit concerning cost and necessity of services by the **person who is in charge of records** showing the service provided and the charge made is sufficient if it follows the following form:

No. _____

John Doe)
(Name of Plaintiff))
V.)
John Roe)
(Name of Defendant))

IN THE _____
COURT IN AND FOR
_____ COUNTY,
TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared (NAME OF AFFIANT) , who, being by me duly sworn, deposed as follows:

My name is (NAME OF AFFIANT) . I am of sound mind and capable of making this affidavit. I am the person in charge of records of (PERSON WHO PROVIDED THE SERVICE) . Attached to this affidavit are records that provide an itemized statement of the service and the charge for the service that (PERSON WHO PROVIDED THE SERVICE) provided to (PERSON WHO RECEIVED THE SERVICE) on (DATE) .

The attached records are a part of this affidavit. The attached records are kept by me in the regular course of business. The information contained in the records was transmitted to me in the regular course of business by (PERSON WHO PROVIDED THE SERVICE) or an employee or representative of (PERSON WHO PROVIDED THE SERVICE) who had personal knowledge of the information. The records were made at or near the time or reasonably soon after the time that the service was provided. The records are the original or an exact duplicate of the original.

The service provided was necessary and the amount charged for the service was reasonable at the time and place that the service was provided.

,Affiant

SWORN TO AND SUBSCRIBED before me on the _____ day of _____, 20____.

My commission expires:

Notary Public, State of Texas

Notary's printed name:
