GEARING UP: PLEADINGS - YOU CAN'T ALWAYS GET WHAT YOU WANT, ESPECIALLY IF YOU DON'T ASK

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State Bar of Texas
MARRIAGE DISSOLUTION 101
April 24, 2019
Galveston

CHAPTER 2

HON. ROY B. FERGUSON - CURRICULUM VITAE

394th Judicial District Court
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Professional Affiliations, Honors, Memberships and Awards

- Judge – 394th Judicial District Court (2013-Present)
- Director – Judicial Section, State Bar of Texas (2015-Present)
- Liaison Member – Judicial Committee on Information Technology (2016-Present)
- Member – Texas Judicial Council Civil Justice Committee's Advisory Council (2018)
- Judge Pro Tem – 8th District Court of Appeals, by assignment (2015-2016)
- Life Sustaining Fellow – Texas Bar Foundation
- Member – Champions of Justice Society
- Member – College of the State Bar of Texas
- Special Service Commendation – State Bar of Texas GPSOLO Section (2014)
- Lawyer of the Year – State Bar of Texas GPSOLO Section (2012)
- Member – District 17 Grievance Committee, State Bar of Texas (2011-2012)
- General Practice Solo and Small Firm Section, State Bar of Texas
    - Councilmember (2003-2016)
    - Officer (2006-2014, including Chair (2009-2010))
- Juvenile Court Referee – Presidio County, Texas, December (2001-2003)
- Justice of the Peace Pro Tem – Presidio County, Texas (December, 1999-July, 2000)
- Licensed to practice before the United States Supreme Court
- Member – State Bar of Texas (1995-Present)

Education and Related Honors

- Juris Doctorate of Law, St. Mary's University, San Antonio, Texas (1994)
- Bachelor of Science in Civil Engineering, University of Texas at Arlington (1992)
- American Jurisprudence Award recipient in administrative law
- Member, Chi Epsilon, honorary fraternity for civil engineering students
- Member, Kappa Kappa Psi, honorary fraternity for college bandsmembers
- Member, Phi Alpha Delta, honorary fraternity for law students

Public Speaking and Articles

- 2019, State Bar of Texas Annual Meeting (scheduled), Presenter, "Simple Things Everyone Does Wrong."
- 2019, Adv. Civil Evidence and Discovery (scheduled), Presenter, "Ethics."
- 2019, Marriage Dissolution 101 (scheduled), Presenter/Panelist, "Gearing Up: Pleadings."
- 2019, Marriage Dissolution (scheduled), Presenter/Panelist, "When a Lie Isn't a Lie: Dealing with False Testimony During Trial."
- 2019, Presiding Judge, "State of Texas v. Kylo Ren – Mock Jury Selection."
- 2019, Adv. Trial Skills for Family Lawyers, Presenter, "Trial on the Merits, Winning from the Beginning."
- 2018, Adv. Family Law Conference, Family Law 101, Presenter, "Discovery: A View from Both Sides of the Bench."

Public Speaking and Articles (continued)

- 2018, Ector County Bar Association CLE, Presenter, "Simple Things that Everyone Does Wrong."
- 2017, NM Defense Lawyers Association and West Texas TADC Joint Seminar, Presenter, "A View from the Bench – Ethical and Effective Advocacy: What Works and What Doesn't."
- 2017, Texas A&M University School of Law, "Ethical and Effective Representation of Rural Communities."
- 2017, Presiding Judge, "State of Texas v. Luke Skywalker – Mock Jury Selection."
- 2016, Adv. Family Law Conference, Presenter, "Parental Alienation: What It Is and What It Isn't."
- 2016, State Bar of Texas Annual Meeting, Presenter, "Effective and Ethical Advocacy from the Judge's Perspective."
- 2016, Presiding Judge, State of Texas v. Harry Potter – Mock Jury Selection."
- 2015, Adv. Family Law Conference, Presenter, "Judges' Tech Tips."
- 2015, Val Verde County Bar Association Annual CLE, Presenter, "Effective Use of Courtroom Technology in Family Law."
- 2015, State Bar of Texas Annual Meeting, Presenter, "Effective Advocacy – What Does and Doesn't Work in the Courtroom from a Judge's Perspective."
- 2015, American Legion District Convention, Keynote Presenter, "And Justice for All."
- 2014, State Bar of Texas CLE, Presenter/Panelist, "What Judges Think Is (and Isn't) Persuasive With the Use of Technology in the Courtroom."
- 2014, State of Texas Juvenile Probation Chief's Conference, Presenter, "Sex, Violence and Video Games."
- 2014, Region 18 Meeting of School Administrators, Presenter, "Sex, Violence and Video Games."
- 2014, State Bar of Texas Annual Meeting, Presenter, "Practical and Ethical Impacts of *In re Stephanie Lee*, or: Who Will Speak for the Children?"
- 2013, West of the Pecos Republican Women's Association, Presenter, "Freedom of Speech is Under Attack!"
- 2012, American Legion Regional Meeting, Presenter, "Defending Freedom of Speech."
- 2012, State Bar of Texas Annual Meeting, Presenter, "Legal Ethics vs. Moral Compass."
- 2011, Texas Bar Journal, January Edition, "Referendum 2011 – How Would You Advise a Lawyer to Vote?"
- 2011, State Bar of Texas Annual Meeting, Presenter, "Ethics and the Small Law Firm – That's an Impact Tremor, That's What THAT is!"
- 2010, State Bar of Texas Annual Meeting, Moderator and Presenter, "Recent Ethical Issues for the Solo and Small Firm Practitioner."
- 2010, General Practice Institute, Waco Texas, Moderator
- 2009, State Bar of Texas Annual Meeting, Presenter, "Hot Topics in Legal Ethics."
- 2008, State Bar of Texas CLE, Presenter, "Ethics and the Small Law Firm." (webcast)
- 2008, State Bar of Texas CLE, Presenter and Moderator, "Ethics and the Small Firm: Use of Technology in the Development of a Successful and Profitable Practice."
- 2008, State Bar of Texas Annual Meeting, Presenter, "Ethics and the Small Law Firm – Ten Hot Tips on Avoiding Grievances."
- 2007, State Bar of Texas Annual Meeting, Presenter, "Ethics and the Small Law Firm – Avoiding Grievances Through Early Detection."
- 2006, Article, "Ethical Pitfalls for the Community Lawyer – an Outline for Discussion among General Practitioners."
- 2006, State Bar of Texas Annual Meeting, Presenter/Moderator, "Panel Discussion on Legal Ethics."

About the 394th Judicial District

The 394th Judicial District is comprised of Brewster, Culberson, Hudspeth, Jeff Davis, and Presidio Counties. The District encompasses approx. 20,000 sq. miles (larger than nine states), and includes roughly 1/3rd of the Texas-Mexico border and 1/5th of the United States–Mexico border.

About the Champions of Justice Society

The Texas Access to Justice Commission, created by the Supreme Court of Texas in 2001, is charged with developing and implementing initiatives designed to expand access to, and enhance the quality of, justice in civil legal matters for low-income Texans. The Champions of Justice Society is comprised of those attorneys and judges who show the strongest support of access to justice.

About the Judicial Committee on Information Technology

A part of the Texas Supreme Court's Texas Commission on Judicial Efficiency, the mission of the Judicial Committee on Information Technology is to establish standards and guidelines for the systematic implementation and integration of technology in Texas' trial and appellate courts.

About the Texas Bar Foundation

Founded in 1965, the Texas Bar Foundation has maintained and pursued its mission to assist the public, improve the profession of law, and build a strong justice system for all Texans. Fellows of the Foundation are selected for their outstanding professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas. Each year, only one-third of one percent of State Bar of Texas members are invited to become Fellows.

About the Texas Bar College

The Texas Bar College is an honorary society of lawyers who are among the best trained attorneys in Texas. Members are qualified attorneys who are interested in both high ethical standards and improved training for all Texas attorneys. The College recognizes and encourages lawyers, paralegals and judges who maintain and enhance their professional skills and the quality of their service to the public by significant voluntary participation in legal education.

About the 394th District Court Mock Jury Selection Program

When Judge Ferguson took the bench on January 1, 2013, public response to jury summonses across the 394th Judicial District was incredibly low, in some counties below 15%. Judge Ferguson implemented a multi-faceted plan to increase and improve jury turnout, without fining or jailing community members in one of the poorest parts of Texas. A key facet of that plan is public education and awareness of the jury system. During Juror Appreciation Week in Texas each year, every high school senior in the District is summoned to appear before Judge Ferguson as a potential juror. Students are placed under oath, qualified, and questioned in a realistic jury selection for a fictional case. In 2016, Harry Potter was tried for the murder of Voldemort. In 2017, Luke Skywalker stood charged with over one million counts of murder for blowing up the Death Star. (Charges against Mr. Potter were dismissed after the jury was empaneled and sworn, and the trial of Mr. Skywalker ended in a mistrial when the defendant leapt from his seat at counsel table and attacked the first witness for the prosecution – Darth Vader.) And in 2019, Kylo Ren is being tried for the murder of his father, Han Solo.

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I. INTRODUCTION.

The gateway to family law litigation is the pleadings. There are many fantastic articles that painstakingly detail the minutia of family law pleading practice.[1] This article will neither rehash nor attempt to reproduce those articles. Instead, this article will provide practical and concise advice you can use *tomorrow* to be a better family lawyer, improve your odds of victory, and minimize the risk of a license-threatening mistake.

Pleading practice is fundamentally about two things: making sure you can get what you want, and keeping the other side from getting more than they should. And while family law pleadings are "liberally construed," unpleaded claims will not necessarily be bootstrapped into a case. According to our Supreme Court, "[A] suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child."[2] However, as you will see below, blind reliance upon that general rule may result in claims – and cases – being lost.

This article will enable you to:

- ensure that you do not, through inartful pleading, forfeit possible relief;
- identify, attack, and eliminate unpled opposing claims; and
- strategize timing and contents of pleadings to maximize the odds of successful outcomes.

II. WHAT SHOULD YOU FILE?

A. Your pleadings

must track your requested relief at trial. If the relief you are granted at trial is not requested in or encompassed by the pleadings, and the issue was not tried by consent, the award in the judgment is ***VOID.*** *In re Estate of Gaines*, 262 S.W.3d 50, 60 (Tex. App.—Houston [14th Dist.] 2008, no pet.) A void judgment can simply be ignored and can never be enforced. *See Eguia v. Eguia*, 367 S.W.3d 455, 459 (Tex. App.—Corpus Christi 2012, no pet.) ("[W]hile it is unnecessary to appeal from a void judgment, it is nevertheless settled that an appeal may be taken and that the appellate court in such a proceeding may declare the judgment void."); *see also, State ex. Rel. Latty*, 907 S.W.2d 484, 486 (Tex. 1995).

The Texas Family Code specifically requires parties to include in their pleadings a "statement describing what action the court is requested to take concerning the child and the statutory grounds on which the request is made." *Tex. Fam. Code* § 102.008(b)(10). "Without proper pleadings and evidence, a trial court exceeds its authority if it modifies or reforms previous orders affecting the custody of a child." *In re M.B.B-Y.*, 2011 Tex. App. LEXIS 2520 (Tex. App.—San Antonio Apr. 6, 2011, no pet.) (mem. op.); accord *In re Russell*, 321 S.W.3d 846, 856 (Tex. App.—Fort Worth 2010, orig. proceeding).; *In re T.R.B.*, 350 S.W.3d 227, 233 (Tex. App.—San Antonio 2011, no pet.); see also *In re Parks*, 264 S.W.3d 59, 62 (Tex. App.—Houston [1st Dist.] 2007, orig. proceeding); *In re A.M.*, 974 S.W.2d 857, 861-62 (Tex. App.—San Antonio 1998, no pet.).

B. Initial Pleadings.

To initiate family law litigation, you must file the appropriate pleading:

1. Divorce.

The document that initiates the dissolution process is the Original Petition for Divorce.[3] If there is a child of the marriage who is under 18 years old, or is 18 years old but hasn't yet graduated from high school, you must either include a suit affecting the parent-child relationship, or if another court has continuing, exclusive jurisdiction of the children through prior litigation, file a contemporaneous Motion for Mandatory Transfer in the prior SAPCR county. *Tex.Fam.Code* §§ 6.406(b), 6.407, 155.201(a).

2. Suit Affecting the Parent-Child Relationship.

"SAPCR" claims include requests to determine and establish parentage, conservatorship, possession and access, and support of the children. These can be brought in a separate cause without a divorce, but if a divorce is filed, SAPCR claims regarding the parties' children *must* be included.

3. Modification.

If there is a final SAPCR order already in place, and there has been a material and substantial change in the circumstances of the child or a party since rendition of the prior SAPCR order, mediated settlement

[1] For a thorough and detailed explanation of pleadings practice, I commend to you the outstanding articles, "Pleading in Family Law Cases," by Hon. Cindy Mayela Aguirre, Hon. Scott A. Beauchamp, and Katherine T. Hamilton, Advanced Family Law Drafting, December 2017, and "Pleadings 101: What to Plead, When to Plead, and Extraordinary Relief," by Chad Petross and Whitney Vaughan, Family Law 101, August 12, 2018.

[2] *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967) (emphasis added)

[3] For assistance in basic family law drafting, you should consider investing in the Texas Family Law Practice Manual.

agreement or collaborative law agreement, you should file a Motion to Modify to change those prior orders. *Tex.Fam.Code* § 156.001 et.seq.

4. Enforcement.

If a party is not in compliance with a prior decree or order, you should file a Motion for Enforcement. Enforcement of a property division is governed by Chapter 9 of the Texas Family Code, enforcement of spousal maintenance by Chapter 8, and enforcement of SAPCR orders by Chapter 157. If you are seeking a finding of contempt, you must strictly comply with the exacting requirements for personal service and identification of the specific decretal language you allege was violated, and provide detailed enumeration of the contemptuous acts. The request for relief must be meticulously crafted, so as to avoid unintended consequences such as mandatory court-appointed counsel or the right to jury trial. Inadequate pleading for contempt can even result in the movant paying the respondent's legal fees.[4]

5. Injunctive relief.

Include in your pleadings requests for all desired injunctive relief, including *ex parte* temporary restraining orders, temporary orders and injunctions, and permanent injunctions.

6. Domestic Torts.

Texas allows persons to sue their spouses for tortious injuries. There are literally hundreds of marital torts that could be asserted.[5]

> PRACTICE TIP: THIS IS NOT A 101 ISSUE! This area is a minefield of malpractice. If you sense that a domestic tort may be appropriate, or if the other side files a domestic tort claim, you should consult with a seasoned trial attorney with experience in the area. Otherwise, just go ahead and call your malpractice carrier.

District and family courts are empowered to consider such torts in the divorce context. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993)*; Massey v. Massey*, 807 S.W.2d 391 (Tex. App. - Houston [1st Dist.] 1991, writ denied). If a tort was committed by one spouse against the other, mandatory joinder may apply, meaning that if the claims are not filed in the divorce case, they may be barred by res judicata. Even if they are not subject to mandatory joinder, they may yet be barred by the statute of limitations if brought independently.

In addition, certain tortious conduct is subsumed within the "just and right division" of the marital estate, such as "fraud on the community." There is no independent tort for damage to the community estate, and the only remedy is to seek a disproportionate division of the marital estate. *See Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). Truly independent torts, on the contrary, are the separate property of the injured spouse, and thus may be separately maintained. *Cameron v. Cameron*, 641 S.W.2d 210, 223 (Tex. 1982). In order to avoid double recovery, the proffering party must elect whether it wishes the evidence of tortious conduct to be considered for purposes of disproportionate division, or in pursuit of a separate money judgment.

> PRACTICE TIP: If the other party has a big separate estate but there is a small community estate, go after a tort judgment. If there is a big community estate, go after a disproportionate division.

7. Verification.

Some pleadings, but not all, require verification or supporting affidavits:

- **a**. Writs of habeas corpus seeking to compel a party to produce a child,[6] and writs of attachment commanding law enforcement to take possession of a child,[7] must be verified.
- **b.** Requests for extraordinary *ex parte* relief, such as kick-out orders and exclusion from access to children, must be supported by affidavit. *Tex.Fam.Code* §105.001(c)(3).
- **c**. A motion for modification of conservatorship filed within one year of entry of the prior order, mediated settlement agreement, or collaborative law agreement, must be supported by an affidavit asserting that (1) the child's present environment may endanger the child's physical health or emotional development; (2) the person who has the exclusive right to designate the residence of the child is the petitioner or is consenting to the modification and the modification is in the

[4] For a thorough explanation of enforcement practice, see "Enforcement of Property Division and Spousal Maintenance" by Christopher K. Wrampelmeier, Texas Advanced Family Law Conference, August 2018, and "Enforcement of the Property Division," by Cindi Graham, Jeffrey Hellberg, Jr., and Lauren Melhart, Texas Advanced Family Law Conference, August 2017.

[5] To better understand this topic, see the incredibly thorough article entitled, "Domestic Tort Cases Today Theories and Practices," John Nichols, Sr., and John "Bo" Nichols, Jr., Texas Advanced Family Law Conference, August 2017.

[6] *Tex. Fam. Code* § 157.372.

[7] *Tex. Fam. Code* §105.001(c); *Tex. R. Civ. Pro.* 15.

best interest of the child; or (3) the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child. *Tex.Fam.Code* §156.102(b). The affidavit must contain sufficient facts that, if true, support the allegation, or the court *shall* summarily deny the motion without granting a hearing. *Tex.Fam.Code* §156.102(b).

d. A motion to modify requesting temporary orders changing the designation of primary conservator of the child because the child's present circumstances would significantly impair the child's physical health or emotional development must include an affidavit based on the person's personal knowledge *or belief* that lays out sufficient facts, if true, that support the allegation. *Tex.Fam.Code* §156.006(b-1).[8]

C. Responsive Pleadings.

1. Original Answer.

Respondents in every case should file a responsive pleading, including an answer. The answer includes a general denial and any specific defense by way of avoidance or estoppel. It may include a request for attorneys' fees, and "almost all responsive matters," such as motions to transfer venue, pleas to the jurisdiction, pleas in abatement, special exceptions. and any other dilatory pleas. *Tex.R.Civ.Pro*. 83, 84, and 85. Affirmative defenses must be specifically pleaded. *Tex.R.Civ.Pro*. 93, 94. In an enforcement proceeding, all affirmative defenses to enforcement or contempt must be specifically pleaded. *Tex.Fam.Code* §§157.005-008. If the affirmative defense is not in the live pleading at the time of trial, it is waived. *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 937 (Tex. 1992).

2. Counter-Petition.

An answer may include a counter-claim or cross-action, including all items in Section A, above, or Section C, below.

3. Verification, Affidavit and Specific Denials.

Certain requests and denials must be verified or supported by affidavit. Some examples relevant to family law pleadings include the following:

a. An allegation that a corporation is incorporated shall be taken as true unless controverted by affidavit. *Tex.R.Civ.Pro*. 52.

b. A denial of partnership must be verified. *Tex.R.Civ.Pro.* 94.

c. When a petition states that all conditions precedent to recovery have been satisfied, the respondent must specifically deny those conditions or they are deemed proven without presentation of evidence by the petitioner. *Tex.R.Civ.Pro.* 54.

4. Contemporaneous Motions.

Almost all responsive matters may be contained within the answer, including motions to transfer venue, pleas to the jurisdiction, in abatement, or any other dilatory pleas, special exceptions. *Tex.R.Civ.Pro*. 84 and 85. See Section D, below.

D. Contemporaneous Motions.

Certain motions may be filed at any time during the litigation process, while others must be filed with the first pleading or they are waived.

1. Jurisdictional Challenges.

a. To challenge personal jurisdiction, a respondent must make a "special appearance." Remember, best practice is to also file an answer, expressly made "subject to" the special appearance. File the special appearance *first*, and then file the answer subject to the special appearance. Failure to do so waives the challenge to personal jurisdiction.

b. The proper motion to challenge the court's subject matter jurisdiction to make a child custody determination under the UCCJEA (*Tex.Fam.Code* § 152.201), or the standing of a nonparent, is a "plea to the jurisdiction."

> PRACTICE TIP: Although these issues *can* be raised later, it would be a waste of your client's money and the court's time to wait.

2. Transfer of Venue under *Tex.Fam.Code* § 155.204(b).

A motion to transfer venue (other than a motion to transfer a SAPCR to the county where a divorce is pending) must be filed contemporaneously with the original pleading or it is untimely and thus *waived*.

3. Transfer of SAPCR Venue to County of Divorce.

If a previously filed SAPCR is pending in another county, you should file the divorce in the preferred

[8] Note that this affidavit may be based entirely on hearsay and does not require first-hand personal knowledge of the affiant.

county of venue, and a contemporaneous motion for mandatory transfer in the prior SAPCR county case. *Tex.Fam.Code* § 155.201(a).

4. Plea in abatement.

A plea in abatement is used to inform the court that another court has dominant jurisdiction, or that the petitioner has not met the 6 month domicile threshold or the 90 day venue threshold. *Tex.Fam.Code* § 103.002. When competing divorces are filed in different Texas courts, the later-filed case must be abated in favor of the first-filed, unless the court finds a lack of diligence in completing service of the first-filed case.

5. Motion to Stay.

A motion to stay is used to inform the court that the same case was filed in another state's court before the case at bar. *Tex.Fam.Code* § 152.206. Once the Texas court determines that another state's court has jurisdiction, the Texas court must stay its case and communicate with the other state's court to determine whether Texas is the more convenient forum. *Tex.Fam.Code* § 152.206(b). If the other court does not relinquish jurisdiction to Texas, the Texas court must dismiss the Texas proceeding. *In re Dean*, 393, S.W.3d 741, 50 (Tex. 2012).

6. Protective Orders.

A party may file an application for protective order along with the petition for divorce, but is not required to do so. In fact, a protective order may be sought in the county court or county court at law, or even in another county altogether. Remember, all applications for emergency protection must be accompanied by an affidavit.

7. Special Exceptions.

A party may file special exceptions to strike unnecessary facts from the opposing pleadings. *Tex.Fam.Code* § 6.402. (See III.B.1, below).

8. Motion to Sever.

When domestic torts are brought against your client, consider filing a motion to sever those claims into a separate civil cause to force an early election of remedies, more quickly finalize the divorce, or to prevent the damning evidence from being presented to the trier of fact in the divorce case. (See Section II.B.6, above.)

> PRACTICE TIP: This is a complicated strategic issue, and you should enlist the assistance of a seasoned family law attorney to advise you on how to proceed.

E. Discovery.

A party may include discovery requests in a pleading. However, responses to discovery requests contained in the original pleading are due 50 days from the date of service of citation, rather than the usual 30 days from the date of service of the requests. *Tex.R.Civ.Pro*. 194.3(a).

F. Tips, Tricks and Traps.

1. Counter-Petitions.

You should give careful consideration as to whether, and when, to bring counterclaims. The safest course of action is file a generic "notice" counter-petition within the original answer, requesting a divorce and asserting necessary SAPCR claims. If you do not, your client runs a significant risk that the petitioner will nonsuit without warning. If the petitioner is unhappy with the court's preliminary rulings, he or she can nonsuit the case at any time before final judgment – even on the morning of trial. The nonsuit is effective when filed, without the need for court approval, and as a result all temporary orders, injunctions, and discovery rulings are automatically dissolved. You don't want your client having to file a new case, pay a new filing fee, and then relitigate all matters they previously won, just to get back to where they were.

2. Paternity.

Always check the dates of birth of your client's children. If a child's date of birth predates the date of formal marriage, you must either include a request to establish the paternity of the child or a claim of informal marriage that predates the birth of the child.

3. Prior SAPCR Orders.

Question your client carefully about whether prior SAPCR orders exist. Less sophisticated clients often do not realize that if they are getting child support, a prior order exists somewhere. If that order is from another state, you must evaluate whether Texas has jurisdiction to revisit the orders under the UCCJEA, which is found in Chapter 152 of the Texas Family Code.[9]

[9] For an outline of UCCJEA practice, see "UCCJEA in Your Daily Practice," by Christopher Wrampelmeier, Advanced Family Law Conference, August 2017.

4. Office of the Attorney General.

If the OAG has ever opened a case on the children, it is entitled to Rule 21A notice of the proceedings. *Tex.Fam.Code* §102.009.

5. Foreign Judgments.

Foreign custody judgments are entitled to full faith and credit, and may be enforced by Texas courts. *Tex.Fam.Code* § 152.305. Barring emergency circumstances or action by the other state, however, foreign judgments cannot be modified by Texas courts. *Tex.Fam.Code* § 152.306(b).

6. Plead in the Alternative.

You should plead for both best case and worst case scenarios, in the alternative. *Tex.R.Civ.Pro.* 48. Failure to do so may waive certain claims. For example:

> Best case scenario: Ask for sole managing conservatorship for your client (if appropriate), or in the alternative, if the judge names joint managing conservators, ask to designate your client as primary, and specifically identify the particular parental rights to be exclusively awarded to your client.[10]
>
> Worse case scenario: In the alternative, in the event the court denies your client's request and instead names the other party as primary conservator, ask for expanded visitation, extended standard possession, or any other changes to the presumptive orders.

7. Protective Orders.

While you are not required to file your protective order application along with the divorce or SAPCR petition, doing so can give you a strategic advantage. In jurisdictions without a revolving docket, the protective order hearing will give your client an opportunity to paint a gruesome picture of the respondent at a very early stage of the divorce proceeding.

8. Discovery and Pleadings.

Strategically, petitioners/movants should wait until the date the respondent's answer is due or received to serve discovery requests, while respondents should serve their discovery requests *along with* their original answer. If a petitioner includes discovery in its original pleading, and the respondent serves its discovery requests along with its original answer, the petitioner will be forced to answer first, possibly by several weeks.

III. HOW SHOULD YOU DO IT?

A. Say What It Is That You Want.

Pleadings consist of a statement in plain and concise language of the petitioner's causes of action or the defendant's grounds of defense. *Tex.R.Civ.Pro.* 45(b). A party must specifically identify desired relief in order to recover it at trial, and the judgment must conform to the pleadings. *Tex.R.Civ.Pro.* 47 and *Tex.R.Civ.Pro.* 301; *Maswoswe v. Nelson*, 327 S.W.3d 889, 895-96 (Tex. App. –Beaumont 2010, no pet.) ("A plaintiff may not be granted a favorable judgment on an unpled cause of action, absent trial by consent."). A party's pleadings must provide fair notice of the petitioner's causes of action and the relief sought, in "short and plain terms." *Tex.Fam.Code* § 6.402. A court can infer a cause of action, but not a claim. *Lynch v. Lynch*, 540 S.W.3d 107, 134-35 (Tex. App. –Houston [1st Dist.] 2017, pet. filed) ("A pleading provides 'fair notice' when the opposing party can ascertain from the pleading the nature of the claims, the basic issues in controversy, and what testimony will be relevant to the claims. … A judgment not supported by the pleadings is erroneous.")

B. But Don't Oversell It.

1. A divorce pleading

must include enough detail to identify the issues, but no more. *Tex.Fam.Code* § 6.402.[11] Divorce pleadings differ from general civil pleadings, in that facts are not appropriate except when seeking special relief. Special exceptions cannot be used to attack pleadings because of too few facts, but can because of too many. These types of special exceptions *must* be granted by the court.[12] Courts expect the facts to come through discovery or in response to no-evidence summary judgment motions, not in the pleadings. *See In Re Marriage of Richards*, 991 S.W.2d 32 (Tex. App.—Amarillo 1999, pet. dism'd).

2. Default Judgment.

You cannot win by default in a family law case, so there is no value in including facts beyond those necessary to establish jurisdiction, obtain extraordinary relief, and track the statutory language. *Considine v. Considine*, 726 SW2d 253, 254 (Tex. App.—Austin 1987, no writ) ("Even if the respondent fails to file an

[10] To vastly expand your knowledge of the subject, see "Rethinking Rights, Powers and Duties," by Kristal C. Thomson, Advanced Family Law Conference, August 2017.

[11] However, there is no express prohibition as to the inclusion of facts in SAPCR pleadings. *Tex.Fam.Code* § 102.008. Therefore, it seems that pleadings in a SAPCR can include facts. How does this apply to SAPCR claims contained within a divorce petition?

[12] "The court shall strike an allegation of evidentiary fact from the pleadings on the motion of a party or on the court's own motion." *Tex.Fam.Code* § 6.402(c).

answer, the petitioner must adduce proof to support the material allegations in the petition.") Even in default, a petitioner must offer evidence to support the requested relief as in any other trial. See *Gonzalez v. Gonzalez*, 331 S.W.3d 864, 866 (Tex. App.—Dallas 2011, no pet.) ("If the respondent in a divorce case fails to answer or appear, the petitioner must present evidence to support the material allegations in the petition.")

C. Tips, Tricks and Traps.

1. Don't overdo it!

Unless required, you should not include inflammatory facts or accusations in the initial pleadings. The vast majority of family law cases settle prior to trial, and you should initially gear your case toward that end. Including in the initial pleading accusations of adultery or cruelty, or fault in the break-up of the marriage, demands for attorneys' fees, requests for supervision or limited access, and requests for vastly disproportionate division of the community estate, may serve only to enflame and anger the parties. This can cause parties to entrench, making settlement more difficult and leading to increased fees and expenses for your client.

2. Evaluate your case.

Realistically evaluate your client's case and the marital estates *before* you file your original petition. If there is little to no monetary value in the marital estate, you may not wish to claim adultery, cruelty, or fault in the breakup of the marriage, or plead for a disproportionate division. (65% of nothing is still nothing.)

3. Use special exceptions.

Not enough people utilize special exceptions. Stripping facts from the pleading will not change the outcome at trial, but having the court order the other party to remove inflammatory facts from the pleading can deescalate tense situations and soothe an irate client.

4. Remember:

Civil pleadings – Minimum facts required. Family pleadings – Maximum facts limited.

5. Don't miss your window.

Be patient, but don't wait until after you receive a trial setting to disclose the grounds and claims you plan to advance at trial. Consider telling opposing counsel in writing prior to mediation that you will be adding these additional claims if the case goes to trial. Doing so prevents an allegation of surprise later in the case. Include those additional claims in your mediation memorandum so the mediator is prepared to address them and doesn't accuse your client of bad-faith backtracking. Definitely disclose them before the end of the discovery period unless you have a Rule 11 agreement to withhold inflammatory claims until after mediation. This is a good idea if you have a strong relationship with the other lawyer. The Rule 11 agreement should include that, if mediation is unsuccessful, the parties will each amend their pleadings within 7 days, and reopen discovery for 60 days to address those issues, if necessary.

IV. HOW DO YOU FIX WHAT YOU DID?

A. Amended Vs Supplemental

1. Amended Pleadings.

An *amended pleading* adds or withdraws from that which was previously pleaded, for correction or to plead new matter, and replaces all prior pleadings. *Tex.R.Civ.P*. 62.

2. Supplemental Pleadings.

A *supplemental pleading* is a response to the last preceding pleading by the other party and does not repeat allegations previously asserted unless such repetition is necessary. *Tex.R.Civ.P.* 69. The plaintiff's supplemental petitions may contain special exceptions, general denials, and allegations of new matter not before alleged by him, in reply to those which have been alleged by the defendant. *Tex.R.Civ.P*. 80.

3. The Key Distinction.

An amended pleading is the only way to add a new claim; you cannot use a supplemental petition to add a new claim. *See J. M. Huber Corp. v. Santa Fe Energy Resources*, 871 S.W.2d 842 (Tex. App.—Houston [14th Dist.] 1995, writ denied)("A supplemental petition is a response to the last preceding pleading by the other party and does not repeat allegations previously pleaded unless such repetition is necessary. An amended petition, on the other hand, adds or withdraws from that which was previously pleaded for correction or to plead new matter. An amended petition also supersedes all prior petitions and operates to dismiss parties and causes of action to the extent they are omitted from the amended pleading." (Internal citations omitted)).

4. Timing.

Generally, amended pleadings should be filed by no later than seven days prior to the date of trial. *Tex.R.Civ.P*. 63. Within seven days of trial, leave of court must be obtained. The party opposing an amended pleading must show unfair surprise or leave will be granted. *Tex.R.Civ.P*. 63. If surprise is proven, the objecting party may recover reasonable costs and expenses incurred as a result. *Tex.R.Civ.P*. 70. (See Section IV.D, below).

5. Trial by Consent.

Trial by consent occurs when issues not raised by the pleadings are actually tried by the parties, without objection. Trial by consent is being more strictly and stringently reviewed, and is disfavored by appellate courts. (See Section V.B., below)

6. Amendment to Conform to Trial by Consent.

When issues are tried by consent, they are treated the same as if they had been properly raised in the pleadings. On motion of either party, the court may allow a trial amendment such that the issues actually tried appear in the live pleadings in the case. Failure to amend the pleadings in this manner does not affect the result of the trial of these issues. *Tex.R.Civ.Pro.* 67.

7. Trial Amendment.

If during trial, a party objects to consideration of an unpleaded issue by consent, or where it becomes apparent that that there is an error in the pleadings, and the responding party objects to their consideration, the court may allow amendment of the pleadings at that time. To defeat the trial amendment, the objecting party must prove that the amendment would prejudice his or her case, and may obtain a continuance to do so. *Tex.R.Civ.Pro.* 66.

B. Tips, Tricks and Traps.

1. Be careful!

An amended pleading replaces all prior pleadings, *including supplements*. *Tex.R.Civ.Pro.* 65; s*ee J.M. Huber Corp. v. Santa Fe Energy Resources*, 871 S.W.2d 842, 844 (Tex. App.—Houston [14th Dist.] 1995, writ denied); *In re Heritage Operating, L.P.*, 468 S.W.3d 240, 244 (Tex. App.—El Paso 2015, orig. proceeding) ("When a plaintiff files an amended petition omitting a defendant named in a previously filed petition, that defendant is no longer a party because the amended petition effects a voluntary dismissal as to the omitted defendant."). Claims omitted from amended pleadings are nonsuited and dismissed. *Id*.

2. Caution:

What if you file an "Original Answer and Original Counterpetition" in one document, and then later file a separate "Amended Answer" to add an affirmative defense? Is the counterpetition nonsuited?

C. Amending In Default Posture.

1. Simply put,

there is no true default judgment in family law cases. (See Section III.B,2, above.) Even so, when the respondent fails to answer or appear, the judgment must be supported by the pleadings. *See In re Marriage of Day*, 497 S.W.3d 87, 90 (Tex. App.—Houston [14th Dist.] 2016, pet. denied). Furthermore, there can be no trial by consent in a default hearing. *See id.* ("[T]rial by consent … cannot occur in the context of a default judgment."); *Maswoswe v. Nelson*, 327 S.W.3d 889, 895-96 (Tex. App. –Beaumont 2010, no pet.) ("A plaintiff may not be granted a favorable judgment on an unpled cause of action, absent trial by consent."). Thus, if final judgment includes relief not requested in the pleadings, even on default, it is *void*. *In re Marriage of Day*, 497 S.W.3d at 90 ("A judgment not supported by the pleadings is erroneous.") And the only way to raise and defend those claims is through the written pleadings.

2. Trial amendments

are also not available in a default scenario because the respondent is entitled to fair notice of the additional claims.

3. If an amended petition raising

a new claim or subjecting the respondent to "more onerous relief" is filed after original service, the pleading party must serve it on the defaulting respondent in accordance with *Tex.R.Civ.Pro*. 21A; *see In re Marriage of Day*, 497 S.W.3d 87, 90 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) ("An analogous situation arises when a plaintiff files but fails to serve on the defendant an amended petition seeking more onerous relief than that prayed for in a previous served petition. 'More onerous' is anything that exposes the defendant to additional liability."); *see also Cox v. Cox*, 298 S.W.3d 726, 733 (Tex. App.—Austin, 2009, no pet.) (reversing default judgment because wife failed to give husband fair notice that her amended petition sought permanent rather than temporary relief). Service may be by any method in Rule 21A; it need not be by personal service of citation.

D. Objecting To Untimely Amendment.

A party attempting to amend a pleading within seven days of trial must seek leave of court. The party opposing a late-filed amendment must show unfair surprise, or leave of court will be granted. *Tex.R.Civ.P.* 63. If surprise is proven, the objecting party may recover reasonable costs and expenses incurred as a result. *Tex.R.Civ.P.* 70.

1. Proving Surprise.

The objecting party must prove that the pleading raises a new matter that (1) could not have been anticipated, (2) reshapes trial, and (3) detrimentally impacts the respondent's presentation. *The State Bar v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994) ("A court may not refuse a trial amendment unless (1) the opposing party presents evidence of surprise or prejudice, or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face.");

Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 939 (Tex. 1990) ("The burden of showing prejudice or surprise rests on the party resisting the amendment.").

> PRACTICE TIP: In a family law context, it may be difficult to show surprise, particularly when it comes to SAPCR issues. You should review the other party's discovery responses shortly before trial, and have them *printed* and close at hand during trial. A party can show surprise by tendering to the court the other party's misleading or incomplete discovery answers, or deposition responses that foreclose, exclude, or deny the issue exists.

2. Continuance.

If the court grants leave to amend, you must ask for a continuance to prepare for the new claims. The court may, in its discretion, order the late-pleading party to the objecting party's costs, expenses and attorneys' fees made necessary by the continuance. *Tex.R.Civ.Pro*. 70.

> PRACTICE TIP: Many judges will want to "carry the request for sanctions forward to trial." Be prepared for this and address it in your initial request, rather than trying to change the judge's mind after the court's announcement. The purpose of the rule is to help the aggrieved party *get* to trial, not compensate them for damages *at* trial.

V. EXCEPTIONS TO EXCLUSION.

Just because specific clams for relief are not included in family law pleadings does not necessarily mean the court cannot consider them. In many cases, the exceptions swallow the rule.

A. Liberal Construction.

Courts are to liberally construe pleadings to contain any claims that reasonably may be inferred from the specific language used in the petition, even if an element of a claim is not specifically alleged. *Flowers v. Flowers*, 407 S.W.3d 452, 457-58 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("[T]ake measures to prevent international abduction" held sufficient to support a permanent injunction against children leaving the country.) However, "liberal construction" cannot read into the petition a new claim that it does not contain. *Id.* at 458. Courts may consider claims when the written words raise an issue, even without properly tracking the legal elements or properly defining the claim. *See King v. Lyons*, 457 S.W.3d 122, 131 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("A court should read the pleadings liberally and not foreclose the grant of injunctive relief for lack of pleading formality so long as the pleading was sufficient to inform the party to be enjoined of the substance of the issue.") (*citing Messier v. Messier*, 389 S.W.3d 904, 908 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (When the father's pleadings "raised the issue of international travel with the children" requesting general relief and "such measures as are necessary to protect the children," the reviewing court determined this was a clear reference to nonmonetary, injunctive relief and thus, sufficient.)

B. Trial by Consent.

1. Trial by consent

is an exception to the general rule of fair notice pleadings. "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." *Tex.R.Civ.Pro*. 67. An issue is tried by consent when evidence on the issue is developed under circumstances indicating that both parties understood the issue was present in the case, and the other party failed to make an appropriate complaint. *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 567 (Tex. App.—San Antonio 2011, no pet.). This rule only applies in exceptional situations where the record as a whole makes clear that the parties tried the unpleaded issue, and is not intended to establish a general rule of practice. *In re A.B.H.*, 266 S.W.3d 596, 600 (Tex. App.—Fort Worth 2008, no pet.). It should be applied with care, and never in a doubtful situation. *Maswoswe v. Nelson*, 327 S.W.3d 889, 895 (Tex.App.—Beaumont 2010, no pet)(quoting *Greene v. Young*, 174 S.W.3d 291, 301 (Tex. App.--Houston [1st Dist.] 2005, pet. denied); *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.).

2. Trial by consent

requires evidence of *trial* of the issue, not evidence of the issue itself. *Flowers v. Flowers*, 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.). If the evidence was relevant to any other properly pleaded issue, the unpleaded issue is not tried by consent. (In family law cases where best interest is an element of all SAPCR claims, evidence that goes toward best interest will generally not support trial by consent of an unpleaded claim.)

> PRACTICE TIP: Object, object, object! If the opposing party asks for relief outside of his or her pleadings during trial, you must object each and every time. *Object and keep on objecting!*

PRACTICE TIP: Remember, telling the judge during opening statement that you aren't trying the issue by consent, or objecting during preliminary hearings, does not preserve error at trial; it really only means you are *going* to object. Trial by consent occurs when the evidence comes in and the issue is tried, not before. *Udobong v. Udobong*, 2018 Tex.App.Lexis 10008, *11-12 (Tex. App.—Houston [14th Dist.] Dec. 6, 2018) (trial by consent of retroactive child support.)

3. Running Objections.

Rely on a "running objection" at your own peril. *Udobong*, 2018 Tex.App.Lexis 10008 (Houston – 14th Dist.) A running objection is used after a specific objection is overruled, and additional evidence or follow-up questions on the issue are anticipated. Running objections may preserve error, but possibly only for a single line of questioning of a single witness. *Goodman v. State*, 701 S.W.2d 850, 863 (Tex. Crim. App. 1985) (rejecting the defendant's contention that his running objection preserved error when six witnesses testified between when the running objection was originally made and when the challenged evidence was reintroduced), overruled on other grounds by *Hernandez v. State*, 757 S.W.2d 744, 751-52 (Tex. Crim. App. 1988); *see also White v. State*, 784 S.W.2d 453, 461 (Tex. App.—Tyler 1989, pet. ref'd) (holding that a defendant's running objection preserved error with regard to the witness then testifying, but not subsequent witnesses). A running objection may be sufficient to preserve error over multiple witnesses if the objection was timely, stated the specific grounds, and requested the ruling later denied. *Ford v. State*, 919 S.W.2d 107, 113-14 (Tex. Crim. App. 1996) (running objection to "any and all impact evidence"); see also *Campos v. State*, 256 S.W.3d 757, 760 (Tex. App.--Houston [1st Dist.] 2008, pet. ref'd). However, it is crucial that you specifically ask for the objection to run to multiple witnesses, or all witnesses who offer evidence on the issue in question.

PRACTICE TIP: In this situation, more is better. Be very specific with the Court about what you are doing. State that you don't want to waste the court's time with objection after objection, but that you wish to preserve error on this issue, no matter when offered or by what witness. In the interest of judicial economy and efficiency, ask the judge for a running objection to all questions and evidence related to the issue, across all witnesses. Be very specific as to what the issue is.

C. The "Best Interest" Catch-All.

Courts have generally declared that the best interest of the child prevails over technical application of rules. "The best interest of the child is paramount and should prevail over an overly technical application of the rules of pleading and practice." Tex.Fam.Code § 153.002; *In re A.B.H.*, 266 S.W.3d 596, 600 (Tex. App.—Fort Worth 2008, no pet.); *Tex.Fam.Code* § 153.002; *Leithold*, 413 S.W.2d at 702; *Lohmann*, 62 S.W.3d at 878-79. In cases affecting the parent-child relationship, the pleading requirements are of "little importance." *In re. Macalik*, 13 S.W.3d 43, 45 (Tex.App.—Texarkana 1999, no pet.); *In re P.M.G.*, 405 S.W.3d 406 (Tex.App.—Texarkana, 2013, no pet.).

However, the "best interest" exception has its limits. Best interest trumps notice pleading requirements, but not so far as to do an injustice, which would allow and encourage trial by ambush. *See In the Interest of A.B.H.*, 266 S.W.3d 596, 600 (Tex. App.—Fort Worth 2008, no pet.) is not intended to establish a general rule of practice). Additionally, you can't rely on best interest to read an entirely new claim into the pleadings. *Flowers v. Flowers*, 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

D. Prayer for General Relief.

Don't rely on prayer for "general relief and all relief to which Petitioner may show herself justly entitled." *In Re Day*, 497 S.W.3d at 96; see also *Flowers v. Flowers*, 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.) ("[W]e cannot use a liberal construction of the petition to read into the petition a claim that it does not contain."); see also *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("[A] prayer for general relief . . . cannot be used to enlarge a pleading to the extent that it embraces an entirely different cause of action for which fair notice does not exist.").

E. Pleading Errors.

Don't rely on a typo in the opposing pleading. Notice may be sufficient even if the wrong word or title was used in a claim. *In the Interest of B.L.H.*, 2018 Tex.App.Lexis 5214 (Tex. App.—Houston [14th Dist.] July 12, 2018, no pet.)("father" instead of "mother" in pleadings.)

VI. SPECIFIC CLAIMS: PLEAD OR NOT?

> **Good Rule of Thumb:** If you bear the burden of proof or what you want isn't presumed, plead it.
> **Better Rule of Thumb:** If it's important to your client, plead it.

A. General Rule.

1. Divorce.

Pleading requirements in divorce cases are tighter on grounds, property division and collateral claims, and softer on SAPCR relief.[13] Grounds for divorce must be specifically pleaded. *Tex.Fam.Code* § 6.001-009; *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.)(reversing divorce granted on adultery grounds, because it was not pleaded and not tried by consent.) Generally, a claim for determination of conservatorship of children imbues the court with the power to decide all SAPCR issues. Both parties are on notice that all issues involving the child will be considered and ruled upon. However, some interpretive intermediate decisions narrow this general rule such that reliance on the general rule may be unwise.

2. Modification.

As you will see below, the courts are splintered as to whether and when specific pleadings are required. The Supreme Court seemingly resolved this issue over fifty years ago: "[O]nce the child is brought under [the court's] jurisdiction by suit and pleading cast in terms of custody and control, it becomes the duty of the court in the exercise of its equitable powers to make proper dispositions of all matters comprehended thereby in a manner supported by the evidence." *Leithold v. Plass*, 413 S.W.2d 698 (Tex. 1967). Nonetheless, appellate courts regularly strike-down lower court judgments that are not specifically supported by the pleadings. Given the split in appellate decisions and the seeming contradiction between the intermediate courts and the Texas Supreme Court, counsel should fall on the side of caution.

B. Specific Issues and Interpretive Cases: SAPCR Issues.

1. Conservatorship in general.

The general rule is broad and grants sweeping powers to the court. When a child is brought before the court, whether in an original divorce, SAPCR case, or SAPCR modification, the Court may decide all SAPCR issues. *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967) ("[A] suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child."); *In re P.M.G.*, 405 S.W.3d 406, 417-18 (Tex. App.—Texarkana 2013, no pet.) (in modification of conservatorship, party sought to be appointed as the person who has the right to designate the primary residence of the child thereby "necessarily invok[ing] the jurisdiction of the trial court over the matters of custody and control, imbuing the trial court with 'decretal powers'"); *In the Interest of P.J.*, 2013 Tex. App. Lexis 15334 (Tex. App.—Fort Worth Dec. 19, 2013, no pet.); *see In re Macalik*, 13 S.W.3d 43 (Tex. App.—Texarkana 1999, no pet.)(where the pleadings of both parties invoked the jurisdiction of the court over the matters of child support, custody, and control, and they both alleged that the scheme of custody, control, and visitation had become unworkable and inappropriate because of a change in circumstances, the court may change any aspect of those issues, even without a specific request for the change granted). However, as described above, subsequent cases have created exceptions such that blind reliance upon the general rule may be unwise.

2. Sole Managing Conservatorship.

Courts are split on whether a party must specifically plead for sole managing conservatorship. Some courts hold that a party must specifically plead for sole managing conservatorship to overcome the presumption of joint conservatorship. *In re A.B.H.*, 266 S.W.3d 596, 600 (Tex. App.—Fort Worth 2008, no pet.)(reversing award of SMC in modification proceeding because prevailing party only pleaded for JMC); *Baltzer v. Medina*, 240 S.W.3d 469 (Tex.App—Houston [14th Dist.] 2007, no pet)(reversing award of SMC to father). The dissent in *A.B.H.* strongly disagreed with the majority decision. "The Supreme Court of Texas has held that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings. Technical rules of practice and pleadings are of little importance

[13] *See Tex.Fam.Code* § 102.008(b)(10).

in determining issues concerning the custody of children. . . . [O]nce the child is brought under its jurisdiction by suit and pleading cast in terms of custody and control, it becomes the duty of the court in the exercise of its equitable powers to make proper disposition of all matters comprehended thereby in a manner supported by the evidence." *In re A.B.H.*, 266 S.W.3d 596, 601(Tex. App.—Fort Worth 2008, no pet.) (dissenting opinion) citing, *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967).

> PRACTICE TIP: prior to trial, amend your pleading to include a claim in the alternative, seeking sole managing conservatorship, in the event that the court finds sole managing to be in the best interest of the child, or determines that there is a pattern or history of family violence such that joint conservatorship is not available. *Tex.Fam.Code* § 153.004.

3. Designation of Primary Conservator.

In a SAPCR case, a court can name *either* party as primary conservator for purposes of establishing residence, even without a counter-petition by the prevailing party. *In Re M.G.N.*, 491 S.W.3d 386 (Tex.App.—San Antonio, pet denied)(in modification, father asked for SMC; court awarded primary to mother without supporting pleading); see *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967).

4. Material Change in Circumstances.

A party seeking modification of prior SAPCR orders must specifically plead and prove that a material and substantial change in circumstances of the child or a party has occurred after the date of rendition of the prior order. *Tex.Fam.Code* § 156.101. A party's allegation of changed circumstances with respect to an issue constitutes a judicial admission of the common element of changed circumstances in the other party's similar pleading. *In re A.E.A.*, 406 S.W.3d 404, 410 (Tex.App.—Fort Worth 2013, no pet.); *In re L.C.L.*, 396 S.W.3d 712, 718 (Tex.App.—Dallas 2013, no pet.). However, carefully and specifically pleaded, the admission is narrowly construed, such that it does not open the door to modification of *all* SAPCR issues. *In the Interest of Y.C.*, 2018 Tex.App.Lexis 6270 (San Antonio)(citing *Snider v. Grey*, 688 S.W.2d 602, 606 n.3 (Tex. App.—Corpus Christi 1985, writ dism'd)). And while the category of change must be pleaded, the specific factual bases for the change need not be enumerated.

5. Modification of Specific Rights and Duties.

As stated above, courts generally hold that once conservatorship of a child is properly within the jurisdiction of the court, the court may craft any order deemed in the best interest of the child. However, many courts arrive at this conclusion through trial by consent. *In the Interest of M.G.N.*, 491 S.W.3d 386, 407 (Tex. App.—San Antonio 2016, pet. denied); *Guillory v. Boykins*, 442 S.W.3d 682, 690 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Bailey-Mason v. Mason*, 334 S.W.3d 39, 44 (Tex. App.—Dallas 2008, pet. denied).

> PRACTICE TIP: If, as primary or alternative relief in a modification, a movant wishes to modify only certain rights and duties of conservatorship, best practice is to specifically identify those rights and duties in the pleading.

6. Possession and Access.

If either party asks the court to modify possession or access, the court can change it however it wants, to favor either side, even without competing claims or a counterpetition. *In the Interest of M.A.A.*, 2016 Tex.App.Lexis 9198 (Tex.App.—Dallas 2016)(court modified and restricted the movant's access, in absence of responsive pleadings); *In the Interest of M.G.N.*, 491 S.W.3d 386, 408 (Tex. App.—San Antonio 2016, pet. denied) (Dad moves to modify possession and restrict mom's access. Mom makes general denial, only. Court expands mom's access and limits dad's. Court holds that dad put issue of possession on the table, and therefore court can modify however it wants in that regard.)

7. Modification of Geographic restriction:

In an original SAPCR, a general request for conservatorship alone is sufficient to impose a geographic restriction. *See Tex.Fam.Code* § 153.134(b); *see also In re P.M.G.*, 405 S.W.3d 406 (Tex. App.--Texarkana 2013, no pet.); *In re Marriage of Christensen*, 2019 Tex. App. LEXIS 777 (Tex.App.—Texarkana). In a modification, however, courts are split as to whether requests to impose, remove or modify geographic restrictions must be specifically pleaded. See *Flowers v. Flowers*, 407 S.W.3d 452, 458 (Tex. App.—Houston [14th Dist.] 2013, no pet.)(reversing modification of geographic restriction because not specifically pleaded); *Gomez v. Rangel*, 2014 Tex. App. LEXIS 10077 (Tex. App.--Amarillo Sept. 8, 2014, no pet.)(mem. op.)(reversing change to geographic restriction not supported by pleading); *In the Interest of M.K.T.*, 2015 Tex.App.Lexis 9921 (Corpus Christi)(must be pleaded, but was tried by consent); ***c.f.*** *In re. P.M.G.*, 405 S.W.3d at 417 (request to change primary conservator imbued "decretal powers" sufficient to change geographic restriction without specific pleading).

> PRACTICE TIP: A material and substantial change *is established* when a primary conservator moves a child in violation of a geographic restriction. *In re W.C.B.*, 337 S.W.3d 510, 516 (Tex.App.—Dallas 2011, no pet).

8. Child Support.

In original SAPCR or modification cases, current child support may always be considered by the court. *See In re O'Neal*, 2013 Tex. App. LEXIS 15397 (Tex. App.—Amarillo, Dec. 13, 2013, no pet.)(holding that changes in visitation rights must necessarily result in a revisit of support obligations); *Boriack v. Boriack*, 541 S.W.2d 237, 242 (Tex. Civ. App. -- Corpus Christi 1976, writ dism'd); *Wolters v. White*, 659 S.W.2d 885, 888 (Tex.App.—Dallas 1983)(court may award child support even without a specific request for it in the pleadings); *see In re A.J.J.*, 2005 Tex. App. LEXIS 3058 (Tex. App.—Fort Worth, April 21, 2005, no pet.) (trial court has broad discretion in setting child support and in the absence of abuse of discretion the decision will not be overturned)(*overruled in part on other grounds*, *Illif v. Illif*, 339 S.W.3d 74, 83 (Tex. 2011)).

> PRACTICE TIP: It remains an open question whether a court that denies a request to modify conservatorship, possession and access of a child can modify child support in the absence of a specific pleading seeking such relief. Best practice is to always ask the court to revisit child support.

9. Retroactive Support.

Most courts have held that specific notice is required when retroactive child support is being sought. *Martinez v. Martinez*, 61 S.W.3d 589, 590 (Tex. App.—San Antonio 2001, no pet.); *In re J.G.Z.*, 963 S.W.2d 144, 148 (Tex. App.—Texarkana 1998, no pet.); *Taylor v. Taylor*, 337 S.W.3d 398, 402 (Tex. App.—Fort Worth 2011, no pet.) (op. on reh'g).; *Espronceda v. Espronceda*, 2016 Tex. App. LEXIS 6071 (Tex. App.—Corpus Christi, June 9, 2016, no pet.) (mem. op.); *Udobong*, 2018 Tex.App.Lexis 10008 (Houston – 14th Dist.)(issue presumed waived because not pleaded, but tried by consent). However, some courts have upheld awards of retroactive support even in the absence of a specific request. *In re Q.D.T.*, 2010 Tex. App. LEXIS 8813 (Houston [14th Dist.], no pet.) (mem. op.)(concluding that pleadings were sufficient to support award of retroactive support where action was initiated "for the purpose of adjudicating parentage and child support" and mother requested "payments for the support of the child in the manner specified by the Court," noting that the family code "specifically provides for an award of retroactive child support on a finding of parentage").

10. Conditions of Access.

To avoid the additional burden of proof for injunctive relief (see Section VI.C.7, below), requests for limitation of parental conduct can be presented as restrictions on possession and conditions of access, rather than injunctive relief, and thus potentially avoid the issue. "It is within the trial court's discretion to place conditions on visitation without pleading requesting such conditions." *Mandeville v. Mandeville*, 2015 Tex. App. LEXIS 12033 (Houston [1st Dist.], no pet.) (mem. op.)(permitting restrictions on parental drinking, and overnight guests while children are present as conditions of access.) "A condition" is not the same as a change of access, rights or duties. Thus, if a condition is in the best interest of child, it may be imposed without a specific request to do so.

In the Interest of B.H.W., 2017 Tex. App. LEXIS 5303, *24 (Tex. App.—Dallas, June 9, 2017, pet. denied); *Peck v. Peck*, 172 S.W.3d 26, 35 (Tex. App.—Dallas 2005, pet. denied). However, reliance upon this exception is risky, as some courts disagree. *In re A.A.N*, 2014 Tex. App. LEXIS 8389 (Tex. App.—Fort Worth, July 31, 2014, no pet.)

11. No overnight visitors.

Courts are split as to whether a request to bar overnight visitors of the opposite sex must be pleaded as a request for injunctive relief, or not. This request has been deemed a condition of possession or access of the child by some courts, and as a permanent injunction restricting parental conduct in others. How it is presented to the court may be dispositive on whether a pleading is required. *Peck v. Peck*, 172 S.W.3d 26 (Tex. App.—Dallas 2005, pet. denied)(holding limitation is acceptable as temporary injunction even if such injunctive relief not requested in pleading); contra *In re A.A.N.*, 2014 Tex. App. LEXIS 8389 (Tex. App.—Fort Worth, July 31, 2014, no pet.) (Fort Worth)(mem. op.)(striking injunction as to conduct of parents without specific pleading)

(See Section VI.C.7, below).

C. Specific Issues and Interpretive Cases: Divorce and Property Issues.

1. Informal Marriage.

So long as the divorce pleading alleges that a marriage exists, specifics of the marriage are not required. *See e.g. Adeleye v. Driscal*, 544 S.W.3d 467, 484 (Tex. App.—Houston [14th Dist.] 2018, no pet.)(Nigerian proxy marriage alleged but not specifically pleaded). However, caution dictates that the

type of marriage should be specifically pleaded. Remember, when a claim carries an additional burden of proof, it should be pleaded. For example, an informal marriage must be established in accordance with Texas Family Code Section 2.401. Because additional evidence is necessary to prove those factors that would not otherwise be material in the case, the existence of an informal marriage should be specifically pleaded.

2. Indemnification.

General indemnity language associated with specifically assigned debts in the decree needs no special pleading. However, at least one court has held that indemnification language that goes beyond the basic default language must be specifically sought in the pleading, or the order is void. *Lynch v. Lynch*, 540 S.W.3d 107 (Tex. App.—Houston [1st Dist.] 2017, pet. filed)(reversing decree containing global indemnification for all debts belonging to the other party).

3. Reimbursement.

A party claiming a right to reimbursement must specifically plead (and prove) that the expenditures in question were made and that they are reimbursable. *Tex.Fam.Code* § 3.402; *see Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex.1982); *but see Reimart v. Reimart*, 2008 Tex. App. LEXIS 8549 (Beaumont, no pet.)(mem. op.)(holding that petition sufficiently raised economic contribution claim by asking the trial court to "divide the estate in a manner that the court deemed just and right, as provided by law.") In the absence of a specific pleading or trial by consent, a claim for reimbursement is waived. *Vallone*, 644 S.W.2d at 459. However, because reimbursement is also an equitable remedy, a court may consider evidence supporting reimbursement in crafting a just and right division of the marital estate. See *Hernandez v. Hernandez*, 703 S.W.2d 250, 252 (Tex. App. - Corpus Christi 1985, no writ). In other words, if you don't plead for reimbursement, you cannot get a separate money judgment on that claim, but you can still advocate for and get a greater division of the community estate as a result.

> PRACTICE TIP: the pleading should include the specific type of reimbursement sought, such as separate to separate, or separate to community. *See Tex.Fam.Code* § 3.402(a). A general claim for reimbursement "from one estate to another" might be deemed insufficient to put the other party on notice of the relevant facts. But *be careful* – if you specifically plead the two estates in question and get them wrong, the court may deny the requested relief.

4. Attorneys' Fees.

A request for attorneys' fees must be specifically pleaded or it is waived. Furthermore, the request must be specific as to both trial and upon appeal. *MacCallum v. MacCallum*, 801 S.W.2d 579 (Tex. App.—Corpus Christi 1990, writ denied) (award of fees upon successful appeal reversed because petition only sought recovery of attorneys' fees at trial); *Wolters v. White*, 659 S.W.2d 885, 888-89 (Tex.App.—Dallas 1983) (The judgment awarding attorney fees to appellee father in his motion to modify a managing conservatorship was reversed, because no affirmative pleading for attorney fees had been filed).

5. Spousal Maintenance.

A request for spousal maintenance must be specifically pleaded or it is waived, and the award is void**.** *In re Marriage of Day*, 497 S.W.3d 87 (Tex. App.—Houston [14th Dist.] 2016, pet denied) (award of spousal maintenance reversed) (citing *Cunningham v. Parkdale Bank*, 660 S.W.2d 810 (Tex. 1983)).

6. Disproportionate Division of Estate.

The trial court has wide discretion in dividing the estate of the parties. *Murff v. Murff*, 615 S.W.2d 696, 698-99 (Tex. 1981).[14] Equal division of property is not required, but the division must be equitable. *Lynch v. Lynch*, 540 S.W.3d 107 (citing *Marin v. Marin*, No. 14-13-00749-CV, 2016 Tex. App. LEXIS 3178 (Tex. App.—Houston [14th Dist.] Mar. 29, 2016, no pet.) (mem. op.)) Consideration of the *Murff* factors and the equities by the trial court is an inherent part of making a 'just and right' division of the property." *Murff* 615 S.W.2d at 698. Thus, a disproportionate division of the marital estate must inherently be equitable, it need not be specifically pleaded. *See Lynch*, 540 S.W.3d at 128.

[14] The "Murff" factors to be considered in crafting a just and right division of the marital estate include (1) the spouses' capacities and abilities, (2) benefits which the party not at fault would have derived from continuation of the marriage, (3) business opportunities, (4) education, (5) relative physical conditions, (6) relative financial condition and obligations, (7) disparity of ages, (8) size of separate estates, and (9) the nature of the property. *Id.*

7. Injunctive Relief.

The courts are split over whether and to what extent a trial court can enter an injunction without supporting pleadings.

- Courts affirming injunctions in the absence of specific pleadings include Houston (1st Dist.), Corpus Christi, Dallas, and Tyler.[15]
- Courts reversing injunctions in the absence of supporting pleadings: Austin, Houston (1st Dist.), Fort Worth, Texarkana, and San Antonio.[16]

In declining to follow its own precedent, the 1st Court in Houston recently defined and split the issue, as follows: "In matters concerning custody, control, possession, and visitation, the trial court's foremost consideration is the best interest of the child, and the court has discretion to fashion orders including injunctive relief that are in the best interest of the child and consistent with the allegations, general prayers for relief, and evidence, without the need for strict proof of the existence of a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law. But in cases in which the injunctive relief sought or granted does not concern custody, control, possession, or visitation of a child, the party seeking such relief must show his entitlement to a permanent injunction as in any civil case." *King v. Lyons*, 457 S.W.3d 122 (Tex.App.—Houston [1st Dist.] 2014, no pet). However, the court in *King* did not expressly overrule *O'Connor*, a 2007 1st Court decision that went the other way. *O'Connor v. O'Connor*, 245 S.W.3d 511 (Tex. App.—Houston [1st Dist.] 2007, no pet.)(permanent injunction enjoining mother's access to children affirmed without supporting pleading).

The Dallas court summarizes the issue in a different way, as follows: the court can restrict actions and activities *of the children* without claim for injunction, but not the actions or activities of the *parent* unless specifically pleaded as injunctive relief. *Peck v. Peck*, 172 S.W.3d 26 (Tex. App.—Dallas 2005, pet. denied).

VII. CONCLUSION.

As you can see, while the general rules seem to be forgiving and clear, appellate application of those general rules is inconsistent. Here is how the case-law boils down:

- You don't need to specifically plead, unless you do.
- "Best interest of the child" trumps technical pleading requirements, unless it doesn't.
- Trial by consent isn't available, unless it is.
- Unpled claims are barred, unless they aren't.

The safest policy is to plead for what you want, and plead all less-attractive options in the alternative. Remember, the rules of thumb:

> **Good Rule of Thumb:** If you bear the burden of proof or what you want isn't presumed, plead it.
> **Better Rule of Thumb:** If it's important to your client, plead it.

[15] *MacCallum v. MacCallum*, 801 S.W.2d 579 (Tex. App.—Corpus Christi 1990, writ denied)(injunction prohibiting children's use of farming equipment upheld); *Peck v. Peck*, 172 S.W.3d 26 (Tex. App.—Dallas 2005, pet. denied)(injunction prohibiting father from having overnight romantic visits upheld in absence of pleading); *In re B.J.H.-T.*, 2011 Tex. App. LEXIS 1518 (Tyler, pet. denied) (mem. op.)(affirming injunctions not specifically related to visitation with the child); *Mandeville v. Mandeville*, 2015 Tex. App. LEXIS 12033 (Houston [1st Dist.] no pet.)(mem. op.)(affirming injunction without supporting pleading).

[16] *Cox v. Cox*, 298 S.W.3d 726, 733 (Tex. App.—Austin, 2009, no pet.)(reversing default judgment because wife failed to give husband fair notice that her amended petition sought permanent rather than temporary relief); *In re A.A.N.*, 2014 Tex. App. LEXIS 8389 (Fort Worth)(mem. op.)(striking injunction as to conduct of parents); *In the Interest of N.W.*, 2013 Tex. App. LEXIS 11862 11862 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.)(must plead); *Falor v. Falor*, 840 S.W.2d 683, 687 (Tex. App.—San Antonio 1992, no writ) (dissolving permanent injunction that father not go near the mother except to exercise child visitation because mother did not plead or prove necessity of permanent injunction); *Ulmer v. Ulmer*, 717 S.W.2d 665, 666-67 (Tex. App.—Texarkana 1986, no writ).