

## **THINGS WE JUST CAN'T HELP YOU WITH**

### **AMICUS APPOINTMENTS:**

A lot of times, you may want to get an amicus to bolster your case. However, if the case is one where the amicus will not get paid, we will almost certainly not appoint one. We need to protect the bar, and can't have them work for free. (TFC 107.021; 107.023).

### **UCCJEA ISSUES:**

If the R lives out of state, the basis for the court's assertion of Long Arm Jurisdiction must be plead. If the case is a SAPCR and at least one parent lives out of state, the requirements of TFC 152.209 (UCCJEA affidavit) MUST be complied with. If they are not, the court, on its own motion may stay the proceeding (TFC 152.209(b)). This is the document that will tell the court whether or not there is even enough basis to assert jurisdiction. If another court has asserted jurisdiction by signing an order that qualifies as a "custody determination" under Chapter 152, that court has exclusive jurisdiction until it gives it up or a determination is made that they do not have jurisdiction. There is nothing you can do that will get a court jurisdiction if they don't have it.

We can't waive the UCCJEA conference call. If your situation mandates it (typically in simultaneous proceedings) the conference call is mandatory (TFC 152.110). You can't agree that the county or state you choose to live in has jurisdiction if they don't.

### **MANDATORY VENUE PROVISIONS:**

The mandatory venue and transfer provisions of the TFC cannot be negated by contract. To do otherwise "would promote forum shopping by contract." Cassidy v. Fuller, 568 S.W.2d 845, 847 (Tex.1978); Leonard v. Paxson, 654 S.W.2d 440, 441-42 (Tex.1983)

Venue cannot be mandated by a Mediated Settlement Agreement (In re Lovell-Osburn, 448 S.W.3d 616 (Hou. {14<sup>th</sup>} 2014))

If you have filed in the wrong county, you have to dismiss and refile. A court that never had jurisdiction to start with cannot transfer the case over which they have no jurisdiction.

## **PROPER NOTICE**

A Respondent's right to notice is a fundamental due process right. Lack of proper notice creates a void order. The most common family law issues that arise on notice are:

### **--Defective Waiver**

Family law waivers must contain a full mailing address.

Only the constitutional rights specifically waived are actually waived. If the Waiver says "I specifically don't waive any rights I may have to conservatorship, visitation, support or property division", then the right to notice on those issues are not waived. If the waiver provides that the Respondent "specifically demands to be noticed of any hearing or trial" then notice has not been waived.

If the Waiver was executed prior to the date the suit was filed it is not valid.

### **--Notice of Relief Sought**

--Long Arm Jurisdiction

If the Respondent lives out of state the petitioner must plead the basis for the court's assumption of jurisdiction over him or her.

If the case is a SAPCR, the court cannot grant any relief without a UCCJEA affidavit (TFC 152.209) if both parties are not Texas residents. The UCCJEA affidavit is what tells the court the basis for your jurisdiction. If the court doesn't have those facts, the judge has no authority to assert jurisdiction.

### **--Citation by Publication**

It's hard to get. The reason is that the Respondent would have a better chance of getting notice if we sent up smoke signals. So, your affidavit must be iron-clad. It's the old "sack of money" test: If your client knew that if they found the Respondent, we would hand over a big sack of money, what all would they do to try to locate that Respondent? Then, that is what they need to do.

An attorney ad litem will be appointed, and that is at your cost. An attorney ad litem can only be waived if the petitioner or counsel "makes an oath" that there are no children under 18 and there is no appreciable property accumulated. You must also submit a Statement of Evidence approved and signed by the court

### **--Children of the Marriage**

Significant inquiry should be made into whether the wife has had any children since the date of marriage to the present date, not the date of separation. If she's had any children, even years after the separation, that is a presumed child of the marriage and must be plead.

### **--Return of Service**

Must specifically include all the information under TRCP 107 (the name, address, city, state, zip, date of service, name of the server, license number, date of birth, and expiration date.)

Make sure the citation states that the proper Respondent was served. If citation was issued to "John Jones", but the return says it was served on "J. Jones", that is bad service.

Make sure the citation was not served on a Sunday. (TRCP 6). If it was, fire your process server.

### **RELIEF NOT REQUESTED/RELIEF NOT PROVED**

An issue can't be tried by consent in a default. This is particularly difficult in unique SAPCR cases and cases with domestic violence. If the petition is generic, and the Respondent does not answer, the court can't deviate from the presumptions without pleadings to support the relief. So a generic petition that says that "Petitioner believes the parties will reach an agreement as to conservatorship..." even with horrific domestic violence testimony does not permit the court to grant an SMC, restrict rights or possession or impose permanent injunctions.

The same holds true with separate property claims and reimbursement claims. If relief is not requested, it can't be granted.

### **INVENTORY AND APPRAISEMENT**

Absolutely required in defaults. If I had a dime for every time counsel appeared for a default without an inventory and said, "But Judge, they don't have any property to divide," I'd be .... well, I'd have a lot of dimes...

Take your time. If you have separate property claims, reimbursement claims, sole managing conservatorship issues, deviation from the standard possession order, child support or any other claims, you've got to have your exhibits ready and your witness prepared. We have no problem taking the extra time we know you need to prove up defaults.

A non-military affidavit and certificate of last known address must be completed prior to prove up. (The last known address can't be "Unknown")

## **MISCELLANEOUS PROVISIONS THAT WE CAN'T HELP YOU WITH**

There is no authority to deny judgment on a properly executed MSA other than a domestic violence exception.

There is no authority to refuse to send a case to Arbitration when a valid agreement to arbitrate exists.

The only issue on a Motion to Enter is whether the proposed order is drafted properly. It is not a Motion for a Do-Over, and I can't make it into one.

There is no authority to impose a child support obligation on a temporary basis on an unadjudicated parent until after such time as that parent has refused to appear for genetic testing. TFC 160.622.

Chapter 160 contains the exclusive methods for determination of parentage and simply "being on the birth certificate" is not one of them.

QDRO's—we lose jurisdiction to sign a QDRO 30 days after the signing of the decree. If more than 30 days pass, you will need to file a Petition to Sign QDRO and have Respondent served or sign a waiver or answer.

Motions to Substitute. So many of these get kicked back because you don't have opposing counsel's signature on the proposed Order.

Certificate of Conference on Motions to Compel. It is more than "answer by tomorrow or I'm filing." I literally had two competing Motions to Compel. Both contained certificates of conference stating that the deficiency letter was sent May 7, demanding the other party to fully answer voluminous discovery by Friday May 8. On May 11 and May 13, respectively, Motions to Compel were filed.

The hearing was a short one.

A special thank-you to Judges Doug and Judy Warne for allowing me to use portions of their paper, "No Matter How Much They Grovel, We Can't Do That" which was presented at the 2019 Marriage Dissolution Seminar.