PRESENTED AT

University of Texas 27th Annual Conference on
State and Federal Appeals

June 1-2, 2017
Austin, Texas

Family Law Appeals

Richel Rivers
and
Mary Evelyn McNamara

RIVERS ♦ MCNAMARA, PLLC
1209 West 5th St., Suite 200
Austin, Texas 78703
512-439-7000
rrivers@riversmcnamara.com
memcnamara@riversmcnamara.com

Family Law Appeals

I. INTRODUCTION

Resolution of marriage and family legal disputes is informed by the application of constitutional, statutory, and procedural principles to the uniquely personal circumstances of the litigants. Appellate review of family law cases thus presents issues uncommon to other appeals.

Here we identify three principles significant to the law's interest in personal and family life in our society and illustrate their application in cases addressed by the Texas Supreme Court: (1) personal liberties must be protected; (2) spouses owe a fiduciary duty to each other; and (3) the best interest of children predominates. Especially in an atmosphere of politically charged public discourse, unifying legal principles fostering fairness and respect are crucial to judicial resolution of family law disputes. The focus of this paper is motivated by our experience guiding people through conflicts involving exceptionally painful personal situations—the loss of relationship, disputes over care and nurture of children, challenges to choices of love, and breaches of trust. When such private matters become entangled in the morass of litigation, people experience the full measure of our government's power over their lives.

This paper is not intended to be a roadmap for handling a family law appeal. Our approach instead is to offer a broader perspective of foundational decisional principles in this difficult subject-matter area. Many helpful papers address a panoply of topics the appellate practitioner might encounter in handling a family law appeal. As an aid to the initial research a particular appellate engagement might require, we have compiled a Bibliography of recent Texas Supreme Court cases and writings in this arena.

II. PERSONAL LIBERTIES MUST BE PROTECTED

Our country's governmental system is founded on the conviction that we hold certain unalienable rights, among them being life, liberty, and the pursuit of happiness.[1] The legal system has often lent its power to the protection of such personal rights against unwarranted state action.[2] Judicial support of personal liberties in family relationships is reflected in cases that afford legal protections to people's private choices or that set boundaries on the state's involvement in individual and family life.[3]

---

[1] Declaration of Independence, Action of Second Continental Congress, July 4, 1776.

[2] *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law forbidding teaching children foreign languages violates liberties guaranteed by 14th amendment); *Reed v. Reed*, 404 U.S. 71 (1971) (invalidating state law giving preference to men over women in application to be appointed administrator of son's estate); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (law prohibiting unmarried persons' access to contraceptives violates constitutionally protected right of privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating state law criminalizing same-sex intimacy).

[3] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking state law requiring parents and guardians to send children to public primary schools); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (law forbidding use of contraceptives violates married couples' constitutionally protected right of marital privacy); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating bans on interracial marriages); *Turner v. Safley*, 482 U.S. 78 (1987) (invalidating prison regulation restricting prisoner's right to marry only when superintendent approves, and there are compelling reasons to do so); *United States v. Windsor*, 133 S. Ct. 2675 (2013) (differentiation between same-sex & opposite-sex marriages "demeans the couple, whose moral and sexual choices the Constitution protects…"); *Obergefell v.*

Recent cultural and political debate over same-sex marriage highlights the importance of respect for the rule of law. The Texas Supreme Court has underscored this virtue in its swift recognition of the same-sex marriage ruling by the Supreme Court of the United States, in the process reminding lawyers and judges of our obligations to uphold the rule of law despite misgivings about what the law should be.[4]

> Unfortunately, rancorous cultural disputes seem to induce jugglery, by lawyers and judges alike.… But it is precisely in divisive, consequential cases when by-the-book fastidiousness by courts is most vital, to blunt even the appearance of evasive corner-cutting or politicized judging.… Every Texas jurist swears allegiance to the Rule of Law, vowing to "preserve, protect and defend the Constitution and laws of the United States and of this State, so help me God." That solemn oath comes first—always—not our ideology, not our legacy, and not our desire to be feted as on the "right side of history."[5]

> As judges and lawyers, we bear a sacred obligation to uphold the rule of law even when the law does not conform to what we believe it should be. That duty includes withstanding the temptation to bend and abuse the legal process to collect an earnestly desired result the law simply does not provide.[6]

Strongly held feelings and beliefs also infect legal battles over parenting choices and behaviors. For example, inter-family disputes over parenting capabilities raise questions of the extent to which a parent is free to choose how to raise his or her own children. A common scenario involves grandparents who can contribute significantly to the welfare of their grandchildren, perhaps better than the grandchildren's own parents. But grandparents' intervention into the lives of their children's children is fundamentally constrained by the sanctity of the parent-child relationship.[7]

> Tommie Granville and Brad Troxel were unmarried parents of two daughters. When they separated, Brad lived with his parents, Jenifer and Gary Troxel, and regularly brought his daughters to his parents' home for weekend visitation. Almost two and a half years later, Brad committed suicide. The Troxels continued to see their grandchildren after Brad's death for about five months, when Tommie told them she wished to limit their visitation with her daughters to one short visit per month. The trial court considered the mother's and the grandparents' proposed visitation

---

Hodges, 135 S. Ct. 2584 (2015) (opposite-sex and same-sex marriages are entitled to equal dignity and respect under the law).

[4] *In re State*, 489 S.W.3d 454, 456 (Tex. 2016) (dismissing Texas Attorney General's mandamus petition as moot following issuance of temporary restraining order allowing same-sex couple to obtain marriage license and following nonsuit of case after marriage ceremony conducted on courthouse steps).

[5] *Id.* at 456 (Willett, J., concurring).

[6] *Id.* at 459 (Devine, J., concurring).

[7] *Troxel v. Granville*, 530 U.S. 57 (2000) (state law permitting any person to petition for child visitation rights at any time, with outcome based solely on trial court's determination of child's best interest, unconstitutionally infringes on parents' fundamental right to rear their children).

> schedules, and issued orders granting the Troxels visitation a bit more often than Tommie proposed.
>
> Tommie appealed, during which time she remarried, her husband adopted her daughters and brought his six children into their family, and the Troxels' visitation order was upheld by the trial court then dismissed by the Washington appellate courts. The Supreme Court of the United States agreed: "The liberty interest at stake in this case—the interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[8]

The *Troxel* case spawned six opinions among the nine justices of the Supreme Court of the United States. Though the justices differed in their views of the appropriate procedural approach and jurisprudential analysis, all of the justices recognized a well-established fundamental right to parent one's child.[9] States have responded to the Supreme Court's guidance with statutes that incorporate presumptive decisional protections for fit parents' control, define the nature of harm or other circumstances justifying intervention in parenting, and confer standing on the persons who may invoke the legal scrutiny of the court into the child's best interest.[10]

Protecting individual liberties can be most uncomfortable when to do so counters mass opinion. The Texas Supreme Court faced this prospect when reviewing the state's removal of 468 children from their parents living in polygamous marriages:[11]

> A large community of people associated with the Fundamental Church of Jesus Christ of Latter Day Saints lived on the 1,700-acre Yearning for Zion ranch near Eldorado, Texas. The Texas Department of Family and Protective Services received an anonymous phone call alleging that a 16-year old girl "Sarah" was being physically and sexually abused at the ranch. Department and law enforcement officials entered the ranch at 9 p.m. and throughout the night interviewed adults and children. Investigators discovered a culture of polygamy including inducing underage girls to enter in polygamous unions with older men and have children, and the Department undertook an emergency removal of all children at the ranch. The Department characterized its action as "the largest child protection case documented in the history of the United States."

---

[8] *Id.* at 65.

[9] "In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all Men … are endowed by their Creator.'" *Id.* at 91 (Scalia, J., dissenting).

[10] *See In re Derzapf*, 219 S.W.3d 327 (Tex. 2007) (grandmother did not overcome presumption favoring children's father as set out in Texas's re-codified grandparent access statute); *In re Scheller*, 325 S.W.3d 640 (Tex. 2010) (trial court abused its discretion in issuing Temporary Orders granting grandfather access when evidence did not establish denial would significantly impair grandchildren's physical health or emotional well-being, but did not abuse its discretion in ordering expert to serve as guardian ad litem and psychologist to evaluate case and make recommendations).

[11] *In re Texas Dep't of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008) (orig. proceeding) (per curiam denial of Department's mandamus petition following Court of Appeals order vacating trial court's temporary orders removing children from their parents and limiting parents' access to their children).

> The district court held a 2-day hearing, and issued temporary orders continuing the Department's possession of the children and allowing the parents' contact with their children only with Department permission. Thirty-eight mothers sought mandamus compelling return of their 126 children, which the Court of Appeals granted. The Department then sought mandamus from Texas Supreme Court, but that petition was denied. The Supreme Court found that on the record supplied, removal of the children was not warranted by the governing statutory provisions. The Court reasoned that "the Family Code gives the district court broad authority to protect children short of separating them from their parents and placing them in foster care." With this reassurance, the Court noted that "[w]hile the district court must vacate the current temporary custody orders as directed by the court of appeals, it need not do so without granting other appropriate relief to protect the children…" and "[t]he court of appeals' decision does not conclude the SAPCR proceedings."[12]

The Court's ability to examine procedural and substantive issues, especially in cases that stimulate heightened attention from the political system, offers a potentially restorative opportunity for protection of individual liberties and pronouncement of respect for all people. Given that conflicts inevitably arise in people's relationships one to another, the legal system's deliberative process may help foster appreciation of unifying principles upon which our common relationship with the state are founded.

III. SPOUSES ARE FIDUCIARIES TO ONE ANOTHER

Texas courts have long and repeatedly held that a fiduciary relationship exists between spouses.[13] The historical underpinnings of the fiduciary rule involve the law's efforts to remedy abuses of trust and confidence given by one person to another. The marital relationship is most deserving of such legal protection. As a scholar of fiduciary law notes:

> As far back as I can remember, I have always believed that the ability of human beings to trust each other is the single most important element in interpersonal relationships. As individuals, we walk around with massive defence structures built up to protect the vulnerable parts of our personalities. The strength of any friendship or other personal tie we allow can be measured by the extent to which, in the company of that other individual, we are willing to put aside our defence mechanisms and trust the other person not to take advantage of our vulnerability. So, too, in business and in government the existence of trust is the cement which allows our institutions to operate.… When we elect individuals to represent us in pulling the levers of society, whether in business or in government, no amount of investigation into their abilities or character will change the fact that we are forced to trust in their judgment and integrity in the management of our affairs.… In the panoply of human

[12] *Id.* at 615.

[13] *Hot Topics in Family Fiduciary Litigation*, Hon. Marilea W. Lewis & Melissa Rachel Cowle, State Bar of Texas 11th Annual Fiduciary Litigation Course (2016); *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999); *see also Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998) (spouses have duty not to commit fraud on community estate); Restatement (Second) of Torts § 551.

> interaction, trust in each other remains the pervasive force which allows man to be the social animal his instincts demand.… [T]he law of fiduciaries strikes at the essence of human activity.…[14]

The law of fiduciaries addresses people's expectations that a fundamental sense of fairness will guide our courts' resolution of matters of trust. Judicial application of the common-law and equitable principles of fairness underlying fiduciary rules serve this public expectation. Legislative expression of public policy set out in the Family Code coincides with this approach. For example, every marriage is presumed to be valid (unless it is void, voidable, or annulled as provided by the Code), to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship. *See* Tex. Fam. Code § 1.101-.103. And, courts are legislatively directed to order a division of the spouses' estate in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage. *Id.* § 7.001.

The marital relationship presents a variety of factual contexts for judicial application of fiduciary concepts, imposition of the resulting duties upon spouses, and fashioning of a fair resolution. Although the Texas Supreme Court has not written a comprehensive analysis of the fiduciary obligations of spouses, many lower court opinions have applied the conceptual components of those obligations to a myriad of circumstances, and the Texas Supreme Court has let stand many of these resolutions.[15]

One case the Texas Supreme Court declined to review is particularly noteworthy in that the Court's action can be reconciled with its other rulings only by application of the equitable underpinnings of fiduciary law.[16] The facts of the case perhaps explain the Court's decision to let the lower courts' result stand:

> Glenn Vickery, an attorney, falsely told his wife Helen that they needed a divorce to protect their community estate from liability to a client who sued him for malpractice. When she balked, he had a friend from law school file a divorce case for her without her knowledge, as well as an answer and cross petition for him. Shortly thereafter, the malpractice suit settled within his insurance coverage limits, but Glenn insisted on proceeding with the divorce on the pretext of protecting their estate and his relationships with Helen and their 9-year-old daughter. Helen acquiesced and agreed to a decree that gave her ~7.5% of the community estate and omitted reimbursement due to the community from his separate property ranch where the family lived. Within 6 months, Glenn demanded and Helen agreed to a *nunc pro tunc* decree that included a property description of the ranch. The next day Glenn hired a lawyer to have Helen evicted from the residence. Shortly after he served Helen with the eviction suit, Glenn married one of Helen's best friends.

---

[14] J.C. Shepherd, Law of Fiduciaries Preface (1981).

[15] *See, e.g.*, *Puntarelli v. Peterson*, 405 S.W.3d 131 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Knight v. Knight*, 301 S.W.3d 723 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Connell v. Connell*, 889 S.W.2d 534 (Tex. App.—San Antonio 1994, writ denied).

[16] *Vickery v. Vickery*, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting) (case summary supplied in Justice Hecht's dissent).

> Helen realized the depth of her husband's deception, tried unsuccessfully to renegotiate a fair redivision of their estate, then filed a bill of review action that was tried to a jury. Finding Glenn committed fraud and breached his fiduciary duty to Helen, the jury awarded Helen $6.7 million for loss of community property, $1.3 million mental anguish damages, $1 million punitive damages, $1.5 million prejudment interest, and $350,000 against Glenn's attorney friend. The trial court set aside the prior divorce decree as having been procured by extrinsic fraud, divided the $14.6 million community estate 58% to Helen ($8.5 million) and additionally granted her judgments for the $1.3 million mental anguish, $1 million punitive damage, and $1.5 million prejudgment interest awards, as well as the $350,000 against Glenn's attorney friend. Helen elected to receive the larger share of the community estate ($8.5 million) rather than the $6.7 million jury award for loss of community property.

The court of appeals affirmed, rehearing *en banc* was denied with one dissent, [17] and the Texas Supreme Court denied review. First Court of Appeals Justice Andell's dissent argued that Helen had no independent tort action against Glenn and thus she was not entitled to the actual, punitive, and prejudgment interest judgments against Glenn, acknowledged that the trial court could have taken Glenn's conduct into account in dividing the community estate, and urged the case should have been remanded to permit the trial court to reconsider the community division.

Indeed, Justice Andell's analysis was confirmed by the Texas Supreme Court in an opinion issued four months after Glenn Vickery filed his petition for review.[18] In *Schlueter*, the Texas Supreme Court held that separate and independent tort actions for actual fraud and accompanying exemplary damages do not exist in the context of a deprivation of community assets.[19] The facts of *Schlueter* also present the scenario of fraud on a spouse's community property interests:

> Richard Schlueter sold his emu business—worth at least $10,000—to his father for $1,000, and he gave his father an early retirement check for $30,360 from which his father took $12,565 allegedly for loan repayments, all to avoid those assets being included in division of his and his wife Karen's $122,600 community estate. The jury found Richard defrauded the community estate and conspired with this father to harm Karen, and the trial court awarded her judgments for $12,850 jointly and severally against Richard and his father, $30,000 in exemplary damages against Richard, $15,000 exemplary damages against Richard's father, and $18,500 attorneys fees against Richard.[20]

[17] *Vickery v. Vickery*, No. 01-94-01004-CV (Tex. App.—Houston [1st Dist.] Dec. 4, 1997) (Abell, J., dissenting from denial of motion for rehearing *en banc*).
[18] *Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998).
[19] *Id.* at 589.
[20] *Id.* at 586.

The court of appeals affirmed the judgments for Karen, but the Texas Supreme Court reversed.[21] The Court determined there is no independent "tort cause of action for wrongful disposition by a spouse of community assets."[22] The remedy for such wrongful actions lay in the ultimate fair disposition of the marital estate and by further judgment if the marital estate is insufficient to remedy the harm to the injured spouse.

So how to reconcile *Vickery* with *Schlueter*? The injury caused by the betrayals of both Glenn Vickery and Richard Schlueter against their wives' interest in their respective marital estates was fully remedied by the financial outcome. Helen Vickery ultimately received 87% of her $122,600 community estate, and Karen Schlueter received 62% of her community estate.[23]

IV. THE BEST INTEREST OF CHILDREN PREDOMINATE

Texas law requires that "[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child."[24] Indeed, in any lawsuit involving children, including those only involving support disputes, the children are caught in the crossfire.

> Children get only one childhood. Unfortunately, acrimony between divorced couples is common, and when those couples have children, Texas law commendably tries to blunt the impact of grown-ups' hostility.[25]

Thus motivated, the Texas Supreme Court in *Oschner* clarified procedures for child-support collection cases, confirming the trial court's discretion to consider evidence of direct child support payments when considering whether the child support obligation has been fulfilled. As Justice Guzman concurred, "the result in this unexceptionally unique case is amply supported by the record evidence…."[26]

> Preston Oschner's child support order required him to make payments to his daughter's school, and when she switched schools, to make payments through a registry. Instead, Preston paid the new school directly, ultimately $20,000 more than his support order required. After accepting this arrangement for almost a decade, his ex-wife Victoria sued him for the balance not paid through the registry.

The trial court held that the direct tuition payments more than satisfied Preston's child support obligation. The court of appeals reversed, holding that the trial court could not consider

---

[21] *Schlueter v. Schlueter*, 929 S.W. 94 (Tex. App.—Austin 1996), *rev'd*, 975 S.W.2d 584 (Tex. 1998).
[22] *Id.* at 589.
[23] Ultimate division of community estates is estimated based on asset information in appellate opinions.
[24] Tex. Fam. Code § 153.002; *Danet v. Bhan*, 436 S.W.3d 793 (Tex. 2014) (per curiam) (reversed Court of Appeals' reversal of trial court termination on no-evidence grounds; found some evidence supports jury's finding that foster parents should be sole managing conservators and remanded to Court of Appeals for factual insufficiency review); *see also Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976) (identifying nine non-exclusive factors that may be considered in determining best interest of child).
[25] *Ochsner v. Ochsner*, No. 14-0638, at *1 (Tex. Jun. 24, 2016) (quoting Justice Willett's opening for the Court's 7-justice majority opinion).
[26] *Ochsner v. Ochsner*, No. 14-0638, at *1 (concurring op., Guzman, J., concurring).

payments Preston made that did not conform to the payment particulars of the child support order. The Texas Supreme Court disagreed, construing the statutory provisions for child-support enforcement proceedings to permit the trial court to consider payments not precisely compliant with the support order. The four opinions written in the case[27] offer a spectrum of insights into the family law dispute resolution process. Two comments seem to summarize the child-centered focus of the process:

> [P]arents promote the best interests of their children by fulfilling their child-support obligations and making payments in precise conformity with the decree to minimize disputes and costly court battles. Nevertheless, I recognize that, like this case, situations exist where parents agree to accept direct payments, and in those instances, the trial court has discretion to weigh evidence in determining the amount of child support that has been paid and whether a child-support obligation has been fulfilled.[28]

> One key way to reduce parental bickering—and protect kids caught in the crossfire—is through a child-support order that specifies how the noncustodial parent is to provide financial support. If the order is violated, the Family Code provides enforcement options.[29]

The outcome of *Oschner* seems facially fair—Preston was credited for paying his daughter's school tuition for almost ten years without Victoria's complaint. Yet the conflict that family endured to take the case to the Texas Supreme Court is perhaps immeasurable.

Perhaps every legal professional involved in family law disputes recognizes that protracted litigation is painful, expensive, and hard on the children. Our state policy encourages people to make their own agreements in family law disputes and provides enforcement means for properly executed agreements.[30] The Texas Supreme Court, in *In re Lee*, [31] has confirmed that the force of the legal system will enforce parties' own agreements:

> Benjamin sued Stephanie for primary custody of their daughter, alleging her poor parenting decisions and history or pattern of neglect had placed the child in danger. He also sought an order restraining her from having their daughter within 20 miles of her husband Scott, a registered sex offender, whom Benjamin testified at the Mediated Settlement Agreement prove-up hearing had violated the terms of his parole with their daughter in the house and had slept naked with their daughter between him and Stephanie.[32] When an associate judge denied judgment on the

[27] Justice Willett for the 7-justice majority; Justice Guzman joined by Justice Lehrmann concurring; Justice Johnson joined by Justice Boyd dissenting; and Justice Boyd joined by Justice Johnson, dissenting.
[28] Guzman, J., concurring.
[29] Willett, J., for the majority.
[30] Tex. Fam. Code §§ 6.602, 6.604, 153.0071. *See also* Tex. Civ. Prac. & Rem. Code § 154.002 ("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….").
[31] *In re Lee*, 411 S.W.3d 445 (Tex. 2013).
[32] *Id.* at 448.

> MSA, Stephanie moved for judgment on the MSA, Benjamin objected and withdrew his consent to the MSA, and the district judge heard testimony from both Benjamin and Stephanie, including testimony about whether the terms of the MSA were in their daughter's best interest. Again testimony established Scott's status as a registered sex offender who had violated conditions of his parole in living with Stephanie, but notably Benjamin did not repeat his comment about Scott having slept naked with his daughter. The trial court concluded the agreement was not in the child's best interest and denied Stephanie's motion to enter judgment on the agreement; the Court of Appeals held the trial court had not committed a clear abuse of discretion in refusing to enter judgment on an MSA that is not in the child's best interest; but the Texas Supreme Court held the trial court did abuse its discretion by denying the motion to enter judgment on the MSA and conditionally issued mandamus.

In *Lee*, the majority read the Family Code mediation provisions as fostering the well-supported policy of achieving resolution of family disputes, which is so critically important to the emotional and psychological well-being of children involved who can face "perpetual emotional turmoil, alienation from one or both parents, and increased risk of developing psychological problems."[33] In the view of the five-justice majority, the Court's holding that a trial court may not deny entry of judgment on a properly executed MSA based on a broad best-interest inquiry is compelled by a proper reading of the statute that in turn well serves children's interests because it fosters case resolution yet leaves the trial court with a safeguard to implement if the "very narrow exception involving family violence" is shown to exist.[34] The four-justice dissent read the Family Code broadly as imbuing the trial court with discretion to refuse to enter judgment on a MSA when the trial court determines that the agreement endangers the child's safety and welfare.[35] A plurality of the Court wrote separately to provide "much-needed guidance to trial courts" concerning the conduct of an endangerment inquiry, and to express confidence that the trial court on remand will take appropriate action if it found entry of judgment on the MSA could endanger the child.[36] In so doing, the plurality agreed with the dissent's concern that requiring trial courts to enter a judgment that could endanger a child would be an absurd result, noted that the Court's holding does not expressly state whether the Family Code allows "a narrow endangerment inquiry" but found that in this case no legally sufficient evidence of endangerment was admitted at the district court's *de novo* hearing on the MSA.[37] The plurality opinion aptly struggled to reconcile competing judicial interpretations of the statute in such a way that emphasized the trial court's important capacity to serve both policy directives and the particular concerns of the case at bar:

> [I]t is not uncommon for family courts to find themselves at a crossroads between divining the legislature's intent on a particular statute and making expedient decisions regard the safety and welfare of the children entrusted to their judgment. Often, they must interpret statutory language without the benefit of guidance from

[33] *Id.* at 449, including research references at n.4.
[34] *Id.* at 450 (Justice Lehrmann's opinion of the Court).
[35] *Id.* at 468 (Justice Boyd's opinion for the 4-justice minority).
[36] *Id.* at 462 (Justice Guzman for the 4-justice plurality).
[37] *Id.* at 464-65.

> the court of last resort. This difficulty is greatly heightened by the significant effect family law decisions have on the daily lives of parties. I have no doubt that the experienced trial judge in this case—now having the benefit of this Court's interpretation—will protect the safety and welfare of the child within the parameters established by the Family Code and consistent with legislative policy choices embodied in section 153.0071.[38]

Among the competing interests arising in family law arena, we are directed that our highest duty is to the next generation. Legislative mandate directing that the court's primary consideration shall always be the best interest of the children provides ample room for application of rules of procedure and evidence, statutory construction, and standards of review to serve that interest in protecting the children who follow us.

V. CONCLUSION

The three principles we posit here provide a basis for judicial decision-making that aligns with generally understood moral obligations affecting our relationships with one another. Respect for the rule of law follows when the process conveys to a litigant the feeling that he or she has been heard, that the rules are reasonable and fairly applied, and that the system gives the litigant relief from a conflict that was unattainable by his or her own personal efforts. As Justice Benjamin Cardozo wrote about this connection between the individual and society:

> There are attractions and repulsions between one individual and another, between individuals and groups, and finally between groups themselves. Energies must be released and energies must be curbed. The reconciliation of these opposites is one of the outstanding problems of the law; it is the problem of liberty and government.[39]

[38] *Id.* at 466.
[39] Benjamin N. Cardozo, The Paradoxes of Legal Science 87 (Columbia University Press) (1928).

Family Law Appeals
Bibliography

Family Law Section Reports:

The State Bar of Texas Family Law Section Report, published quarterly, includes commentary, articles, and case digests. The Reports, dating to 2007, are available to Family Law Section members at http://sbotfam.org/the-family-law-section/section-report/.

Recent Texas Supreme Court Cases:

Attorney General v. Scholer, 403 S.W.3d 859 (Tex. 2013) (estoppel not defense to child-support enforcement action).

In re Chambless, 257 S.W.3d 698 (Tex. 2008) (grandparent access to grandchild).

Chu v. Hong, 249 S.W.3d 441 (Tex. 2008) (remedies for fraud on the community).

In re Dean, 393 S.W.3d 741 (Tex. 2013) (interpretation of Uniform Child Custody Jurisdiction and Enforcement Act in custody determination involving two states).

In re Derzapf, 219 S.W.3d 327 (Tex. 2007) (grandparent access to grandchild).

In re Green, 221 S.W.3d 645 (Tex. 2007) (failure to pay contractual alimony not enforceable by contempt).

Hagen v. Hagen, 282 S.W.3d 899 (Tex. 2009) (trial court's clarification of unambiguous Decree of Divorce).

Iliff v. Iliff, 339 S.W.3d 74 (Tex. 2011) (construction of Texas Family Code section 154.066, when court finds intentional unemployment or underemployment and applies child support guidelines to obligor's earning potential).

Kramer v Kastleman, No. 14-1038 (Tex. Jan. 27, 2017) (acceptance-of-benefits doctrine in divorce).

In re Lee, 411 S.W.3d 445 (Tex. 2013) (mediated settlement agreements).

Milner v. Milner, 361 S.W.3d 615 (Tex. 2012) (mediated settlement agreements).

Natural Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150 (2012) (standards for landowner's testimony regarding property value).

Ochsner v Ochsner, No. 14-0638 (Tex. June 24, 2016) (court's consideration of direct payments in child-support enforcement action).

Pearson v. Fillingim, 332 S.W.3d 361 (Tex. 2011) (division of property).

Pidgeon v. Turner, No. 15-0688 (Tex. Sept. 2, 2016) (Devine, J., dissenting from denial of petition for review of *Parker v. Pidgeon*, 477 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2015) (upholding City of Houston's provision of benefits to same-sex spouses of employees)). (Petition subsequently reinstated on rehearing and granted on Jan. 20, 2017; submitted on Mar. 1, 2017, awaiting opinion).

In re Scheller, 325 S.W.3d 640 (Tex. 2010) (grandparent access to grandchild).

Schlueter v. Schlueter, 975 S.W.2d 584 (Tex. 1998) (fraud on the community; just and right division of property).

Shook v. Gray, 381 S.W.3d 540 (Tex. 2012) (grandparent rights, standing).

In re State, 489 S.W.3d 454 (Tex. 2016) (Willett, J., concurring, in dismissal of petition for writ of mandamus as moot post-*Obergefell*; petition challenged pre-*Obergefell* TRO holding Texas ban on same-sex marriage unconstitutional).

State v. Naylor, 466 S.W.3d 783 (Tex. 2015) (State lacked standing in pre-*Obergefell* challenge to same-sex divorce).

Tedder v. Gardner Aldrich, LLP, 421 S.W.3d 651 (Tex. 2013) (attorney's fees in divorce cases).

Tucker v. Thomas, 419 S.W.3d 292 (Tex. 2013) (attorney's fees in suits affecting the parent-child relationship).

Vickery v. Vickery, 999 S.W.2d 342 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review of property division).

Recent Continuing Legal Education Articles:

Hot Topics in Family Fiduciary Litigation, Hon. Marilea W. Lewis & Melissa Rachel Cowle, State Bar of Texas 11th Annual Fiduciary Litigation Course (2016).

Jurisdictional Issues, Chris Nickelson, State Bar of Texas 41st Annual Advanced Family Law Course (2015).

Fiduciary Issues in Family Law Cases, Richard R. Orsinger, State Bar of Texas 10th Annual Fiduciary Litigation Course (2015).

Inter-Spousal Torts, John F. Nichols, Sr. & Meghann Jane Smith, State Bar of Texas Bar College 17th Annual Summer School Course (2015).

Constitutional Issues and Family Law, Georganna L. Simpson, Rebecca Tillery & Elizabeth Hearn, State Bar of Texas 9th Annual Bill of Rights: Cutting-Edge Controversies in Constitutional Law (2015).

Post-Trial/Appeals, Chris Nickelson, Hon. Dean Rucker & Georganna L. Simpson, State Bar of Texas 40th Annual Advanced Family Law Course (2014).

Preparing for Appeal in Family Law Cases, Claude E. Ducloux, State Bar of Texas Advanced Family Law Drafting (2013).

Family Law Appeals, Georgeanna L. Simpson, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013).

The Family Relationship: Spousal, Charles M. Wilson III, State Bar of Texas Fiduciary Litigation: Beyond the Basics Course (2011).

Fiduciary Litigation, John F. Nichols, Sr., Brian L. Webb & Katie Pearson Klein, State Bar of Texas 37th Annual Advanced Family Law Course (2011).

Trying a Case with Appeal in Mind, Hon. Ann Crawford McClure & Chris Nickelson, State Bar of Texas 37th Annual Advanced Family Law Course (2011).

Jurisdiction/Standing, Christopher K. Wrampelmeier, State Bar of Texas 37th Annual Advanced Family Law Course (2011).

Constitutional Rights of Children, Barbara J. Elias-Perciful, State Bar of Texas 36th Annual Advanced Family Law Course (2010).

Fiduciary Duties in Family Law, Richel Rivers & Mary Evelyn McNamara, State Bar of Texas Fiduciary Litigation Course (2008).

Preserving Your Case for Appeal, Hon. Eva Guzman & Nina Reilly Indelicato, State Bar of Texas 34th Annual Advanced Family Law Course (2008).

Electronic Evidence—Spy Torts, John F. Nichols, Sr., Brandi Branch & Richel Rivers, State Bar of Texas 34th Annual Advanced Family Law Course (2008).

Recent Journal Articles:

Jamie Bryant, *My Two Dads (and Three Moms): Balancing a Child's Interest and a Parent's Fundamental Right When Granting De Facto Parent Status*, 50 Fam. L. Q. 151 (2016).

Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2014-–2015: Family Law Continues to Evolve as Marriage Equality Is Attained*, 49 Fam. L. Q. 545 (2016).

Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L. Q. 25 (2013).

J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 Fam. Ct. Rev. 104 (2013).

Gordon E. Finley & Seth J. Schwartz, *The Divided World of the Child: Divorce and Long-Term Psychosocial Assessment*, 48 Fam. Ct. Rev. 516 (2010).

Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 Colum. Hum. Rts. L. Rev. 759 (2011).

Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 Fam. L. Q. 381 (2008).

David D. Meyer, *The Constitutionalization of Family Law*, 42 Fam. L. Q. 529 (2008).

Annette Ruth Appel, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 Colum. Hum. Rts. L. Rev. 573 (2008).

Maxine Eichner, *Principles of the Law of Relationships Among Adults*, 41 Fam. L. Q. 433 (2007).

RICHEL RIVERS

RIVERS ♦ MCNAMARA, PLLC
1209 West 5th Street, Suite 200
Austin, Texas 78703
(512) 439-7000 (Telephone)
rrivers@riversmcnamara.com

Richel Rivers has been practicing law for 41 years. She has been a long time partner with Hilgers & Watkins, which merged with Brown McCarroll in Austin. She and her partner Mary Evelyn McNamara founded their family law firm of Rivers ♦ McNamara PLLC in 2011.

Rikky is a litigator who is certified by the Texas Board of Legal Specialization in the Civil Trial Law, Civil Appellate Law, and Family Law. She is a life fellow of the Texas Bar Foundation and has chaired the District 9 Membership Committee. She is a Master Emeritus of the Robert W. Calvert American Inns of Court, serving for several years as the Inn's Administrator then as the Inn's President in 2005. Her professional service also includes frequent presentations on trial practice and ethics topics. Her practice involves primarily complex family law matters at the trial and appellate levels, but also includes representation of individuals in probate, fiduciary, and professional responsibility matters.

Visit her firm's Web site at www.riversmcnamara.com.

MARY EVELYN McNAMARA

RIVERS ♦ MCNAMARA, PLLC
1209 West 5th Street, Suite 200
Austin, Texas 78703
(512) 439-7000 (Telephone)
memcnamara@riversmcnamara.com

Mary Evelyn McNamara has been practicing law since 2002 and is certified by the Texas Board of Legal Specialization in Family Law. Her practice involves primarily complex family law matters at the trial and appellate levels.

After graduating from the University of Texas School of Law, Mary Evelyn clerked for Justice Jan Patterson at the Third Court of Appeals in Austin for two years. She then joined Brown McCarroll in Austin and became a partner there. In March 2011, she and her law partner Richel Rivers founded their family law firm of Rivers ♦ McNamara PLLC in Austin.

Mary Evelyn is a past president of the Board of Directors of Volunteer Legal Services of Central Texas, which helps low-income people access the civil justice system by providing free legal advice and representation by volunteer attorneys. She is also a past president of Texas Women Lawyers and a founding Master of the Barbara Jordan American Inn of Court in Austin.