

since the testator died, or (2) the court determines that estate administration is needed under Texas Estates Code § 301.002(b) (e.g., to recover property due a decedent's estate).<sup>5</sup>

### Will Construction and Interpretation Rule Applicable to Revocable Trusts

If a trust is created and amendable or revocable by the settlor (or the settlor and the settlor's spouse), the construction and interpretation rules of Texas Estates Code Chapter 255 will apply as if the settlor is the testator and the beneficiaries upon the settlor's death are devisees unless the settlor provided otherwise. Settlor will need to consider these issues when drafting trusts and include appropriate provisions addressing these issues in the same manner as they do in their wills. These rules include contents of specific gifts, pretermitted children, satisfaction, anti-lapse, gifts of securities, exoneration of specific gifts, exercise of power of appointment, class gifts, judicial modification or reformation, and Texas Estates Code § 355.109 dealing with abatement.<sup>6</sup>

### Transfer on Death Deeds

The 2019 Legislature repealed the statutory suggested forms for creating and revoking transfer on death deeds. Instead, the Texas Supreme Court must promulgate new sample forms.<sup>7</sup>

A memorandum of conveyance recorded prior to the grantor's death will now void an otherwise valid transfer on death deed.<sup>8</sup>

### Notes

1. 575 S.W.3d 331 (Tex. 2019).
2. Tex. Est. Code § 51.054.
3. *Id.* at § 355.102(b).
4. Tex. Prop. Code § 92.0162.
5. Tex. Est. Code §§ 257.151, 257.152.
6. Tex. Prop. Code § 112.0335 (applicable only if the settlor dies on or after Sept. 1, 2019).
7. Tex. Gov't Code § 22.020(b)(2-a).
8. Tex. Est. Code § 114.102.



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## FAMILY LAW

By Georganna L. Simpson and Beth M. Johnson

A mediated settlement agreement, or MSA, can satisfy the Texas Family Code before a suit is pending.<sup>1</sup> In *Highsmith*, the husband and wife went to a mediator without attorneys before filing for divorce. The mediation resulted in an MSA—the husband initiated a suit and obtained a final order incorporating the MSA. The wife argued the MSA was not binding under the Texas Family Code because no suit was pending when they signed it. Although the appellate court agreed with the wife, the Texas Supreme Court held there was no such requirement in the code.

If there is any chance that the relationship between an attorney and arbitrator might extend beyond “purely professional,” it is better to err on the side of disclosure.<sup>2</sup> In *In re Marriage of Piske and Lange*, a property division was reversed because the arbitrator and lawyer failed to disclose that they were friends, which raised questions regarding the arbitrator's impartiality.

A claim of domicile can be controverted by a party's averment to the federal government that she intends to stay in the U.S. temporarily.<sup>3</sup> In *In re Peter Swart*, because a wife was in Texas based on a temporary visa, her divorce suit could not be maintained in Texas.

Texas Family Code § 156.006(b) was recently amended to apply to temporary orders that change, remove, or add a geographic restriction to the exclusive right to designate a child's primary residence.<sup>4</sup> Under the former version of the statute, parties had to first establish that temporary orders “had the effect of changing” the person with that exclusive right. In *In re Lee and In re J.W.*, the person with the right was not changed but the geographic restriction was modified, and without evidence of significant impairment to the child's physical health or emotional development, the change via temporary orders was unauthorized.

The 5th Court of Appeals in Dallas recently held that a parent with an expanded standard possession order can be a “custodial parent” for the purposes of determining child support and noted that the goal of child support is to provide the child with “adequate resources.”<sup>5</sup> Because the mother had possession for roughly 20% to 30% of the time, she was a custodial parent entitled to support, calculated by offsetting the statutory guideline amounts that would be imposed on each parent.

After a 2013 amendment to the Texas Penal Code, a party need not show fear of bodily injury or death to prove stalking.<sup>6</sup> Mere harassment will suffice.

### Notes

1. *Highsmith v. Highsmith*, \_\_ S.W.3d \_\_, No. 18-0262, 2019 WL 5482657 (Tex. 2019).
2. *In re Marriage of Piske and Lange*, 578 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

3. *In re Peter Swart*, \_\_ S.W.3d \_\_, No. 05-19-00015-CV, 2019 WL 3212143 (Tex. App.—Dallas 2019, orig. proceeding).
4. *In re Lee*, No. 04-19-00440-CV, 2019 WL 3642640 (Tex. App.—San Antonio 2019, orig. proceeding) (mem. op.) (restriction removed); *In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216, at \*3 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.) (restriction imposed).
5. *In re A.R.W.*, No. 05-18-00201-CV, 2019 WL 6317870 (Tex. App.—Dallas 2019, no pet. h.) (mem. op. on rehearing).
6. *Lopez v. Crisanto*, \_\_ S.W.3d \_\_, No. 08-17-00252-CV, 2019 WL 4058589 (Tex. App.—El Paso 2019, no pet.); *Wargocz v. Brewer*, No. 02-17-00178-CV, 2018 WL 494755 (Tex. App.—Fort Worth 2018, no pet.) (mem. op.); *In re M.M.W.*, No. 06-18-00082-CV, 2019 WL 1757897 (Tex. App.—Texarkana 2019, no pet.) (mem. op.).



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## GOVERNMENT LAW

By Victor A. Flores

Last year was an active year with sweeping legislative changes, including among others HB 1325 (authorizing framework to grow industrial hemp) and HB 347 (ending most unilateral annexations by any city, regardless of population or location). Additionally, the following is a summary of three court decisions that impacted governmental entities.

### **Governmental Immunity in Breach of Contract Cases: *Hays Street Bridge Restoration Group v. City of San Antonio***

In 2018, the Texas Supreme Court listed four factors under *Wasson II*<sup>1</sup> for reviewing the governmental/proprietary dichotomy in breach of contract cases. *Hays Street Bridge Restoration Group v. City of San Antonio*<sup>2</sup> was the first case since *Wasson II* to raise these factors during oral arguments before the court. Originally, the city of San Antonio and the Hays Street Restoration Group entered into a memorandum of understanding, or MOU, to preserve and restore the 1880s Hays Street Bridge for community use.<sup>3</sup> The city obtained a state administered grant for 80% of the project's funding and the Restoration Group raised and transferred to the city more than \$189,000 in matching funds.<sup>4</sup> The city finished the bridge restoration but then decided to sell the adjacent

property to a private company.<sup>5</sup> The Restoration Group sued the city, alleging that the transfer of the property to the private company was a breach of the MOU.<sup>6</sup>

Applying the *Wasson II* factors, the court held that despite the city's discretionary act of entering the contract, (1) the restoration of the bridge was intended to benefit the general public, (2) 80% of the project was funded by a grant administered by the Texas Department of Transportation thereby benefiting the state, and (3) the purpose of the project was sufficiently related to governmental functions.<sup>7</sup> On this issue, the Texas Supreme Court held that the city satisfied the *Wasson II* factors and was entitled to governmental immunity.

### **Economic Development Corporations and Governmental Immunity: *Rosenberg Development Corporation v. Imperial Performing Arts, Inc.***

In 2012, Rosenberg Development Corporation, a Type B economic development corporation, executed a contract with Imperial Performing Arts, Inc.<sup>8</sup> Under the contract, RDC's board of directors held sole discretion to grant an extension of time for each performance.<sup>9</sup> The projects were more time-consuming and expensive than contemplated.<sup>10</sup> As a result of the delays, counterclaims for breach of contract were filed by RDC and Imperial.

As a matter of first impression, the Texas Supreme Court reviewed whether RDC was immune from suit under the common law even though RDC was neither a sovereign entity nor a political subdivision of the state.<sup>11</sup>

The court ultimately held, "Governmental immunity does not extend like ripples from a pebble tossed into a pond but, instead, is limited to those entities acting as an arm of state government. Despite fulfilling public purposes, economic development corporations do not exist quite like an arm of the state government, imbued with aspects of sovereignty such as immunity from suit."<sup>12,13</sup>

### **Circumventing the Texas Open Meetings Act: *State v. Doyal* and SB 1640**

The Montgomery County judge was indicted for violating the Texas Open Meetings Act, or TOMA, for knowingly conspiring to have secret deliberations related to the planning of a county bond project.<sup>14</sup> The county judge filed a motion to dismiss on the basis that the act was overbroad and unconstitutionally vague. The trial court granted the judge's motion to dismiss but the 9th Court of Appeals in Beaumont reversed and held that the statute was not unconstitutionally vague.<sup>15</sup> Upon further review by the Texas Court of Criminal Appeals, the court held that the statute was unconstitutionally vague on its face.<sup>16</sup>

In response to the *Doyal* decision, the Texas Legislature passed SB 1640, amending the act to establish language that was more clear and instructive. With the passage of the bill, it remains a crime to use walking quorums to circumvent TOMA.