

**FAMILY LAW INVESTIGATIONS
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The below outline is an abbreviated outline of a much larger family law, SAPCR, community property, CPS and juvenile justice outline. It encompasses selected portions of these outlines. It is only a hyphenated area of the entire family law area. I have concentrated on what we can cover and what I think is important to know.

I. INTRODUCTION.

A. THE BLACKLETTER LAW.

1. Where? – Generally codified in what is now commonly known as the Texas Family Code (TFC).
2. How is Organized? – The code is organized by five titles that include:
 - a. Title 1: The Marriage Relationship
 - b. Title 2: Child in Relation to the Family
 - c. Title 3: The Juvenile Justice Code
 - d. Title 4: Protective Orders and Family Violence
 - e. Title 5: The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship.

However, family law practitioners ought to be aware of a number of other areas of family law. The investigator should also have some familiarity with these areas of law and they should include:

- f. Texas Constitution of 1876 (Particularly the Bill of Rights and Community Property sections)
- g. Texas Civil Practice and Remedies Code (Particularly Enforcement of Out of State and Country Judgments)
- h. Texas Code of Criminal Procedure (Particularly the Arrest without warrant sections, protective order sections and the Family Violence Prevention Act.)
- i. Texas Government Code (Particularly the Family Drug Court Program)
- j. Texas Health and Safety Code (Particularly the Mental Health and Retardation Records)
- k. Texas Penal Code (Particularly the Offenses Against the Family Section, et al)
- l. Texas Probate Code (Particularly the homestead, descent and distribution areas)
- m. Texas Property Code (Particularly Personal Property and Residential Tenancies)
- n. Federal Law – Including:
 - i. Special Immigrant Juvenile Status
 - ii. Military Retirement Insurance Benefits
 - iii. Bankruptcy

- iv. Federal Criminal Law (Particularly Child Support, Kidnapping, Domestic Violence).
- v. Foreign Relations and Travel
- vi. Indian Child Welfare Act
- viii. Federal Income Tax
- ix. HIPPA
- x. ERISA
- xii. Social Security
- xiii. Hague Convention on International Child Abduction
- xiv. Service Members Civil Relief Act
- xv. Code of Federal Regulations – (Particularly the Foreign Relations, Department of State)

Bottom line is that this is a HUGE area of law that is not just civil in nature and involves a real mashing of law specialties. It is a great area of study regardless of the types of investigation you do.

INVESTIGATIVE TIP:

Where can I see it? – There are a number of solely black letter law resources. Most are free such as www.statutes.legis.state.tx.us. However, it is a great resource for attorney and investigator alike to purchase (or, find) an annotated version of the code and related law. There are several to purchase with subtle differences. They include:

1. *Sampson, Tindall & England's Texas Family Code Annotated (2017) WestLaw, legalsolutions.thomsonreuters.com or 800-344-5009.*
2. *Texas Annotated Family Code, Debra Lehrmann (2013) Lexis Nexis.*
3. *O'Connor's Family Code Plus, by Joan Jenkins & Randall Willhite, (2013) Jones McClure Publishing.*
4. *Texas Family Code, (2013) West Publishing.*

I would also suggest grabbing, if possible, the following as they tend to be useful for investigators and answer a lot of questions. I'll give you my preference of the ones to look at the course:

1. *Texas Criminal Codes Annotated – A number of people make it. Texas Criminal Defense Lawyer's Association (TCDLA) actually has a few that are pretty good. Check with Texas District and County Attorney Association (TDCAA).*
 2. *O'Connor's Causes of Action – Great if you are doing civil investigations and need to know state causes of actions and the elements to prove what you want.*
 3. *Texas Rules of Court Annotated and Texas Rules Civil Trials – O'Connor's makes my preference. This book details out discovery and provides more of a treatise that is useful to the civil practitioner.*
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II. MARRIAGE

A. MARRIAGE AS A STATUS.

Realize that marriage is a status under the law. It affords the two that enter into it a number rights and duties. Many of these are important for an investigator and can drive litigation one way or another. Sure, the primary issues we deal with are things like support, maintenance, division of community property, custody, child support, etc. But, establishing marriage can be important for privilege issues that are common in criminal cases or establishing a claim of loss of consortium in a personal injury case. That is why it is important for an investigator to have an idea how one gets into or out of that status.

B. TWO TYPES OF MARRIAGES.

1. Formal Marriages – AKA “Ceremonial Marriage;” We base these marriages off the license and application system spelled out generally in TFC § 2.001 – 2.209. A license must be applied for at the county clerk’s office and is valid for 30 days. However, parties must wait the 72 hour waiting period to conduct a ceremonial marriage. The 27 day window to complete the marriage is a great time of emotion, celebration and, in some cases, disaster.

INVESTIGATIVE TIP:

The investigator should be aware that every formal marriage requires 2 county clerk filings. An application and a license. Failure to find both means that either the parties failed to return the executed license OR a more scandalous reason might exist why that marriage ended.

Although marriages do require a number of prerequisites, the public policy is that marriages are valid if established by independent proof. *Chapman v. Chapman*, 32 S.W. 564 (Tex. Civ. App. 1895).

However, here are some general marriage rules you might want to know:

- a. No residence requirement for a license. (So, look everywhere). But, be knowledgeable of the Austin form submitted by clerks to the Texas Department of Health and Human Services. Marriages, Divorces and Annulments are generally reported here www.dshs.texas.gov/vs/marriagedivorce/default.shtm.
- b. Seventy-Two hour waiting period required between application and license. TFC § 2.204. BUT, there are exceptions. (The Military Marriage).

- c. Divorcee can't marry a third party within 30 days after the divorce.
- d. Court order required for those under the age of eighteen. TFC § 2.101. Recent change in legislature. Used to allow parental consent. Now you must get a court order.
- e. Certain person authorized to conduct ceremonies TFC § 2.202.
- f. No particular form of the ceremony is needed or required.
- g. Premarital counseling is encouraged. TFC § 2.103.
- h. No same-sex marriages. Tex. Const. art. I, § 32. Now overruled by *Obergefell v. Hodges*, 2015 WL 213646 - Supreme Court 2015. Courts must recognize marriages between people of the same sex.
- i. No transsexual marriage? Not now. See above. But, also see *In Re McReynolds*, 502 S.W.3d 884 (Tex. App.—Dallas 2016, no pet.) (court can't order under family code new gender of individual).

2. Informal Marriages – AKA “Common Law;” Texas recognizes common law marriages. Occasionally, as an investigator you will be asked to locate evidence to prove or disprove that a marriage exists. Obviously, these claims are usually made at the time separation occurs so that a past lover can get a foot hold for claims of temporary support, community property and other relief.

- a. What does it take for a Common Law Marriage? – Agreement, Cohabitation, and Holding Out.

To establish a common law marriage, it must be shown by a preponderance of the evidence that the parties:

- i. agreed to be married;
- ii. lived together in Texas as husband and wife, AND;
- iii. in Texas, represented to others that they were married.

See TFC § 2.401.

By the way, this is a Jury question. *Jordan v. Jordan*, 938 S.W.2d 177 (Tex. App. 1997). But court can try and decide under summary judgment which is common.

- i. Element 1 – Agreement – The Texas Supreme Court has ruled that cohabitation and holding out may be evidence of an agreement and that proof can be by direct or

circumstantial evidence. *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993). Can't just show an occasional reference of "my wife" or "my husband." Particularly, in light of today when non-marital cohabitation is common.

- ii. Element 2 – Cohabitation – Usually pretty easy because the parties almost always did at some point. Without it, no common law marriage can exist. But, cohabitation must occur in the State of Texas.
- iii. Element 3 – Holding Out – Even a single act, such as signing a mortgage or credit application or deed record as husband and wife can support a finding of common law marriage. *Estate of Claveria v. Claveria*, 6105 S.W.2d 164 (Tex. 1981).

INVESTIGATIVE TIP:

So, a good investigator is going to look at things that prove that in all likelihood a marriage exists or the converse that it does not. Evidence can be circumstantial. Things to look at might include;

1. *Title to vehicles, property, deed record filings, credit applications. Do they share a common surname? Shared addresses and reported names on credit header information and its resellers such as Lexis, TLO, Tracers, etc. Look for signed documents (particularly in deed records) that show married persons.*
2. *Interviews – Has she been introduced as the Mrs. or the Miss? School or PTA mentions, donations, introduction. Does other family consider her to be a spouse? Daughter-in-law mentions?*
3. *Purchases – Does the ring exist? What about anniversary gifts? His and her gifts? Booked vacations?*
4. *Social Media – Are they shown as a couple? Are they providing information representing that they are married? Lack of dating sites? What about Ashley Madison?*
5. *Surveillance – Does the claimed spouse do things that only another spouse would do? Live together, go to church together, act like spouses? Or, if you represent the defending spouse, do they act more like a hook up? Dating? Running around? Baby's Daddy type behavior?*

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- b. Other Common Law Issues:

- i. Declaration of Informal Marriage – Can execute a sworn declaration of informal marriage and file in the deed records of the county clerk. See TFC § 2.402. Not a requirement, but helps prove a marriage. Almost always done in an attempt to prove marriage for some benefit (i.e. Social Security Benefits) (Inheritance) Etc. Pay attention if trying to find assets on a Subject around death.
 - ii. If you prove marriage you may be entitled to Marital Communications Privilege and Martial Testimonial Privilege.
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INVESTIGATIVE TIP:

Criminal defense investigators should be familiar with marriage as a status to prohibit testimony. If you can prove marriage (informal or formal) then you may be able to keep someone off of the witness stand. Always useful in which the spouse may have incriminating information as to your criminal defendant. 2 types of privilege exist:

1. *Testimonial Privilege – provides the spouse of an accused with a privilege not to be called as a witness for the State. There are exceptions such as victim and bigamy. Not useful in family violence cases.*
 2. *Confidential Communications – These are communications between 2 spouses whether you are a party or are not. Pillow Talk. See Texas Rule of Evidence 504(a). See corresponding Federal Rule and the US AG's same sex recommendation.*
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C. MARRIAGE VALIDITY.

1. State Policy – Is to uphold the validity of marriages, unless there are strong reasons to either hold it void or voidable. TFC § 1.101. Doesn't matter if ceremony is conducted by unauthorized persons. Generally, no matter in terms of fraud, mistake, illegality unless induced to do so. Even then, it may allow a person to annul a marriage. 2 types of bad marriages:
 - a. Void Marriages – These marriages are void by law and can't be. Really only 2 circumstances:
 - i. Consanguinity – You can't marry your aunt. Actually, up until 2005, when Texas had a number of polygamist problems, you could marry your cousin. Now, Texas is one of 31 states that prohibit marriage of a first cousin.

- ii. Bigamous Marriage – Not the criminal section. But, your marriage is valid when the old one gets dissolved and most recent is always presumed valid. Putative Spouse Doctrine.

Also, you might want to look at Texas Penal Code § 25.01 concerning Bigamy as a criminal offense.

INVESTIGATIVE TIP:

Bigamy cases in which a criminal prosecution exists are rare. However, be aware that an affirmative defense is that you believed that you were no longer married. Almost need to get an admission or active representation of two marriage. Records ALONE will not usually meet what you need to prosecute it successfully. You must show some active deception. Read Texas Penal Code § 25.01 carefully if you are trying to prove this.

By the way, if you have a void marriage, you file a suit to declare the marriage void. If you see this, one of the 2 above happened. No property is divided up or anything. Just like they were never married.

- b. Voidable Marriages – Generally, an annulment, brought by one party, has the thread of a common element in these cases. There usually is no cohabitation together after the situation, whatever it is, was discovered. What are these situations?:
 - i. Alcohol;
 - ii. Narcotics;
 - iii. Mental Incapacity;
 - iv. Impotency;
 - v. Fraud;
 - vi. Duress;
 - vii. Force;

See TFC § 6.105 – 6.107. Also, see *Desta v. Anayaoha*, 371 S.W.3d 596 (Tex. App.—Dallas 2012, no pet.) (court found fraud where wife was marrying for purposes of immigration); *Leaux v. Leaux*, 305 S.W.3d 22 (Tex. App.—Houston 2009, pet. denied) (annulment granted on basis of fraud when the wife failed to disclose eight prior marriages). But, 2 other circumstances where it can happen include:

- i. Underage marriage – Which can be brought by parent but, it is in Court's discretion whether granted. If they are still under 18 years of age. But, that is a slowly shrinking crowd if now you have to get a court order to get married. See the recent 2017 change.

- ii. If married within that 72 hour cooling off period.

Under both these the “no cohabitation” element does not apply but limitation periods are short.

INVESTIGATIVE TIP:

Always pull the petition for an annulment. If there is an annulment there will have to be a specific fact pleading that tells you why. Many times, the fact scenario is one of alcohol inducement. But, always good to pull and get the details. Never irreconcilable differences. But, fraud is a possibility and used as a catch all. The argument is fraud in inducement of the engagement and marriage.

III. DISSOLUTION OF MARRIAGE.

A. GROUNDS FOR DIVORCE.

1. No-Fault Divorce – Under the current practice, most that marriage has become insupportable because of irreconcilable differences. Only defense is that there is an expectation of reconciliation, but, no one has won on that ground. Even if you have adultery or another fault reason, you can always plead it later.
2. Fault Divorce – These ground have been around since the 1960s and are rarely pled. However, as an investigator, they can be critical. They include:
 - a. Adultery;
 - b. Conviction of a felony with imprisonment for at least one year without a pardon (not on testimony of other spouse);
 - c. Abandonment for more than one year;
 - d. Living apart for at least three years without cohabitation;
 - e. Confinement to a mental hospital for three years, and;
 - f. Cruel treatment. *See* TFC § 6.003-007.

If plead, the court may consider fault ground in dividing in a just and right division of property. In other words, instead of a 50% split of the community property, because of fault (adultery) a party may ask the court to award a disproportionate share of the community property to one spouse.

FYI – We will talk about separate and community property down below. However, the court is required to make a “just and right” division of property. What does that mean? It means that the court or jury has a lot of discretion in the division of this property.

3. Proving Adultery and Cruel Treatment – These two are the most commonly plead FAULT pleadings.

a. Adultery.

Definition – Adultery means the "voluntary sexual intercourse of a married person with one not the spouse." *In re S.A.A.*, 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.); *see also Ayala v. Ayala*, 387 S.W.3d 721, 733 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

If proved, the court can award a disproportionate share of the community property. How much? As much as the court determines is a just and right division of the community property. Here are some examples:

1. *Faram v. Gervitz-Faram*, 895 S.W.2d 839 (Tex. App.-Fort Worth 1995, no pet.) (73%);
2. *Oliver v. Oliver*, 741 S.W.2d 225 (Tex. App.-Fort Worth 1987, no writ) (80%);
3. *Rafidi v. Rafidi*, 718 S.W.2d 43 (Tex. App.-Dallas 1986, no writ) (85%-90%);
4. *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App.-Dallas 1986, writ dismissed) (83%);
5. *Jones v. Jones*, 699 S.W.2d 583 (Tex. App.-Texarkana 1985, no writ) (86%);
6. *Campbell v. Campbell*, 625 S.W.2d 41 (Tex. App.-Fort Worth 1981, writ dismissed) (96%);
7. *Huls v. Huls*, 616 S.W.2d 312 (Tex. Civ. App.-Houston [1st Dist.] 1981, no writ) (85%);
8. *Lucy v. Lucy*, 162 S.W.3d 770 (Tex. App.—El Paso 2005, no pet.). (73%).

Other adultery issues –

1. The ground is not limited to adultery committed before the separation of the parties. *Bell v. Bell*, 540 S.W.2d 432 (Tex. Civ. App. Houston 1st Dist. 1976). BUT, beware of the age of this case. The court may consider this in its award. Now see, *In re Marriage of C.A.S. D.P.S.*, 405 S.W.3d 373 (Tex. App.—Dallas 2013, no pet. h.) (W moves out and asks for counseling to reconcile. H participated but not meaningfully. Starts dating and spending money on girlfriend in violation of temporary court order for gifts and vacations. H skipped deposition by W to be with girlfriend. W amended petition

alleged adultery and asked for disproportionate share of community property).

2. Going to hotel room for “sexual encounters” but no intercourse can support a finding of adultery. *Morrison v. Morrison*, 713 S.W.2d 377 (Tex. App. Dallas 1986).
3. If one spouse employs an investigator to procure evidence, and this agent entices the opposing spouse and her paramour to commit adultery, the spouse cannot successfully obtain a decree, although he may not have directed or authorized his agent to bring such adultery about. Basically, you can’t sleep with the subject. *Smith v. Smith*, 218 S.W. 602, Tex. Civ. App. 1919).
4. No recrimination (You did it too!) or condonation (You condoned it!) defense. See case above and TFC § 6.008. But, you can get the court to weigh those facts in distribution.
5. Although adultery may be proved by direct and circumstantial evidence, clear and positive proof is necessary and mere suggestion and innuendo are insufficient. *Miller v. Miller*, 306 S.W.2d 175, 176 (Tex. Civ. App.—San Antonio 1957, no writ). Can’t just have one party say so. And, can’t use evidence outside of trial. Like emails and texts seen by party but, not admitted properly in court. *Dzierwa v. Cerda*, 2014 Tex. App. LEXIS 8518 (Tex. App. San Antonio Aug. 6, 2014).
6. Admission of adultery alone is enough to support a finding of adultery by the court. See *White v. White*, 2008 Tex. App. LEXIS 5048 (Tex. App.—Fort Worth 2008).
7. However, husband's admission to an affair does not mean the trial court is required to grant Wife the divorce on the grounds of adultery, although it would have been within its discretion to do so. See *Clay v. Clay*, 550 S.W.2d 730, 732-33 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ).
8. The court may consider the wasteful expenditures made by a spouse in furtherance of his extramarital affair. *Ohendalski v. Ohendalski*, 203 S.W.3d 910 (Tex. App.—Beaumont 2006).
9. Intentional infliction of emotional distress can be brought in a divorce proceeding. However, you can’t consider same

conduct for tort recover and just and right division. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

10. Divorce granted on photos of girlfriend kissing husband at airport is enough for circumstantial evidence of adultery, *In re Marriage of C.A.S. D.P.S.*, 405 S.W.3d 373 (Tex. App.—Dallas 2013, no pet. h.).
11. Adultery and wasting of the community assets on its furtherance awarded 77W% to W and 23% to H. *Loaiza v. Loaiza*, 130 S.W.3d 894 (Tex. App.—Ft. Worth 2004, no writ).

INVESTIGATIVE TIP:

So, here are the tips in reviewing all of these cases MOST of them have a party making an admission. That, in Texas, is the way to go and most experienced litigators are going to strategize that way. However, if you have to prove adultery 2 real elements come out in these cases:

1. *Intent – The intent to have sexual relations.*
2. *Opportunity – The opportunity to have sexual relations.*

You don't have to prove directly that it happened. You do need to show circumstantially that it most likely did. Finally, this is an argument that the court has ultimate say so on. So it is imperative that you do more than the, "I got you!!!" Your lawyer is going to need multiple bullets to convince the court, jury and opposing party to rule, agree or admit to adultery. Factors you need to uncover and document are:

1. *Repetition – Multiple occasions.*
2. *Excessive spending – Based on community property ½ that dollar is the spouses.*
3. *Deception – Against the spouse.*
4. *Flaunt – Of the affair to friends, family, coworker or associates.*
5. *Humiliation – Of one spouse because of the infidelity of the other.*
7. *Abandonment of Other Family Duties – Left the kids for wife.*
8. *Difference in Lifestyle – Spouse v. Girlfriend.*
9. *Multiple partners, closely situated partners or relational partners.*
10. *Exposure to STDs, medical conditions or unsanitary conditions.*
11. *Illegality of affair. Such as prostitution.*

Make sure that you document the above in your report or testimony. Place in your report the representations your client made to you. Sure, they may be hearsay, but, preface it with a proper lead in and you have a chance of scoring extra points with the court to show why adultery in this case is excessive.

- b. Cruelty – Cruelty is defined "as willful and persistent infliction of unnecessary suffering, whether in realization or apprehension, whether of mind or body and as acts that endanger or threaten life, limb or health of the aggrieved party and inflict mental anguish." *Brown v. Brown*, 704 S.W.2d 528, 529 (Tex. App.--Amarillo 1986, no writ); see also *Mathisen v. Mathisen*, 01-92-0970-CV, 1993 Tex. App. LEXIS 2410 (Tex. App.--Houston [1st Dist.] Aug. 31, 1993, no writ). Can be both Adultery and Cruelty; *In the Matter of the Marriage of Bacerra*, 100 S.W.3d 637 (Tex. App.—Texarkana 2003, no writ) (finding cruelty where H gave gifts to other women).

INVESTIGATIVE TIP:

Cruelty is the catch all of fault divorces. No need for finding of physical violence. But, if you have something that you have documented in surveillance or by way of interview that is atrocious then this is the catch all. (i.e. the flaunted sex tape, verbal abuse in front of family, humiliation, physical violence).

- 4. Abandonment and Living Apart – Usually, this is more than a move out and more than what most spouses allege. However, your unsuccessful report to find him or serve him and your affidavit for substitute service can be useful.

B. RESIDENCE QUALIFICATIONS, JURISDICTION, VENUE.

- 1. Divorce – Residency requirements are under TFC 6.301 and include 2 separate requirements which must be met.
 - a. One party must be a Texas domiciliary for the preceding six month period, AND;
 - b. One party must be the resident of the county where the petition is filed for the preceding 90 days.

By the way, you don't need personal jurisdiction over a non-resident spouse for divorce. You do for child support, spousal maintenance, attorney's fees and property rights. See *Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998). There is a long arm jurisdiction. See § 6.305.

- 2. Custody Case – Custody case is always joined with the dissolution. The SAPCR is the suit that is transferred. The dissolution controls. So one spouse, by moving residence, can determine where the custody suit is fought at. (There are ways to get out of this).

INVESTIGATIVE TIP:

As an investigator, part of your job in family cases, if not all cases, is to issue spot. Many times, you are the only one that is dealing with the client at the very pre-stages of a divorce. When you see the Houston-Dallas problem, talk to the client. Force them to talk to a lawyer. Win the race to the courthouse.

C. PROCEDURE.

1. Pleadings – No evidentiary facts are needed in the Original Petition. But, be aware that they must plead if there is a protective order for family violence in effect. If all you can get to is the divorce then look for the Protective Order.
 - a. Confidentiality – In Harris County only, when you file divorce it is off the books until 31 days after filing or after the date of the service of citation. FYI, if you keep looking and can't find it here is why. TFC § 6.411.
 - b. Captions – The caption of any divorce is “In the matter of the marriage of _____ and _____, and in the interest of _____ minor children.” Lots of areas in the code comply with this and they start with TFC 6.401.

If you are seeing initials then those pseudonyms are acceptable and now the preferred method for the uber wealthy and celebrity.

INVESTIGATIVE TIP:

So, check your District Clerk's Index regularly for these issues. Also, make sure that you are looking for “J.W.B” as opposed to “James Wesley Bearden” when you are conducting these searches. Otherwise you may miss them.

- c. Service – Just like all other civil matters. Be aware of waiver and publication are acceptable.
2. Temporary Restraining Order and Injunctions – These are almost always now served at the time the citation and petition are served. Many times, they are within the petition themselves or attached thereto. See TFC § 6.501. Several things to remember about TROs:
 - a. TROs are usually ordered ex parte. Meaning that only one side is needed to get them ordered.

- b. TROs usually notice parties to stop vulgar communication, not take the parties children out of the jurisdiction, don't disrupt the kids, don't move the money, don't cause harm, don't damage or remove property.
 - c. TROs are designed to be temporary in nature and are usually "stop it" type orders. Not proactive.
 - d. After notice and a hearing, an injunction can issue. These TROs turn into more lasting orders. See below as they are almost always ordered with Temporary Orders.
 - e. TROs are really civilly enforced. They have become common place and are generally boiler plate in many divorces. Much different remedy than protective orders which are discussed below.
- 3. Standing Orders – Common in most big city orders. When you serve look at the general restrictions in your area. They may tell you how the court feels about trash talking to children, spend of money, move outs, funds cut off, etc.
 - 4. Temporary Orders – This order which may be battled out numerous times, allows the court to order an unlimited amount of money for support, requiring orders for exchange of information, orders as to who may operate businesses, exclusive control of key assets. The judge has broad discretion to order temporary support for the spouse, maintenance of the assets and custody and care of the children.

INVESTIGATIVE TIP:

The temporary order is many times done quickly in an Associate Judge's Report that is usually filed in the jacket. Many times, these orders list income and expenses, ordered injunctions and schedule of temporary visitation and child support. Paternity, drug orders, stay away orders, prohibitions, counseling, psychological testing are all listed here and are fought over in these hearings. These are the meat.

- 5. Protective Orders – Can be brought by themselves or within a divorce petition. Governed by Title 4 of the TFC. See below for a more detailed discussion.
- 6. Sixty Day Waiting Period – A divorce may not be granted until at least 60 days have elapsed since the date suit was filed. Some Exceptions. TFC § 6.702.

7. Jury Trial – All litigants are allowed to seek a jury trial TFC § 6.703. However, less than 1% of cases are tried to a jury. That means that it is a battle of hearings to a Judge who is the sole decider. Your testimony, report or video tape can be critical. So, know where and what you are fighting. What judge are you going to see?:
 - a. Associate Judge – An appointed judge.
 - b. District Judge – An elected judge.
 - At final hearing, you have the right to an elected District Judge. However, the majority of these cases are decided in the many hearing prior to a final trial. You may appeal an associate judge's order to the district judge.
 8. Court Ordered Alimony & Maintenance – Alimony has never been allowed. We do allow court ordered maintenance under Chapter 8 of TFC. Very specific in conditions of maintenance. Meant to equalize the non-income producing spouse to post divorce.
 9. Divorce Decree – Must be ordered as a final order of the court. This order will award and distribute the community property assets of the parties. Usually will be disclosed in the decree.
 10. Qualified Domestic Relations Order – This is the order to divide up a pension, 401(k), defined benefit plan or other retirement plan.
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INVESTIGATIVE TIP:

The divorce decree can be the best document for locating specific assets of a subject under investigation at the time of divorce. Almost all decrees will divide community property and award or confirm separate property. However, look in both deed records and the court's file. Beware, the agreements incident to divorce can be referenced to avoid a public records listing and many times that happens. Also, QDROS is the order required by federal law to divide pension, retirement, IRA, 401k and other annuitized benefits. Therefore, read the order in a divorce if you intent is to

IV. COMMUNITY PROPERTY. [The highly abbreviated version]

A. CONSTITUTIONAL BASE

Community property is constitutionally based in our state constitution. See Article XVI, Section 15 of Texas Constitution. This system is amplified by Chapter 3 of the Texas Family Code.

B. SEPARATE PROPERTY.

A spouses separate property consists of;

1. Property owned or claimed before marriage;
2. Property acquired by spouse during marriage by gift, devise or descent; or
3. Personal injury sustained by the spouse during marriage, except recovery for medical expenses and loss of earning capacity. TFC § 3.001.

C. COMMUNITY PROPERTY.

Everything not separate property. TFC § 3.002.

1. Characterization of Community Property (CP)
 - a. Property possessed by either spouse during or on dissolution of Marriage is presumed to be community property. TFC § 3.003(a).
 - b. In order to rebut the community property presumption, a party must present clear convincing evidence that the property is separate.
 - c. This is the only property to be divided by the Judge. He can only consider community property when dividing in an unequal share.

INVESTIGATIVE TIP:

The key is finding community property that can be divided in your favor. How will it be divided in your favor? By adultery, cruelty or some other equitable means. What we want is community property.

2. Inception of Title Doctrine

- a. The Texas Constitution recognizes that property owned or claimed by a spouse before marriage is the separate property of that spouse.

It is not the passing of title that controls; if the ownership of or claim to property arises before marriage then the property is separate. With regard to real estate, this is generally the signing of the purchase contract, not necessarily the date of the deed. *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898) (origin of title determines character of property, not acquisition of final title).

INVESTIGATIVE TIP:

So, there is a lot of argument here if you can get close. Pay attention to not only the date filed, but, date executed, dated contracted for, date agreed to (even if orally), date thought about agreeing to, date the that the thought about the thought to agree came about. Also, realize that transfers between spouses and those dates may be between estates. Think estates not people.

3. Tracing

- a. Tracing is probably the most prevalent method of establishing the separate character of marital property. The clear and convincing burden of establishing separate property will not be met solely by the testimony of an interested witness.
- b. One must establish the time and/or means of acquiring the property in question. This will require tracing the acquisition of the property in issue back through several bank accounts or to several other pieces of property. Documentary evidence is usually the key to proving a separate property claim. If you wait until the last minute and cannot provide documentary evidence, likely, you will not be able to prove the separate character of the subject property.
- c. Rules – Tracing these assets through their mutation is done primarily with the following rules:
 - i. Community First Out Method – If multiple estate funds are deposited in one account community is the first out.
 - ii. Identical Sum – If deposits and withdrawals are the same, then that can be traced.
 - iii. Minimum Sum Balance – Identifying the minimum balance in an account original containing separate property funds.
 - iv. Pro Rata Funds – Separating an asset purchased with the share of funds from separate estates in the pro rata amounts.

4. Presumptions Arising from Conveyance through which Title is Acquired.

- a. Spouse as the Grantor with no Significant Recital – Presumption of a Gift when a deed is from the husband to the wife as grantee and contains no significant recital (it states the funds were paid from the separate property of a spouse or states that the property conveyed to a spouse as his or her separate property), the normal community property presumption is replaced by the presumption of a gift of separate property to the wife.

5. Credit Transactions (Presumed Community Property)

- a. Separate property down payments on a home does not control the character of the credit, credit is presumed to the CP.
 - b. “Ray Debt”- when a creditor agrees, in writing, to only look to one spouses’ separate property for repayment, this agreements means the community will NOT be liable for the debt. Therefore, the property acquired by such credit is separate property.
6. Personal Injury Recoveries
- a. Generally, recoveries for personal injuries are separate property.
 - b. Loss of earning capacity, earnings during marriage and medical expenses are generally characterized as community property.
 - c. The issue in the Courts is whether the CP presumption applies, leaving it to the injured spouse to prove by clear and convincing evidence that the recovery is separate or whether there is a presumption the recovery is SP which must be rebutted by the spouse seeking CP characterization.
7. Rules for Classifying Property.
- a. Agreement and Classification by Spouses – By agreement they can classify their property.
 - b. Inception of Title Rule -The character of property is determined at the earliest moment to which the claimant can claim title. With regard to real estate, this is generally the signing of the purchase contract, not necessarily the date of the deed. *Welder v. Lambert*, 44 S.W. 281 (Tex. 1898) (origin of title determines character of property, not acquisition of final title).
 - c. Income from Separate Property is Community Property
 - d. Gifts are Separate – Generally, the income and property that arises from gift are included.
 - e. Community Presumption – All property is presumed to community.
 - f. Installment Purchases Before v. During Marriage.
 - g. Community Credit, with Exceptions.
 - h. Reimbursement. Past Economic Contribution (No More). – Expenditure of funds from one estate on another.
 - i. Time, Toil and Effort – Reimbursement Claim for Work Performed.
 - j. Premarital and Marital Agreements.
 - k. Comingling – Bank Accounts “Community First Out” Presumption.
 - l. Interspousal Transfers – Generally considered and presumed a gift.
 - m. Partition, Exchange and Agreement – Constitutional.

- n. Separate rules for Rents, Oil and Gas receipts, Income Trusts v. Corpus Trusts, Corporate and Partnership Distributions, Dividends, Capital Gains, Defined Benefit Plans and Pensions.
 - o. Jury has responsibility of classifying the property as opposed to the judge who determines the division of the marital estate.
 - p. And the list goes on....
-

INVESTIGATIVE TIP.

These rules are why it is important to nail down when property was transferred or interest came about. Particularly important are professional business interests. Doctors, lawyers, businessmen, engineers may have several interests, firms or practices. The spouse likely has a community property interest in that entity as far as the participating's share is. Documenting those entities are important. Also important, is documenting the devaluation, increase and rules between the partners. You may find this in Secretary of State filings, SEC filings, public disclosures, business credit and other databases that can aid your client's lawyer or CPA.

D. SEPARATELY MANAGED COMMUNITY PROPERTY.

Texas Family Code § 3.102. – Managing Community Property. During marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single, including:

- 1. personal earnings;
- 2. revenue from separate property;
- 3. recoveries for personal injuries; and
- 4. the increase and mutations of, and the revenue from, all property subject to the spouse's sole management, control, and disposition.

E. CLASSIFICATION.

5 types of property under our regime they are:

- 1. Wife's Separate Property.
- 2. Wife's Sole Managed Community Property.
- 3. Jointly Managed Community Property.
- 4. Husband's Sole Managed Community Property.
- 5. Husband's Separate Property.

Why the classification? Your liability for contract or tort to 3rd parties matters. Basically, if liable under contract all of the property which you have under your control is liable. If tort, after marriage, all community property is available. If before marriage, only property in which you have a management interest can be tagged. *Carlton v. Estate of Estes*, 664 S.W.2d 322 (Tex. 1983).

F. COMMUNITY DEBTS.

Depending on the type of property and the type of debt, a creditor may lay claim to various types of property. When you are doing an asset or background search for family law or other civil matter, knowing what you can get your hands on is critical. Know this chart:

Diagram of Marital Property Liability

	Husband's Separate Property	Husband's Sole Management. Community Property	Joint Management. Community Property	Wife's Sole Management. Community Property	Wife's Separate Property
Husband's Separate Property Debt*					
Husband's Pre-Marital Liabilities					
Husband's Non-Tortious Liabilities During Marriage					
Husband's Tortious Liabilities During Marriage					
Wife's Tortious Liabilities During Marriage					
Wife's Non-Tortious Liabilities During Marriage					
Wife's Pre-Marital Liabilities					
Wife's Separate Property Debt*					
Joint Liabilities Of Spouses					

INVESTIGATIVE TIP:

Knowing the types of classifications are important for a good asset and background investigation. Regardless of the rule above, identifying the details of all assets are important. So, good background investigations. Use TLO, Lexis as a shotgun. Use the actual public record filing as gospel. That is why you need to go to the actual data source. The date of title, acquisition or possession matters for all of the above rules. Be able to answer these questions:

1. *Deed Records – When was it filed? Executed? Closed on? Possessed? Taxes? Trusts and interests when do they pass?*
2. *Corporate Entities – Who filed? When did officers, manager, members come or go? Incorporators? Change in registered agents? Public Information Reports?*
3. *Assumed Names – Where and when? Why do get an assumed name?*
4. *UCC – UCC filings, date satisfied, filed, renewed, property included, what is the secured property taken?*

5. *Credit – Can't pull his, but you can pull hers. Be aware of joint credit. When has a credit line begun? Realize credit is rife full of errors but, it allows for a lot of creative argument.*
6. *Look for Transfers – Of real property, vehicles, payment of rent, apartment fees...these may be considered gifts or other.*
7. *Adverse Public Records – Mismanagement, criminal, civil litigation.*
8. *Edgar, Licensing, Reported Addresses. Boats, Planes, Vehicles, Closely Held Business Files.*
9. *Computer Analysis – Not what he visited, but when where and what was transferred.*

If you are hired pre lawyer, have your client soak up any available evidence. Do a data dumps, image the household computer. Put it in your file or do a report to your lawyer to get it in.

V. THE PARENT-CHILD RELATIONSHIP.

- A. Paternity – Whether maternal or paternal there is more than a DNA test to determine paternity.
 1. Mother either birthed you, adopted you, or the court adjudicated it was you.
 2. Father adjudication of paternity is a bit more complex. But, can be had by;
 - a. an un rebutted presumption of the man's paternity of the child under Section 160.204;
 - b. an effective acknowledgment of paternity by the man under subchapter D, unless the acknowledgment has been rescinded or successfully challenged;
 - c. an adjudication of the man's paternity;
 - d. the adoption of the child by the man; or
 - e. the man's consenting to assisted reproduction by his wife under Subchapter H, which resulted in the birth of the child.

Does not have to have DNA test, unless contested. Usually done as an AG paternity hearing.

INVESTIGATIVE TIP

Paternity is a complex issue. You can be a father without being the father. In some cases, an acknowledged or presumed father can become a father without being the actual biological father. In such cases, an investigation can be made to show that the man who is presumed or acknowledged is and then that will establish paternity.

B. CHILD SUPPORT.

Child support is generally set on a percentage of an individual's total net resources. For one child, the percentage starts at 20%. *See* Texas Family Code 154.061. Calculating child support, for the most part, is pretty mechanical. Except determining the individuals' net resources.

1. Net Monthly Resources – Virtually all income, wage, salary, income, interest, dividends, rental income. Everything but taxes, government benefits and a few other things. This is where if you get hired to help, you can be of some assistance.
2. Attorney General – Paternity actions under the attorney general or IVD actions are a great resource for looking at who declared paternity or alleged paternity. DNA tests are frequent here. This is a good resources.

INVESTIGATIVE TIP

If you are investigating either the mother or alleged father, you need to pull the paternity file if possible. Many times, there may be multiple alleged fathers (respondents). Also, if attempting to find child support sources (net resources) for a client always have them request assistance from the Attorney General's office. Although a seasoned attorney is a great tool, if funds are tight send them to the AG's office. The AG has a number of resources that even private attorneys do not.

VI. SUIT AFFECTING THE PARENT CHILD RELATIONSHIP

A. SAPCR – SUIT AFFECTING THE PARENT CHILD RELATIONSHIP.

This is the suit filed that is the typical custody fight. All of these rules begin in Title 5 of the Family Code. TFC § 101.0302.

B. WHO CAN BRING A CUSTODY CASE?

Very defined now, but not the case in our not so distant past. This is critical to know so that you can spot for your client and know when to send them to an attorney. This is for an original suit. Party may be able to intervene more easily in an ongoing suit. TFC § 102.003.

1. Parent – Parent of the child (remember a presumed parent is OK, alleged father, OK).
2. Governmental Agency, Adoption Agency – Most normally Department of Family and Protective Services (CPS).

3. Person, other than a foster parent, who has actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.
 - a. Court doesn't necessarily have to continuous uninterrupted time, but, I would.
4. Foster Parents – If the child is residing with them at least 12 months.
5. Relatives of a Deceased Parent – By 3rd consanguinity.
6. Grandparents – TFC 102.004, 2 scenarios:
 - a. Grandparent can file a case for *managing conservatorship* if an order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development.
 - b. Grandparent can't start a suit for possessory conservator, BUT court *may* grant grandparents or other person deemed by the court to have had substantial past contact with the child to intervene in a pending suit filed by the person authorized to do if there is satisfactory proof to the court that appointment of a parent as SMC or both parents as JMC would significantly impair the child's physical health or emotional development.

Also, see TFC 153.433. The seminal case in third party standing and the surrounding issues is *Troxel v. Granville*, 530 U.S. 57 (2000). Found that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Affords a presumption of the parent to the non-parent. Can't just be better with grandparent must meet the two standards above.

INVESTIGATIVE TIP

Standing. At the beginning of any case, if you aren't representing the parents, then you need to see about trying to find standing. Know the time lines in number 3 (most often pled by step-parents) and in 6 (most often plead by the Grandparents. As an investigator, buy time with your lawyer and client prior to filing suit. If you have the grandparent go for the gusto and try and write your report to show significant impairment to the child. If foster parent, or grandparent, show actual care and control. Can't just be that grandparents are better. Must show significant impairment. Also, if the situation permits it, think about waiting them out.

C. WHERE TO FILE?

Venue for SAPCR is governed by TFC 103.001. Venue is in: (1) the child resides; (2) court of continuing jurisdiction or (3) venue is fixed for dissolution of marriage.

1. Divorce – Get ahead of the Houston – Dallas Problem.
2. UCCJEA – Uniform Child Custody Jurisdiction Enforcement Act. This is uniform law that is been ratified every state but Massachusetts. The UCCJEA puts jurisdiction of a custody case in the child's "home state."

The home state is defined as the state where the child has lived with a parent for six consecutive months prior to the commencement of the proceeding (or since birth for children younger than six months). If the child has not lived in any state for at least six months, then a court in a state that has (1) "significant connections" with the child and at least one parent and (2) "substantial evidence concerning the child's care, protection, training, and personal relationships" may assume child-custody jurisdiction.

If more than one state has "significant connections" and "substantial evidence...", the courts of those states must communicate and determine which state has the most significant connections to the child. All of this is governed by Chapter 152 of the Texas Family Code.

INVESTIGATIVE TIP

There are several of these cases and more on the way as we become a nation of state and globe trotters. You may be retained to determine the residence or obtain facts proving or disproving that an individual resides with the child in Texas. Many times, this is a matter of a mother and child running to forum shop where they think they have the best chance. Look at surveillance and positive actions that prove significant connections such as:

1. *Driver's License.*
2. *Vehicle Registrations.*
3. *Temporary Housing.*
4. *Surveillance to identify attempts to find jobs.*
5. *Travel back to the competing state.*
6. *Mail forwarding.*
7. *New phones, email and social media.*
8. *Current care of the child.*
9. *Behaviors, habits and routines.*

This is a new type of investigation that requires creativity and is very short fused. But, the key determining factor is significant contact. If you get this case prove the above and get the evidence to the attorney so that he can move the case back. Don't delay, your client will need to move fast.

C. STANDARD OF PROOF

Generally, the standard of proof in a suit affecting the parent-child relationship is a preponderance of the evidence. Tex. Fam. Code § 153.002; In re V.L.K., 24 S.W.3d 338, 342 (Tex. 2000).

D. BEST INTERESTS TEST

The primary consideration of the court in determining access managing conservatorship, termination, possession, support, and most everything else in this section of the code is what is “in the best interests of the child.” (“BIC”) TFC § 153.002.

What is the best interests of the child?? The *Holley* factors and they include:

1. the desires of the child;
2. the present and future emotional and physical needs of the child;
3. the emotional and physical dangers to the child now and in the future;
4. the parental abilities of the person seeking custody;
5. the programs available to assist in promoting the child's best interest;
6. the plans the person has for the child;
7. the stability of the home environment;
8. the act or omissions of the person that may indicate that the existing parent-child relationship is not an appropriate one. *Holley v. Adams* S.W.2d 367 (Tex. 1976).

INVESTIGATIVE TIP:

Custody, no matter original SAPCR, grandparent access, modification, CPS case or any other action, will be decided ultimately on BIC. If you can cast BIC in benefit of your client then you can win almost any fight under this section. The key here is not a smoking gun, but wild fire to overwhelm the other side. Compile several pieces of evidence. The key is quantity with at least one quality.

E. JOINT MANAGING CONSERVATOR.

Parents share in all rights in duties except 2 First is the right to determine the primary residence of child and the second is the right to receive child support.

1. Presumption is for JMC - Section 153.131 codifies the “parental presumption” – the legal and constitutional presumption that it is in the best interest of a child to be with a natural parent unless the appointment would impair the child’s physical health or emotional development. It further specifies that the parental presumption is in favor of both parents jointly. Tex. Fam. Code § 153.131.
2. Standard to Rebut Presumption of JMC - The parental presumption can be rebutted by showing that the appointment of the parent would significantly impair the child's health or development. Not so for modification of a prior order. The family code also provides that the parental presumption is rebutted if a parent has "voluntarily relinquished actual care, control, and possession of the child to a nonparent" for one year or more and the appointment of a nonparent as managing conservator is in the best interest of the child. Tex. Fam. Code § 153.373.
3. Parental Rights and Duties – In a JMC, the court will allocate and typically, by default, share parental rights and duties. May make rights and duties independent, joint or exclusive. However, 2 rights, with 2 corresponding duties are typically divided. Tex. Fam. Code § 153.134.
 - a. Right to Designate the Primary Residence of the Child – With a corresponding right to visitation and access to the child.
 - b. Right to Child Support – With a corresponding duty to pay child support.

However, there are other rights that can be divided as litigated. The top two are the staples and what most of everyone is fighting about.

F. SOLE MANAGING CONSERVATORSHIP.

You must first rebut that JMC isn’t going to work. In deciding to appoint one parent SMC instead of appointing JMC, courts have considered evidence relating to conflict between the parents, distance between the parents, the behavior of a parent during separation, an inability of the parents to work together in the best interests of the children, a parent’s judgment and ability to make prudent decisions, the parents’ ability to share in decision-making, and each parent’s ability to promote a positive relationship between the children and the other parent. *Robinson v. Robinson*, 16 S.W.3d 451 (Tex. App.—Waco 2000, no pet.); *Lide v. Lide*, 116 S.W.3d 147, 155 (Tex. App.—El Paso 2003, no pet.). Texas Family Code § 153.032.

1. Parental Rights and Duties – They will likely be exclusive to the SMC, unless the court has restricted them. Example would be domicile restrictions. Tex. Family Code § 153.132.

G. POSSESSORY CONSERVATORSHIP.

If a court does not appoint a person as a JMC conservatorship, the parent is presumed to be appointed a possessory conservator. Tex. Family Code § 153.074.

H. POSSESSION AND ACCESS.

The Texas Family Code contains a rebuttable presumption in favor of the standard possession order. Tex. Fam. Code § 153.252. This is, all things being equal, the recommendation by the legislature.

- i. Standard Possession Order – 1st, 3rd, 5th weekends, weekday visit, holidays split up and summer visitation. Tex. Family Code § 153.312; 153.313, et seq.
 - a. There are other presumption for younger children, different standards depending on how far apart you live, and sibling presumptions as well.
- ii. Extended Standard Possession – Basically the same as above, with a pickup on Thursday evening for the off weekends. The reason behind this is extending the possession to a point of almost equal and avoiding confrontation at pickup for the children.
- iii. Rebuttable Presumption - he Texas Family Code contains a rebuttable presumption in favor of the standard possession order. Factors that are considered are (1) the age, developmental status, circumstances, needs, and best interest of the child; (2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and (3) any other relevant factor. Tex. Fam. Code § 153.256.

INVESTIGATIVE TIP

It is not one thing to rebut the presumption or to win these cases. It is multiple things. The more issues you spot on surveillance the better position you put your client in. It is not always just about drinking or substance abuse. It is about proving what is happening in all aspects. Convince the Court that because of a litany of issues control should be given to your client.

VII. MODIFICATION.

After you have a SAPCR order, whether in conjunction with Divorce or with stand alone can't you take another bite at the apple? Yes, under the right set of circumstances. However, be wary of the change of standards.

A. WHO CAN FILE?

Any party affected by the last order or anyone who has standing under Chapter 102 (the standing sections above). TFC § 156.002.

B. WHERE TO FILE?

Court of Continuing Exclusive Jurisdiction, basically the court where jurisdiction remained.

C. GROUNDS?

TFC 156.101 the grounds for modification of an order include BIC and one of the three:

- i. the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed....;
 - a. [Most popular of the three is material changes and it may be established by circumstantial evidence. Courts have found the following to be material changes: (1) marriage of one of the parties, (2) poisoning of the child's mind by one of the parties, (3) change in the home surroundings, (4) mistreatment of the child by a parent or step-parent, or (5) a parent's becoming an improper person to exercise custody. *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex.App.-Houston [14th Dist.] 2009, no pet.).]
- ii. the child is at least 12 years of age and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or
- iii. the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months.

INVESTIGATIVE TIP.

Know the standards. Realize that it can be something as simple as a new marriage, new change in home or residence. Ultimately, you have to prove why the court should change the prior order. Why is the status quo no longer OK for the child. Doesn't necessarily mean that you want to

prohibit all access and visitation. Just changing some of the term. Look at the old order and predict then new.

D. ENFORCEMENT OF CUSTODY ORDER.

1. Habeas Corpus – Tex. Family Code 157.371 allows for a court of continuing exclusive jurisdiction to issue a writ of habeas corpus to direct the Sheriff (usually) to seize the child and return it to the petitioning parent. If you have an order, all you need to do is show that the parent is entitled to possession at that time. Writ will issue and can be served in Texas.
 2. UCCJEA Warrant – If child is in another state, UCCJEA allows a warrant to issue under Tex. Family Code §152.311 which will have the same effect
-

INVESTIGATIVE TIP.

Writ or warrant matters very little. If someone has run with the child and is not telling them where they are at, all that is needed for this order is that your client has a custody order that allows him possession and he doesn't have the child. However, prepare some facts that this is your client's only option. If they have taken the child out of state, are not answering phones, have made a runaway attempt.

Writ and warrant can be for third parties (i.e. grandmother). If you get this case, find the child. Get the order and then coordinate with local law enforcement. I have found that law enforcement will with this order bend over backwards. You may have to talk to a Sheriff Deputy in the civil division. This is one of the times you are on the perceived good guy side. Use their resources. Be sneaky and lead the police to the wrongdoer.

VIII. TERMINATION OF PARENT-CHILD RELATIONSHIP

- A. Clear and Convincing Evidence – This is the death penalty for civil cases by parents against the other, family against parents, adoption termination where there is no presumed father, or Department of Family and Protective Services (“CPS”) cases. Involuntary termination must be
- B. Grounds for Involuntary Termination – TFC § 161.001 – See the full list in the statute. There are over TWENTY grounds for termination. However, here are the big one.
 1. Voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away for a period of at least six months;

2. Knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
 3. Contumaciously refused to submit to a reasonable and lawful order of a court under Subchapter D, Chapter 261 (Investigation by CPS);
 4. Executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by this chapter;
 5. Been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code;
 6. Had his or her parent-child relationship terminated with respect to another child based on a finding that the parent's conduct was in violation of Paragraph (D) or (E) or substantially equivalent provisions of the law of another state;
 7. Knowingly engaged in criminal conduct that has resulted in the parent's: (i) conviction of an offense; AND (ii) confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition;
 8. Been the cause of the child being born addicted to alcohol or a controlled substance, other than a controlled substance legally obtained by prescription, as defined by Section 261.001;
 9. Prove at least one of the twenty available AND....that termination is in the *best interest of the child*.
-

INVESTIGATIVE TIP:

You have to prove the above plus BIC in a termination case brought by the parent. These are rare. More often, are cases brought by DFPS. Those cases are pled under typically 4, 5 as catch alls. However, these cases are investigated by CPS and are those investigations are regulated by law under Subtitle E, Protection of the Child, of Title 5 of the TFC. (TFC §261 – 266). This has and will continue to change. If involved in a CPS matter, this is where you need to look to see what ground exist

IX. EVIDENCE – PROVING THE DECIET, CHEATING AND WRONGDOING.

A. INVESTIGATION AND EVIDENCE

This next section deals with evidence ultimately used in a hearing or at trial and the subsequent rules for use, admittance, authentication and whether your investigative technique, method or evidence violates law or not.

1. Press Test – The below is organized according to an adopted and modified legal ethics test. Similar to the Stansfield Turner National Interest Test but, with following considerations for *all* involved:
 - a. Criminal Responsibility;
 - b. Civil Responsibility;
 - c. Codified ethical responsibility;
 - d. Potential to defend to the opposing party and/or tribunal; AND
 - e. Potential to defend to the public.

The potential, is the ability of the authorizer to justify the activity to the designated party. Ultimately, you have to factor all of these and PRESS the potential liability. Then, you must weigh what benefit you get from authorization and what overall liability exists on the other side. Again, consider a) through e), press the liability together, then weigh what you get by authorization.

B. ACTIVITY BARRED BY CRIMINAL LAW.

1. Wiretapping – Both Federal and State statutes, including Texas prohibit interception of a voice communication unless at least one party to the communication knows of and consents to the interception at the time of interception. 18 USCA 2510 et seq.; Tex. Penal Code Ann § 16.02. The acts, in essence, mirror each other. But, their interpretation and exceptions differ.
 - a. Electronic Communications Privacy Act of 1986 (“ECPA”) – ECPA was an amendment to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which was primarily designed to prevent unauthorized government access to private electronic communications. It now protects wire, oral and electronic communications *while in transit* from interception by a third party.

The act, also known as the Federal Wiretap Act, prohibits the interception of oral or wire communication by use of any electronic, mechanical or other device. 18 U.S.C. § 2511.

- i. Effect on State Law – Title I and II of the Electronic Communications Privacy Act (“ECPA”), preempts state law

that provide less security for conversation. However, states can provide more protection by statute.

ii. Two Party States – These "two-party consent" laws have been adopted in;

- (1) California.
- (2) Connecticut.
- (3) Florida.
- (4) Illinois.
- (5) Maryland.
- (6) Massachusetts.
- (7) Montana.
- (8) New Hampshire.
- (9) Pennsylvania.
- (10) Washington.

iii. Complicated Two Party States – Some states have complicated and ambiguous statutes that you should be aware of when investigating in those areas.

- (1) Illinois – Illinois's two-party consent statute was held unconstitutional in 2014. *People v. Melongo*, 2014 IL 114852 (2014). It has now been revised and prohibits recording of a private conversation. 720 Illinois Compiled Statutes 5 / Criminal Code of 2012 Article 14.
- (2) Hawai'i – In general a one-party state, but it requires two-party consent if the recording device is installed in a private place. Hawaii Revised Statutes Division 5. Crimes and Criminal Proceedings § 711-1111.
- (3) Massachusetts – State bans "secret" recordings rather than requiring explicit consent from all parties. It falls in a two-party consent state. You should pay careful attention to this law as possession of a device with intent to record violates the statute. Mass. Gen. Laws Ch. 272, § 99.
- (4) Washington – Statute implies a requirement to satisfy consent by a notice and announcement that is recorded indicating that all parties consent to recording. Wash. Rev. Code § 9.73.030.

- (5) Montana – Statute has an announce provision which requires that you give warning. Mont. Code ann. § 45-8-213-1-c-i, ii, iii.

We will leave the Texas Statute for later. It mimics the Federal statute and consent by one party protects you from ECPA and Texas Penal Code:

- iii. ECPA Cross Border Issues – When recording is in Texas with a party in California, whose law applies? Generally, where the state with the most significant interest is at. If you are here, you are *probably* fine.

See Becker v. Computer Sciences Corp., 541 F.Supp. 694, 704-706 (S.D. Tex. 1982) (where former employee who surreptitiously recorded telephone conversations relied upon laws of Texas when he did so, and former employer was licensed to do business in Texas, conducted business in Texas and had registered agent in Texas, Texas rather than California had most significant interest in case, even though parties whose telephone conversations were recorded lived in California).

- iv. Federal Exclusionary Rule – Strong exclusionary rule in federal statute for not allowing such evidence to be admitted in Court or any administrative action. 18 U.S.C.A. § 2515.
- v. Criminal Penalty – The penalty for a violation of the statute is a fine or imprisonment for up to five years, or both.
- vi. Federal Civil Remedies – The Federal facts allow for actual and punitive damages for violation of the wiretap act. Although the statute allows minimal liquidated damages of \$10,000 for violation of the Federal Act, Courts (majority) have found that that awarding damages is discretionary and the court may refuse to do so for *de minimus* violations. The federal wiretap act also includes a strong exclusionary rule. *Goodspeed v. Harmon*, 39 F.Supp. 2d 787, 791 (N.D. Tex. 1999).
- vii. Federal Interspousal Exception – The 5th Circuit has actually held a minority position to the Federal Wiretap Act that has said that Congress did not intend the act to regulate martial controversies or override state inter-spousal tort immunity. It has held that the recording of telephone conversations by one spouse against another is not what is meant to be covered

by the *Federal* act. *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974). We are the *minority* rule. However, be advised that this exception is limited to eavesdropping by the *spouse* in the *marital home*. *Glazner v. Galzner*, 316 F.3d 1185 (11th Cir. 2002). That does not include anyone assisting them, such as a private investigator. However, beware, the spouse may still be liable under state law. *Heyman v. Heyman*, 548 F.Supp 1042 (N.D. Ill. 1982). Texas's state law clearly outlaws such activity and holds different than *Simpson*. *Collins v. Collins*, 904 S.W.2d 792 (Tex. App – Houston [1st Dist.] 1995, writ denied).

- viii. Federal Extension Phone Exception - Title I of the Federal Law contains a narrow-held exception for eavesdropping over an extension phone that is done for the ordinary use of the subscriber. § 2510(5)(a)(i). Specifically, the statute prohibits nonconsensual interception using an electronic, mechanical or other device.

Mostly employer/employee cases. But, it is still very, very narrow and has been interpreted various ways. Not good law to rely on as if you lose, you violated federal law. They are going after the “party line.” So, it becomes a great defense and not much of an offense tool.

Cases:

- (1) Wife cannot proceed with claim for relief from husband who wiretapped phone in marital home under 18 USCS § 2520, even though wife had filed for legal separation at time of wiretapping, where both parties resided in marital home and could have listened in on phone conversations by use of extension phones, because (1) 18 USCS § 2510(5)(a)(i) "extension phone" exception is expression of congressional intent to leave matters of interspousal domestic conflict to realm of state courts, and (2) there is no evidence that wiretap ever intercepted conversation in which wife participated. *Perfit v Perfit*, 693 F. Supp. 851(C.D. Cal., 1988).
- (2) Recording of all incoming and outgoing calls, including employee plaintiffs' conversations, by Dictaphone machine attached to telephone system of company providing central alarm services was in ordinary course of business under 18 USCS § 2510,

and alleged lack of notice was justified; recording is standard practice within central station alarm industry and is intended at least in part to deter criminal activity, was recommended by company's underwriters and relevant trade association, and may be required by authorities in certain instances. *Arias v Mutual Cent. Alarm Serv.*, 202 F3d 553 (2000).

- ix. Family Law – Some federal and state courts have interpreted that this exception allows for protection of a parent (even a non-custodial parent) to record his child while interacting with the other parent. *Schieb v. Grant*, 22 F.3d 149 (7th Cir. 1994). The underlying basis here is to not regulate the familial relations and not to subject to liability under a federal act. Now covered by vicarious consent.
- x. Federal and State Vicarious Consent Exception – Although the above exception has roots in the statute, courts dealing with both the states and federal wiretap acts themselves have begun to hold that a parent may vicariously consent to record the conversations of their minor children. The federal courts have articulated a “good faith” test. Meaning that if the parent had a “good faith, reasonable basis for believing such consent was necessary for the welfare of the child,” then the recording was allowed into evidence. The parent must demonstrate a reasonable belief “...that the minor child is being abused, threatened, or intimidated by the other parent. *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998).

Fairly recently, in *Alameda v. State*, the Texas Court of Criminal Appeals has upheld that where the parent has a good faith, objectively reasonable belief that the recording is necessary for the welfare of the child a vicarious consent exception to the Wiretap Act will make such recordings permissible. *Alameda v. State*, 235 SW 3d 218 (Tex. Ct. of Crim. App. 2007). Again, the age of the child and purpose for surveillance are factors in making this exception.

- (1). Press Test – Be Careful here. This is close to a BIC test but not really. If you get it wrong, it could spell disaster for you, your client and their case. If you don't get vicarious consent, you are in violation of the law.
- (2). Prior *Alameda* Cases: *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah 1993); *Wagner v. Wagner*, 64

F. Supp. 895, 896 (D. Minn. 1999); *March v. Levine*, 136 F. Supp. 2d 831, 849 (M.D. Tenn. 2000), *aff'd*, 248 F.3d 462 (6th Cir. 2001); *Allen v. Mancini*, 170 S.W.3d 167 (Tex. App.–Eastland 2005, *pet. denied*); (As long as a parent has a good faith, objectively reasonable basis for believing that the taping of telephone conversations is in the best interest of the parent’s minor child, the parent may vicariously consent to the recording on behalf of the child).

- xi. State Interspousal Exception – Some states, like Mississippi, have found that this exception exists. *Stewart v. Stewart*, 745 So. 2d 1319 (Miss. 1994). Texas, however, has made clear that Tex. Penal Code § 16.02(b)(1) does not include that. *Kent v. State*, 809 S.W.2d 664, 668 (Tex. App.–Amarillo 1991, *pet. ref’d*) (defendant violated code by placing wiretap on the wife’s telephone); *Duffy v. State*, 33 S.W.3d 17, 24 (Tex. App.–El Paso 2000, *no pet.*).
- xii. Reasonable Expectation of Privacy – A statutory claim and protection is somewhat predicated on the belief that one has a reasonable expectation of privacy that ought to be guarded. That is almost guaranteed when you are talking on a telephone that has 2 parties on it. Courts have generally held that one must have a objective and subject reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967). However, what happens when you are in public?

Test – In cases involving the reasonable expectation of privacy afforded to oral communications in the eavesdropping and wiretap contexts. Courts primarily look to considerations such as: (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating. These considerations help the court develop, but do not define, a set of nonexclusive factors to evaluate the subjective expectation of privacy in oral communications in publicly accessible spaces.

Courtyard Recordings – Reporter records political meeting in hotel courtyard and records some voices with a hidden unenhanced audio hearing. Allows evidence to be heard that recording a private conversation in public could be an intrusion. Not a finding, just a reversal of summary judgment. *Stephens v. Dolcefino*, 126 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2003).

xiii. Video Surveillance Allowed – The ECPA does not prohibit silent video surveillance. So, if you aren't recording any sound, you are going to be ok. Disable the sound on your devices. At a minimum, use regular non-enhanced microphones. *Thompson v Johnson County Community College*, 930 F. Supp. 501(D.C. Kan. Cir., 1996).

b. State Wiretap Act; Texas Penal Code § 16.02 – Same as federal act. One party state that, without consent, if interception occurs it is unlawful. Consent can be both explicit and implicit.

i. No Exceptions – No exceptions for spouses. You record your spouse with another, without authorization, then you are liable. Vicarious Consent is allowed. *Alameda v. State*, 235 SW 3d 218 (Tex. Ct. of Crim. App. 2007).

ii. Finding the Tap – If you engage in a Technical Surveillance Countermeasure Sweep of a client's property and locate a wiretap what are your options? You may have to leave it there under this statute if it was placed by law enforcement. Also, remember that you may have a need to report that to law enforcement anyways (unless you are working under the supervision of an attorney). *See* Tex. Occ. Code § 1702.133(b).

“(g) A person commits an offense if, knowing that a government attorney or an investigative or law enforcement officer has been authorized or has applied for authorization to intercept wire, electronic, or oral communications, the person obstructs, impedes, prevents, gives notice to another of, or attempts to give notice to another of the interception.” Texas Penal Code §16.02.

iii. Sample Cases

- (1). In a trial for solicitation to commit murder, defendant was not entitled to suppress an audio taped conversation with an investigator posing as a hit man; the court rejected defendant's wire-tapping arguments, finding that no application was required for an order to record defendant's conversation with the investigator because the investigator consented to the recording. *Casey v. State*, 2006 Tex. App. LEXIS 1266 (Tex. App.-Houston [14th Dist.], Feb. 14, 2006).
- (2). Where police had permission of a participant in a telephone conversation to record the conversation, record of the conversation was legal, and the recording was admissible at defendant's trial on charges of conspiracy to commit capital murder. *Matthews v. State*, 1998 Tex. App. LEXIS 4556 (Tex. App.-Dallas, July 28, 1998).
- (3). Telephone calls that defendant made from jail were not illegally intercepted under Tex. Penal Code Ann. § 16.02(c)(3)(A) because a technical administrator with the contracting company that operated the inmate phone system testified that a prompt notified inmates at the beginning of each phone call that their calls were monitored or recorded. *Escalona v. State*, 2014 Tex. App. LEXIS 2008 (Tex. App. Dallas Feb. 20 2014, no pet. h.).
- (4). In a sexual assault on a child case, because a court correctly determined that a mother had a good faith, objectively reasonable belief that recording her child's telephone conversations was in the child's best interest, the court did not err in allowing the audiotapes to be admitted over defendant's objection that the child had not consented. *Alameda v. State*, 181 S.W.3d 772, 2005 Tex. App. LEXIS 9829 (Tex. App. Fort Worth 2005).
- (5). In claiming that the recorded conversation between defendant and the victim was illegally obtained and therefore inadmissible under Tex. Code Crim. Proc. Ann. art. 38.23(a), defendant did not point to and the court is not aware of any authority that specifically holds that a minor cannot consent to the recording of his or her own conversations for purposes of Tex.

Penal Code Ann. § 16.02(c)(4); the error, if any, in admitting the recording was harmless under Tex. R. App. P. 44.2 because the information on the recording was cumulative of other testimony. *Robertson v. State*, 2010 Tex. App. LEXIS 969 (Tex. App.-Corpus Christi, Feb. 11, 2010).

- iv. Civil Remedies; Tex. Civ. Prac. & Rem. Code § 123.001(2) – Allows for liability for improper interception by use of a mechanical, electrical or other device. Allows for recovery of injunction, statutory damages of \$10,000 for each occurrence; actual damages in excess of \$10,000; punitive damages in the amount to be determined by the court and reasonable attorney’s fees. Same recording rules in Federal. Reasonable expectation of privacy in public. We will discuss this in more detail in the civil cases below.
2. Federal Stored Communications Act (“SCA”) – Federal law that protects against unauthorized “access” to electronic communication while it is in “electronic storage.” These quotes are oddly defined and really deal with transmission interception. Basically, the courts have struggled to define “temporary, intermediate storage” in the context of how data is stored and transmitted over the internet. They are clear on prohibiting interception during transmission. (Think FBI Carnivore Program).
- a. Primary Purpose – Protect privacy interest of personal information that is stored on the internet and to limit the government’s ability to compel disclosure of information that is held by third parties.
 - b. Electronic Storage – Oddly defined and depends what court is looking at it. It can depend on whether it is stored on a local drive (like your home computer) or a remote server. The Stored Communications Act is not violated when someone access mails that are stored locally on a computer, but it can be a violation to access webmail that is stored on the internet. There is some disagreement about whether e-mail that is intercepted after it has been received and read is in “temporary, intermediate storage,” “backup storage,” or “post-transmission storage.” The first two categories would be protected under the Stored Communications Act, while the third would not. Most likely, email stored on a local personal computer, post-transmission, does not violate the SCA.
 - i. Hard Drive – Some courts have held that computer files that are stored in a hard drive in post transmission storage on your computer are not the same thing as electronic storage.

Thus these are free to access: *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 114 (3d Cir.2003) F. Supp2d 623 (E.D. Pa. 2001); *White v. White*, 781 A.2d 85 (N.J. Super Ct. CH Div. 2001).

- ii. Server Storage – However, sometimes, post transmission storage on a third party server has been found to be protected by the SCA. See *Fischer v. Mt. Olive Lutheran Church*, 207 F. Supp.2d 914 (W. D. Wis. 2002).
 - c. Social Media – We’ll discuss below but it is still an unsettled question to some degree. Recently, a California federal court held that Facebook and MySpace were protected under the Stored Communications Act. *Crispin v. Christian Audigier, Inc., et al*, CV 09-09509-MMM-JEMx C.D. Cal.) (May 26, 2010).
 - d. ECPA v. SCA – ECPA really deal with communications in transit while the SCA concerns stored communications.
3. State Stored Communications Act – Texas has one that mirrors almost identically the Federal Statute. Tex. Penal Code § 16.04.

INVESTIGATIVE TIP

The SCA has a potential to be turned over because it lags behind the times. When dealing with computers, it is always best to get the court order authorizing analysis. It can be sometimes better to have just the image of the hard drive in storage awaiting possible examination. Many times this tactic becomes more of a stick used for settlement.

- 4. Voice Mails – USA Patriot Act amended the Stored Communications Act (both federal law) which now treats voicemails similar to email communication under the SCA. Courts had found in the past that retrieving stored voicemails messages violated the Federal Wiretap Act. *United States v. Smith*, 155 F.3d 1051 (9th Cir. 1998). Since that courts have now interpreted that it is not a violation to obtain answering machine messages located on a physical recorder, but it is a violation to access voicemail messages stored on a telecommunications system. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874-880 (9th Cir. 2002).
- 5. Breach of Computer Security – Texas Penal Code § 33.02 makes it a crime to access someone’s computer without their consent. Felony if the intent is to obtain benefit or defraud or harm another.

- a. Criminal Cases – Mainly deal with suppression of the illegally obtain evidence in a criminal case. More specifically, child pornography cases. Why is it that these cases are here? Why is it that there are no hacking cases here? What is the push? Are we weakening the statute? What do we want as investigators?
 - i. Computer Repairman – Defendant authorized file access to a repair person, who consented to police viewing several of the files at issue, and that the police reasonably believed the repair person had authority; accessing the files did not violate statute because the computer files were accessed in the course of carrying out defendant’s repair order and in the ordinary course of the repair company’s standard procedures. *Signorelli v. State*, No. 09-06-450-CR, 2008 Tex. App. LEXIS 335 (App.—Beaumont 2008)
 - ii. Sweetheart Email – Because defendant gave his girlfriend access to his email accounts in exchange for her agreement to continue their relationship and because he claimed he had nothing to hide, defendant effectively consented to her access to his accounts, despite his contention that she was only allowed to look at them if he was sitting next to her. Court found consent and no violation of the statute. *Dipple v. State*, No. 05-12-00114-CR, 2013 Tex. App. LEXIS 273 (App.—Dallas 2013).
- b. Civil Liability – You too can be sued for this through its corresponding civil mechanism within the Tex. Civ. Prac. & Rem. Code § 143.001 (2015). See below cases who provide recovery if you violate the first statute.
 - i. Screen Shots is Accessing – Suit between two former spouses involved in business together. Husband takes screen shots of text messages and phone call logs while wife is sleeping. Court finds that this is a violation of the statute because the phone is a computer under the statute, wife has greater ownership claim on the phone than husband; and that taking a screen shot is accessing under the statute. *Miller v. Talley Dunn Gallery, LLC*, No. 05-15-00444-CV, 2016 Tex. App. LEXIS 2280 (App.—Dallas 2016).
 - ii. Don’t Download at Office – Court held that downloading without consent, even if you are an employee or contractor, from employer’s computer systems can be considered a violation of the penal code and actionable under civil

practices and remedies code. *Institutional Secs. Corp. v. Hood*, 390 S.W.3d 680 (Tex. App.—Dallas 2012).

6. Online Impersonation – Texas was one of the first states to implement a law prohibiting online impersonation. Tex. Penal Code § 33.07. The law creates two offenses:

a. Statute

“a. A person commits an offense if the person, without obtaining the other person's consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to:

- i. create a web page on a commercial social networking site or other Internet website; or
- ii. post or send one or more messages on or through a commercial social networking site or other Internet website, other than on or through an electronic mail program or message board program.

b. A person commits an offense if the person sends an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any person:

- i. without obtaining the other person's consent;
 - ii. with the intent to cause a recipient of the communication to reasonably believe that the other person authorized or transmitted the communication, and;
 - iii. with the intent to harm or defraud any person.
- “

Under this statute, you must have the intent to harm the victim. The penal code defines "harm" as "anything reasonably regarded as loss, disadvantage, or injury." There is no requirement the harm be physical harm. Emotional distress can be sufficient to qualify as harm under the Penal Code. Tex. Penal Code § 1.07(a)(25). *White v. State*, No. 14-05-00454-CR, 2006 WL 2771855 (Tex. App.-Houston [14th Dist.] Sept. 28, 2006, pet. ref'd) (mem. op.). Never impersonate a subject, witness or party.

7. Stalking – Tex. Pen. Code § 42.072. This statute is difficult to read. But, I have selected parts so that you can get an idea how the statute works against you:
- a. Statute.

“A person commits offense if...

 - (a)...on more than one occasion pursuant to a scheme or course of conduct;
 - (b)...knowingly engaged in conduct, including following the victim...;
 - (c)...in a manner that the perpetrator knew, or reasonably would believe, that the victim would regard as threatening bodily injury to the victim or the commission of an offense against the victim’s property; and,
 - (d) the conduct would cause a reasonable person to be placed in fear of bodily injury to himself or the victim’s family or destruction of the victim’s property...”
 - b. Defenses – Surveillance is not stalking based on reasonable person’s belief. But, you can stalk as an investigator. You can be subject to the statute. Poorly written statute. A good and used argument is that the state provides you a license to include surveillance and if you are granted a license how can you be prosecuted? How is this comparable to a driver’s license?
 - c. Trackers + Harassment = Felony – Court held that trackers plus text messages that instilled fear caused a finding for stalking. *Werner v. State*, 445 S.W.3d 228 (Tex. App.—Houston [1st Dist.] 2013) (rev’d on other grounds). Third degree felony up to second degree if you have been convicted before. They will still get you under the tracking since it is not a lesser included offense.
8. Unlawful Installation of a Tracking Device – Texas Penal Code § 16.06 – A person commits an offense if the person knowingly installs an electronic or mechanical tracking device on a motor vehicle owned or leased by another person.
- a. Another - What does the term “by another” mean? Not defined by a case that I can find reported.
 - i. Spouse?
 - ii. Child?
 - iii. Employer / Employee?

- b. Defenses – A private investigator has an affirmative defense. While, as written, Law Enforcement has an exception to any pending criminal investigation.

4th Amendment Search – *US v. Jones*, 132 S. Ct. 945 (2012) (holding that the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment). This case was decided on grounds of trespass. However, the court did not necessarily throw out the expectation of privacy test. This case may be more of an example of how the Supremes are protecting the vehicle than anything else. So, maybe they have to have the warrant now. Not the case in past criminal law where a bumper beeper was not an unreasonable search and seizure.

- 9. Illegal Divulgence of Public Communications; Texas Penal Code § 16.05 – A person who provides electronic communications service to the public commits an offense if the person knowingly divulges the contents of a communication to another who is not the intended recipient of the communication. Not you, the communications company. Your source may not be safe.
- 10. Unlawful Use of Criminal Instrument; Tex. Penal Code § 16.01 – A person commits an offense if the person possesses a criminal instrument or mechanical security device with the intent to use the instrument or device in the commission of an offense OR with knowledge of its character and with the intent to use a criminal instrument or mechanical security device or aid or permit another to use the instrument or device in the commission of an offense, the person manufactures, adapts, sells, installs, or sets up the instrument or device. Think lock pick device, or other unnecessary items. Probably not the best thing to have in your car.
- 11. Unlawful Use of Pen Register or Trap and Trace Device; Tex. Penal Code § 16.03 - A person commits an offense if the person knowingly installs or uses a pen register or trap and trace device to record or decode electronic or other impulses for the purpose of identifying telephone numbers dialed or otherwise transmitted on a telephone line.
 - a. However; an officer, employee, or agent of a lawful enterprise and the actor installs or uses a device or equipment while engaged in an activity that: (1) is a necessary incident to the rendition of service or to the protection of property of or services provided by the enterprise; and (2) is not made for the purpose of gathering information for a law enforcement agency or private investigative agency, other than information related to the theft of communication

or information services provided by the enterprise; or (3) a person authorized to install or use a pen register or trap and trace device under Article 18.21, Code of Criminal Procedure.

12. Illegal Use of Unmanned Aircraft to Capture Photo Image; Tex. Govt. Code § 423.003 – A person commits an offense if the person uses an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image. See Drone section below.
13. Unlawful Promotion of Intimate Visual Material; Texas Penal Code § 21.16 – Revenge porn bill that makes it a crime to record, promote and distribute intimate visual material. See Updates section below.
14. Improper Photography or Visual Recording; Texas Penal Code § 21.15 – Makes it an offense to photograph or videotape without the other person's consent AND with intent to arouse or gratify the sexual desire of any person. Peeping tom law and law for camera in the bedroom by snooping spouse. What you want to use when you find the camera.
15. Criminal Trespass; Tex. Penal Code § 30.05 - A person commits an offense if the person enters or remains on or in property of another...without effective consent and the person: had notice that the entry was forbidden; or received notice to depart but failed to do so.
 - a. Notice – Can be explicit or purple paint marks or explicit warnings. But have to have notice. If none, you have to have a warning. If you get, move on.
16. Criminal Mischief; Tex. Penal Code § 28.03 – A person commits an offense if, without the effective consent of the owner; he intentionally or knowingly damages or destroys the tangible property of the owner; he intentionally or knowingly tampers with the tangible property of the owner and causes pecuniary loss or substantial inconvenience to the owner or a third person; or he intentionally or knowingly makes markings, including inscriptions, slogans, drawings, or paintings, on the tangible property of the owner. You have to tamper and if it is less than a \$100 it is a Class C Misdemeanor.

B. ACTIVITY BARRED BY CIVIL REMEDIES.

1. Right to Privacy
 - a. U. S. Constitution – The U. S. Constitution has never truly held that there is a definable right to privacy within the text of the constitution or any of its amendments. A number of discussions, heralding back

to the late 1890s, began to lay the foundation of general privacy protections. Harvard Law Review, Volume VI, 12-15-1890, No. 5. However, the Supremes have held through a mishmash of cases and a general interpretation of cases that privacy exists in the 1st Amendment (privacy of beliefs); 3rd Amendment (privacy of the home against use by soldiers); 4th Amendment (privacy of the person and possessions against unreasonable searches); and the 5th Amendment Self-Incrimination Privilege (which provides protection for the privacy of personal information). It thus has become, in both the text of the constitution and through application, a basic fundamental right.

See Meyer v. Nebraska (right to attend parochial schools); *Griswald v. Connecticut* (right to buy contraceptives); *Stanley v. Georgia* (right to view porno in home); *Roe v. Wade* (woman's right to abortion); *Lawrence v. Texas* (sodomy not illegal). All of which is applied to the states by the 14th amendment. Very broad and abstract policy.

- i. Protection Against Government – Most of the above cases are restrictions upon state actors. Remember, the Bill of Rights protects you from unwanted government intrusion. You are a private citizen and are not subject, necessarily, to the same restrictions that police have under those bill of rights. However, you will be *measured* by them. Especially by fourth amendment search and seizure law meant to reign in police. Therefore, be aware of the cases that follow. Some are civil and some are criminal defendants. Many times these are simply deciphered by *State v. Smith* as opposed to *Adams v. Smith*.
- b. Texas Constitution - In addition, the Texas Supreme Court has held that privacy, although not explicitly spelled out in the state constitution, mimics the US Constitution and creates various zones of privacy that are protected. These include protection against arbitrary deprivation of life and liberty; the freedom to speak, write or publish; protection of not being compelled to give evidence against oneself; protection of the sanctity of one's home from unreasonable intrusion and right of conscience in religious matters. *Texas State Employees Union, et al v. Texas Department of Mental Health and Mental Retardation, et al*, 746 S.W.2d 203 (Tex. 1987).
- c. Common Law Right to Privacy – In addition to constitutional protections, American courts have generally recognized a cause of action broadly titled invasion of privacy when one interferes with another's seclusion of solitude. These civil matters result in money

damages. They may not necessarily result in excluding evidence in another trial.

2. Invasion of Privacy – As we discussed above, this fundamental right to privacy is protected through a common law cause of action of Invasion of Privacy. Such a claim should not be lightly taken. Its violation can cause all sorts of fury to rain down on you by a judge or jury should you run afoul of it. Traditionally, there are four distinct torts that one can sue under. They are;
 - a. unreasonable intrusion upon the seclusion or private affairs of another (AKA, Intrusion Upon Seclusion);
 - b. unreasonable publicity given to an aspect of one's private life in which the public has no legitimate concern (AKA, Public Disclosure of Private Facts);
 - c. publicity that unreasonably places another in a false light before the public (AKA, False Light);
 - d. unwarranted appropriation of one's name or likeness (AKA, misappropriation of name and likeness).

Texas Courts have expressly allowed for intrusion upon seclusion and for public disclosure of private facts. Those causes of invasion of privacy are critical to understand. Texas has explicitly rejected False Light because it essentially is covered by defamation which has a number of substantive and procedural limitations. Texas has likely provided some support for misappropriation of name or likeness. *See Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). For our discussions, we will concentrate only on the first two; intrusion on seclusion and public disclosure of private facts.

3. Intrusion on Seclusion – This is what you will be sued upon. Simply put this is the suit that will result for overreaching and over-snooping. The elements for this private cause of actions are:
 - a. the defendant (investigator) intruded on the plaintiff's solitude, seclusion, or private affairs;
 - b. the intrusion would be highly offensive to a reasonable person; AND
 - c. the plaintiff suffered some injury as a result.

See Valenzuela v. Aquino, 853 S.W.2d 512, 513 (Tex. 1993); *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973); Restatement (Second) of Torts § 652B. A good discussion of these elements can be found in Restatement (Second) of Torts § 652B and Dorseano's Texas Litigation Guide § 335.03.

Elements Continued

- a. Intrusion – A showing of conduct in the nature of an intrusion is necessary to establish a cause. The invasion may take the form of actual physical intrusion into a place or it may be by senses (sight, hearing) with or without the aid of mechanical devices. Thus, entering a person's home, hotel room, or hospital room without consent, tapping another person's telephone, or placing another person under surveillance or photographing his or her movements would equal an intrusion. Intrusion may take the form of an investigation or examination into a person's private life, such as by opening personal mail, searching a private room, or examining his or her personal bank records. Restatement (Second) of Torts § 652B, Comment b; Prosser and Keeton on Torts, § 117 (5th ed. 1984).

The intrusion must usually be private. Although an individual is not protected from being observed or photographed in a public place, a person is protected when at home or in the hospital. Similarly, a plaintiff has no cause of action for the inspection of records that are generally considered public record. However, a plaintiff is protected against illegal search and seizure. Thus, the importance of 4th amendment cases. *Id.*

- b. Highly Offensive – Must be highly objectionable to a reasonable person. This is the fuzzy element. Usually meant to create a sense of shock. You can have an intrusion which may not necessarily be offensive. This is why these cases are very hard to quantify. There is always a lot of argument here.
 - c. Damages – You must sustain some damages. These damages can include mental anguish, compensatory, exemplary, loss of earning capacity, injunction, pre and post judgment interest, court costs and attorney's fees.
- 4. Case Law - These cases include such thing as setting up a video camera in the plaintiff's bedroom without permission; entering the plaintiffs home without permission; entering plaintiff's private office without permission; following, spying on and harassing the plaintiff; making harassing phone calls at unreasonable hours; searching an employee's locker and purse; and, wiretapping.

Specifically, look at these cases, almost all have a subject and objective test for an expectation of privacy;

- a. Defendant in Public – Defendant wants to challenge video evidence of him in public. Claims they need a warrant and then claims that they are liable for invasion of privacy. Surveillance video taken of a criminal defendant in public is not an intrusion as he has no seclusion or expectation of privacy. No need for warrant as it is not a search and seizure. *McCray v. State of Maryland*, 581 A.2d 45 (Md. Ct. Spec. App 1990) (video captured images of someone in a private place with reasonable expectation of privacy has invasion of privacy claims).
- b. Binoculars and Open Window – During neighbor dispute, neighbor parked in opposing driveway and used binoculars to look into kitchen at plaintiff resident. Court held that one cannot expect to be entitled to seclusion when standing directly in front of a large window with the blinds open or while outside. *Vaughn v. Drennon*, 202 S.W.3d 308 (Tex. App.–Tyler 2006, no pet.).
- c. Bedroom Cameras – Wife hired a private investigator to investigate her husband’s infidelities. As part of the investigation, private investigator installs a hidden camera in the shared bedroom of the couple. While wife goes out of state, investigator monitors and records husband’s sexual encounter with his girlfriend in the marital bedroom. Court upholds invasion of privacy suit against investigator. Even though the investigator may have only furnished technical services in connection with acts constituting invasion of privacy, the private investigator may still be liable as if an actual invasion of privacy has been committed. A spouse by virtue of marriage relinquishes some of his privacy but, not all and not when recording happens without consent and no expectation is had. *Clayton v. Richards*, 47 S.W.3d 149 (Tex. App.–Texarkana 2001, pet. denied).
- d. Extension Phone – Husband and wife separated with wife living in a separate apartment. She installs a land line on her own. Husband then has phone company install an extension to his location to listen in. Court holds both husband and phone company liable for an intrusion. *Lecrone v. Tel. Co.*, 201 N.E.2d 533 (Ohio Ct. App. 1963).
- e. Stalking – Husband, while married, breaks up with his girlfriend after brief extra-marital affair. Girlfriend then followed husband several days a week for several years at his office, home, family vacations, children’s schools, dinners with his wife and other outings. She sent him unwanted cards, gifts, and letters. She was overheard making vulgar sexual remarks by his wife, kids and neighbors. Court upholds verdict for invasion of privacy awarding a

\$40,000 award for Husband. *Kramer v. Downey*, 680 S.W.2d 524 (Tex. App.—Dallas 1984)

- f. Peeking over the Fence – Phone company built a cell tower twenty feet from the property line of the plaintiff. During construction, maintenance and work men looked over their 6-foot fence. Court held that evidence didn't justify finding of invasion of privacy. The fact that maintenance workers come to an adjoining property as part of their work and look over into the adjoining yard is legally insufficient evidence of highly offensive conduct. There was no evidence of how often these workers looked, how long, what or who they spied, or even what the plaintiffs were doing when the peering happening. *GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet*, 61 S.W.3d 599 (Tex. App.—Houston [14th Dist.] 2001).
- g. Official Photos – Plaintiff went to police to report an assault. Officers told her that they needed her to undress to photo bruises. Over her objections, they ordered her to do so. After taking photos, two other officers reproduced and disseminated the photos through the department. Court found officers conduct was highly objectionable intrusion. *York v. Story*, 324 F.2d 450 (9th Cir. 1963).
- h. Videotaping Neighbors, Part II – Landowners sue neighbors for invasion of privacy for videotaping into their kitchen windows. The kitchen window faced the backyard, not a public street, and there was a six-foot-tall privacy fence separating the parties' properties. Taping occurred early one Saturday morning for only 10 second intervals while plaintiff was in kitchen eight months pregnant and wearing only her pajamas. Property was only 10-15 feet from each other. Defendant was trying to document out of control dog as instructed by animal control. Court held that videotaping the landowners' house from their property, over the fence, constituted an actionable invasion of privacy. Court held that when the window of a home is not observable by the alleged intruder in the normal course of non-intrusive activities. You cannot say as a matter of law that a plaintiff has no reasonable expectation of privacy merely because her window blinds are open. *Baugh v. Fleming*, No. 03-08-00321-CV, 2009 Tex. App. LEXIS 9847 (Tex. App.—Austin 2009).
- i. AOL Emails OK – Wife hired PI to go through a family computer located in the family sun room. Wife had recently found a written letter in the room to husband's girlfriend. PI copied hard drive and located incriminating emails of affair which were saved on the local machine and were not password protected. Court held that accessing stored email does not constitute a violation of the common law privacy intrusion tort and that email in a home computer that both

spouses had access to had no reasonable expectation of privacy. No different than flipping through a file cabinet. *White v. White*, 344 N.J. Super. 211, 781 A.2d 85 (N.J. Super Ct. App Div. 2001).

- j. Shared File Cabinets – Divorce action in which husband sought to suppress evidence of his extramarital affair that his wife found "in one of the office file cabinets in a room to which plaintiff [wife] had complete access." The papers, consisting of love letters sent to the defendant by his paramour and a jewelry receipt for jewelry not given to his wife, had been left "in files to which she had a full freedom of entry." Court held that no intrusion held. *Del Presto v. Del Presto*, 97 N.J. Super. 446, 235 A.2d 240 (App. Div. 1967).
- k. No Wiretapping – Husband wiretapped telephones of wife's attorney with help of another and then attempted to hide conduct. Court found intrusion and upheld a \$1,000,000 award in punitive damages. *Parker v. Parker*, 897 S.W.2d 918, 930 (Tex. App.- Fort Worth 1995, writ denied).
- l. Discarded Garbage – Citing *California v. Greenwood*, these courts held that the Fourth Amendment right to be free in reasonable searches and seizures does not prohibit the warrantless search and seizure of garbage left for collection outside the curtilage of the home. "Curtilage" is the area to which extends the intimate activity associated with the sanctity of a man's home in the privacies of life. Courts concluded that garbage discarded outside the curtilage of the residence had no reasonable expectation of privacy. Thus there can be intrusion. *California v. Greenwood*, 486 U.S. 35 (1988); *Smith v. Maryland*, 442 U.S. 785 (1979); *United States v. Kramer*, 711 F.2d 789 (7th Cir. 1983); *Nilson v. State of Texas*, 106 S.W.3d 869 (Tex. pp.-Dallas 2003).
- m. Office Trash – Commercial dispute where letter was retrieved after it was thrown away by plaintiff into office waste basket, then collected by the maintenance and stored in a community waste area that was locked. No intrusion in an area (community waste area) where she had no expectation of privacy. Area was not in curtilage of her seclusion of office. Can't expect that giving your documents to third party (maintenance man) will protect your privacy. *Danai v. Canal Square Associates*, 862 A.2d 395 (D.C. 2004).
- n. Reporter's Recording – Reporter records political meeting in hotel courtyard and records some voices with a hidden unenhanced audio hearing. Allows evidence to be heard that recording a private conversation in public could be an intrusion. Not a finding, just a

reversal of summary judgment. *Stephens v. Dolcefino*, 126 S.W.3d 120 (Tex. App.—Houston [1st Dist.] 2003).

5. Public Disclosure of Private Facts – The elements for this private cause of action includes;
 - a. the defendant publicized information about the plaintiff's private life;
 - b. the publicity would be offensive to a reasonable person;
 - c. the matter publicized is not of legitimate public concern; and,
 - d. the plaintiff suffered an injury as a result of the defendant's disclosure.
6. Cases - The following cases give you an idea of how this action works. It does require a publication of the information. Meaning the communication must be one that is made to the public at large, or disseminated to so many persons that the matter becomes public knowledge. *Industrial Foundation of the South v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668, 683, 684 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Most of the cases protect you as an investigator.
 - a. Bad Press – Decedent killed himself shortly after an article was run by newspaper owner and column author, which indicated that decedent was arrested for indecent exposure in a public park during a police crackdown on homosexual activities in public places. Court held that there was no liability for disclosing fact that are a matter of public record. *Hogan v. Hearst Corp.*, 945 S.W.2d 246, 250–251 (Tex. App.—San Antonio 1997, no writ).
 - b. Court Information – Sexual orientation and HIV-positive status of a police officer that was disclosed in a court hearing in which the officer's ex-wife claimed that their child would not be safe in the officer's custody was held to be of legitimate public concern. *Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.—San Antonio 2001, pet. denied).
 - c. Sex Assault Victim – Newspaper disclosed facts about a sexual assault victim that allowed her acquaintances to identify her. Court held indirect identification of a person whose identity is not of legitimate public concern through disclosure of information that may be of legitimate public concern presents particular problems. To require the media to sort through such facts and catalogue them according to their individual and cumulative impact under all circumstances would impose an impossible task, which could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public. Therefore,

disclosure of such information may be allowed. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474–475 (Tex. 1995).

So if you have to disclose to anyone outside of your client and publish to a number of individuals, then do so by disclosure in court first. Think press test on this also. Always think about your disclosure of findings. Only to your client and more importantly to your client's legal representative. Any time you release a report or information it has repercussions. Control the disclosure.

7. Defamation – A common law tort which has a number of procedural and substantive limitations which are not really discussed here. However, it is worthwhile to know the very, very basic elements. A person has a valid cause of action for defamation when; (1) the defendant makes a false and “defamatory” statement concerning the person; (2) the defendant “publishes” or permits the “publication” of the defamatory statement to a third party without a legally-recognized privilege to do so; (3) the publication results from intentional or negligent conduct by the defendant, and; (4) special harm results from the publication of the defamatory statement or the statement constitutes defamation “per se.”

Defamation is a long and storied cause of action that is never as simple as one thinks when you file it. For investigators, the best defense is that defamatory statement is true. Truth is the best defense to defamation. So, think about that in your interview, reports, letters and other interactions.

8. Texas Civil Wiretap Act – Under Texas statutory law, Chapter 123 of Civil Practices & Remedies Code, a party to a communication has a civil cause of action against a person who intercepts, attempts to intercept, or employs or obtains another to intercept a communication, or against a person who uses or divulges information that he or she knows, or reasonably should know, was obtained by interception of a communication. Tex. Civ. Prac. & Rem. Code Ann. 123.002(a).
 - a. Civil Statutes with Invasion of Privacy – Many spy torts are in fact based on a violation of criminal law. However, that is not necessarily a needed statute. Invasion of privacy is going to always be plead. The civil corresponding acts are for purely damages.
9. Inter-spousal Torts Liability – All liability that may be had above, likely involved the coordination or at least notice by your client and the client's legal representative. These cases can be filed by one spouse against another and then joined to the divorce. They can help offset bad behavior one way or another. Such is the case in these cases;

- a. *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App.—Houston [1st Dist.] 1995) (holding that the wife was entitled to statutory damages for the husband’s covert taping of telephone conversations between the wife and her paramour, their child, and possibly the wife’s lawyer).
 - b. *Meany v. Meany*, 639 So. 2d 229 (La. 1994) (holding judgment for negligent infliction of sexually transmitted disease);
 - c. *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (holding that in a divorce proceeding a spouse may recover for intentional (but not negligent) infliction of emotional distress).
 - d. *Cater v. Cater*, 311 Ark. 627, 846 S.W.2d 173 (1993) (holding claim of assault and battery maintained divorce).
- 10. Unlawful Disclosure or Promotion of Intimate Visual Material – Texas SB 1135 now makes it a crime to disclose or promote “revenge porn.” Over objections, including TALI, it makes publishing “intimate visual material” a crime when the subject of the recording had a general expectation of privacy. Broad definition of intimate visual material (could include kissing and necking) and publishing (could potentially include turning your DVD over). Test is still the reasonable expectation of privacy test. Take time to think about potential in public reasonable expectation private areas. For instance, a car, under a blanket, in a park, etc.
 - 11. Voyeurism – Texas HB 207 makes it a crime to commit voyeurism. Voyeurism is observing another individual *with the intent to arouse and gratify sexual desire*, another person with a reasonable expectation of privacy in a building, structure or conveyance. Conveyance is a car, train, trailer, aircraft or sleeping car.

X. PROTECTIVE AND TEMPORARY RESTRAINING ORDERS.

A. PROTECTIVE ORDER PURPOSE.

The purpose of a protective order is to protect the life and emotional well-being of persons who have been the victims of Domestic Violence. Protective orders usually prohibit one family member (or romantically involved) from contacting, getting near one or more other family members. To issue a protective order, the Court must find from the application and affidavit filed, that family violence has occurred and it is likely to occur in the future.

- i. Domestic Violence – In Texas, we have two definitions under Domestic Violence they include Dating Violence, and Family Violence but, they are in essence the same thing:

- a. Dating and Family Violence: An act, other than a defensive measure to protect oneself, by an actor that is committed against a victim: with whom the actor has or has had a dating relationship or is in a family relationship...which is intended to result in physical harm, body injury, assault or sexual assault; OR that is a *threat* that reasonably places the victim in fear of imminent physical harm, bodily injury, assault or sexual assault.

Dating Relationship: Relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. To determine whether or not there is or has been a dating relationship, the court may look at length of relationship; nature of relationship; and the frequency and type of interaction between the persons involved.

- ii. Procedure – After notice and hearing, if the petitioner makes a showing that;
 - a. family violence has occurred, AND;
 - b. it is likely to occur again.

That doesn't necessarily mean physical violence. In some circumstances, imminent threatened harm may be enough. *Boyd v. Palmore*, 2011 WL4500825 (Tex. App.—Houston [1st Dist.] 2011) (respondent blocking applicant's car with his body and jumping on hood constitutes family violence); *Wilkerson v. Wilkerson*, 321 S.W.3d 110 (Tex. App.—Houston 2010) (holding that actual physical harm is not necessary for a finding of family violence, threats that included discharging a gun was plenty to prove family violence occurred); *See* TFC § 71.004. If shown the court can prohibit the respondent from:

- a. Committing family violence;
- b. Directly or indirectly communicating with a member of the family;
- c. Going near the residence or place of employment of the party seeking the order;
- d. Removing a child from the possession of the party;
- e. Stalking the party;
- f. Engaging in conduct intended that is likely to harass, annoy, alarm, abuse, torment, or embarrass the party;
- g. Possessing a firearm (unless you are a peace officer).

Protective orders are criminally enforced. By themselves, they are an if/then statement. If x is near y, you have probable cause to arrest him. It is wise to think of a protective order as a delayed arrest warrant. A temporary order, TRO or other court order is traditionally enforced by contempt. Orders are

good for 2 years, unless specified otherwise. Definition of Family is broadly defined. TFC § 71.004

- iii. Protection Provisions – There are several terms and conditions in a protective order that prevent the defendant from committing domestic violence. For instance, a protective order may prevent one spouse from coming within 500 feet of the abused spouse or the children. The circle of prohibited space moves with the person (or people protected). The Court may also prohibit the defendant from committing acts of family violence, communicating with the victim, threatening anyone in the victim's household, harming or threatening the household animals, and from possessing a firearm. A final protective order can remain in effect for up to 2 years.
- iv. Ex Parte Protective Order – Ex Parte protective orders are an even more extreme ruling of the Court. An Ex Parte protective order is applied for and granted without any notice to the defendant until he/ she is served with the order. These are almost always the preferred procedure. The Court must find there is clear and present danger to the victim to enter such an order without a hearing. This type of protective order is only good for 20 days but may be extended by the Court for additional 20 day periods. If an affidavit accompanies the application outlining all the facts and circumstances and the victim appears to testify at the Ex Parte hearing, the court may exclude the defendant from the family residence. Protective orders are big deals and basically create a new criminal law that applies to only one person, the defendant. Violations are subject to contempt of Court and, more importantly, violations are criminal offenses. The order will contain language advising law enforcement officials to arrest defendant's in violation of the order.
- v. Confidentiality - Certain information may be kept confidential from public disclosure. Not all. *See Texas Family Code § 85.007.*
- vi. Service – Anyone under TRCP 21a, the court and the clerk. If a separate suit almost always personal service. Notice is almost never allowed substitute or publication in these proceedings. *See Tex. Penal Code § 82.043 (Notice only); 85.041; 85.042 (but, practically, law enforcement, the court or the clerk).* Additionally, the service fees are waived which drives these to constables or other law enforcement officials.

INVESTIGATIVE TIP:

If you are on surveillance and become aware of the fact that your subject is in violation of a protective order, then call the police. They really have little option but to arrest them. It is an open and shut case.

If your client has been noticed on a protective order and they intend to challenge it, think of the affidavit or testimony and investigate the case similar to a criminal defense case. Credibility is key. Look at challenging, even if mundane, all the facts in the affidavit or other notice received.

If a protective order is issued and you intend to do an investigation, whether surveillance, interviews, background or any research, do the following:

- 1. Read every word of the protective order;*
- 2. Re-read every word of the protective order;*
- 3. Take a 10 minute break, come back and re-read every word of the protective order;*
- 4. Develop an investigative plan that doesn't violate the protective order;*
- 5. Call the CLR, first, and make sure that they are on board with what you are doing;*
- 6. Liberally repeat 1-3.*

Realize that you are an agent of your client and the client's legal representative. It does not matter who pays you. As an agent and representative and subordinate, you may be bound by the order. Document your efforts. Use the press test. Realize that your client's burden is going to now be higher. One night of adultery or small dinky argument aren't going to work. Think about explaining to the Judge.

B. TEMPORARY RESTRAINING ORDER.

A restraining order is a set of orders the Court imposes on one or both of the parties in a divorce, which regulates their conduct while the divorce is pending. Most of the time, a restraining order prevents a divorce litigant from such things as emptying the joint bank account, from incurring new debt, from opening and confiscating the other parties mail, using obscene language when speaking with the other party, talking badly in front of the children and/or removing a child from any daycare or school where they are currently enrolled. Restraining orders may include many items, sometimes, dozens of separate prohibitions. Unlike protective orders, restraining orders are routine in Texas divorces.

A Temporary Restraining Order (TRO) is usually served with the initial divorce papers. It puts temporary restrictions on the party served that last for 14 days – usually a hearing is set within that time. At the hearing, the Court will then generally place mutual injunctions based on the temporary restraining order that are enforceable on both parties. Basically, if the orders requested are reasonable, there is a very good chance the Court will agree and sign them into effect. Restraining orders are not criminally enforceable by the Sheriff's Department or Police, rather, violations are reported to the Court, which has the power to find the offender in contempt of Court, and apply sanctions such as fines, or even jail time. Since TRO are generally served with the initial divorce pleadings, anyone who is certified to serve process in Texas may serve the orders. Tex. Family Code § 6.501.

XI. JUVENILE JUSTICE CODE.

A. WHERE???– The Juvenile Justice Code is found in Title 3 of the Texas Family Code, beginning in Chapter 51. That is unique in itself. Although quasi criminal, it is based on rules of civil proceedings.

1. Rehabilitative – Where as the adult system in Texas has become nothing but punitive, the children’s system is almost completely rehabilitative.
2. Who does it apply – A “child” means a person who is:
 - a. ten years of age or older and under 17 years of age, or;
 - b. seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. Tex. Fam. Code § 51.01.
3. Delinquent Conduct – Mostly, anything in the penal code. In fact, if you ever defend these cases, use the penal code first. In the family code it is defined as:
 - a. conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail;
 - b. conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in justice or municipal court or a county court.
 - c. conduct that violates Section 49.04, 49.05, 49.06, 49.07, or 49.08 of the Penal Code (Intoxication and Alcoholic Beverage Offenses); and,
 - d. conduct that violates Section 106.041, Alcoholic Beverage Code relating to driving under the influence of alcohol by a minor (third or subsequent offense). Tex. Fam. Code. § 51.03.

Proof beyond a reasonable doubt is still required. Tex. Family Code §

4. Certification – A child can be certified as an adult and their case transferred to Criminal District Court.
 - a. the child must have been 14 years of age or older when the offense was committed and it was a capital felony, aggravated controlled substance felony or 1st degree felony; or
 - b. 15 years of age or older if the offense was a 2nd degree, 3rd degree or state jail felony; and
 - c. the court, after a full investigation and hearing must determine there is probably cause that the child committed the offense and because

- of the seriousness of the offense and background of the child, the community requires criminal proceedings.
- d. The juvenile court shall conduct a hearing without a jury to consider transfer for criminal proceedings
 - e. a full diagnostic study, social evaluation and full investigation of the child, his circumstances and the circumstances of the alleged offense must be completed.
 - f. all reports from probation, court employees, and professional consultants (counselors etc...) may be considered.
 - g. the court can also consider whether the offense was against property or persons, the sophistication and maturity of the child, record and previous history of the child, prospects of adequate protection of the public and likelihood of rehabilitation. Tex. Family Code § 54.02.
5. Confidentiality of Juvenile Records – has changed over a period of time. However, as a rule, these records can only be released to a set list of individuals (court, attorney, law enforcement, counselors). If you are working for the attorney of the child or get approval by court, you may get them. Child has a procedure, similar to expunction, to seal juvenile records. Texas Fam. Code. § 58.005; 58.201
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INVESTIGATIVE TIP.

You are very unlikely, because of the rehabilitative nature of case, to be hired to defend a child. If you do, you really should focus on mitigation. These matters are routinely tried to a Judge who almost always has CPS cases. That being said, many juvenile delinquents are in fact children of CPS cases. Many cases are tried informally and allow for other measures than detention. Much more creative than adult court.

Confidentiality, Juveniles have a privilege in admitting to “adjudications” (convictions) under juvenile system. Hard to impeach them off of a juvenile problem.

6. Interviewing and Investigating Juveniles – Generally, if you stand in loco parentis then you are held to the standard of not violating the juveniles constitutional rights just like normal criminal defendants. However, additional burdens have been put in place. They include;
- a. The police and any agent of the state may not interview a child and have that statement be admissible in court unless the child has been mirandized by the officer and the court, it is written and signed in the presence of the judge. Tex. Family Code 51.095.

- b. Custody is more loosely defined than other Miranda cases. More protection is afforded to ensure voluntary protection. Tex. Family Code 51.095.
 - c. Right of parent to be present during processing and in detention facilities Texas Family Code § 61.103.
 - d. Six Hour Rule - A child may not be detained in a juvenile processing office for longer than six hours. Texas Family Code §52.025(d).
 - e. Breath Specimen - Under the Family Code, a child may submit to or refuse the taking of a breath specimen without the concurrence of an attorney (despite TFC 51.09), but only if the request and response are videotaped; and the video is maintained and made available to the child's attorney. Failure to comply with this provision would make the breath test inadmissible. TFC § 51.09
7. Child Witnesses - Children are presumed competent to testify unless, after examination by the court, they appear "not to possess sufficient intellect to relate transactions with respect to which they are interrogated." Tex. R. Evid. 601(a)(2). As an investigator, as long as you were not hired by the Court, professional staff, prosecuting attorney, school, counselor or any other quasi State agency and are not working as an agent of the state in loco parentis lodging allegations or charges, you may interview the child. However, for policy reasons, it is probably smart to have the parent's noticed and/or permission when reasonably able.
- a. Qualifications for Child Witness – The court must be satisfied that the child has sufficient intelligence and understands the difference between truth and falsehood, appreciated the consequence of telling a lie and know what was required by the oath of court.
 - i. Test - When determining competency, the court looks to the following factors; (1) competence of the child to observe intelligently the events in question at the time of occurrence, (2) the child's capacity to remember events, and (3) the child's capacity to narrate facts. *Escamilla v. State*, 334 S.W.3d 263, 265 (Tex. App.—San Antonio 2010, pet ref'd).

Because a child is unable to comprehend information on the same level as an adult, competence can be proved by demonstrating that the child knows the difference between a truth and a lie, and that they "understand the moral responsibility to tell the truth." *Id.*
 - b. No Age Requirement - There is no age below which a child is automatically deemed incompetent to testify." *Escamilla v. State*, 334 S.W.3d 263, 265 (Tex. App.—San Antonio 2010, pet ref'd).

- c. Comfort Issues and Accommodations – Testimony can be limited by court and can include comfort items (dogs and dolls) prior third party interviews and testimony by closed circuit television. Tex. Code Crim. Proc. Ann. Article 38.074 (2011).
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INVESTIGATIVE TIP.

The only real rule for child witnesses is competency. Meaning you can interview and treat a witness like any other adult witness. Make sure they are not represented as you may, as your lawyer's subordinate, create an ethical violation for that attorney. You are not even required to talk to or obtain permission from the child's parent. No law for private parties have ever existed. Even if not represented, you need to employ the press test. Keep in mind the idea that talking to a minor child may be beneficial and critical in some cases. However, the fact of not getting parental permission first may be difficult to explain.

XII. FEDERAL AND INTERNATIONAL ISSUES.

A. INDIAN CHILD WELFARE ACT.

1. Best Interest of Tribe ("BIT") – Federal Law that codifies the dealing with Native American children under U.S.C.A Title 25. Purpose is to keep Native American children with the tribe. The intent of Congress under ICWA was to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" (25 U.S.C. § 1902).
 2. Eligibility - An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."
 3. No Divorce – Only meant for pre-adoptive placements, foster placements, adoptions, child welfare proceedings, and terminations (think CPS). Not for Divorce.
 4. Tribal Court – If qualified, you can move for acceptance by the Tribal Court. However, if the Tribe declines, then no luck. Detailed procedure here which is mostly on the back of Department of Family and Protective Services.
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INVESTIGATIVE TIP

Look for the Indian Child. There is a lot of misinformation on the ICWA. Such as that it applies in divorces. It doesn't. Only in child welfare cases. But, look for an Indian relationship regardless.

If so, get it to the lawyer. You probably have a duty as the lawyer's representative to notify the lawyer, who in turn will notify the court, if a possible ICWA issue exists.

B. HAUGE CONVENTION.

Broad term used for a number of international treaties which cover different areas of the law. Three options, obtaining a voluntary return through the Central Authority or representative; settling out of court or filing a Notice of Petition and Petition for Return of Child

1. Convention on the Civil Aspects of International Child Abduction – The international treaty that provides a civil method to seek the return of a child who has been wrongfully removed or retained outside of the country of the child's *habitual residence*.
 - a. Parents file a petition under the International Child Abduction Remedies Act ("ICARA") which gives both United States federal and state courts jurisdiction over these cases. ICARA, 42 U.S.C.11603(a) & (b). Now transferred to 22 U.S.C. 9003(a) and (b).
 - b. Habitual Residence – Probably domicile, not defined in convention. Refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered. *See In re Bates (a minor)*, CA 122/89 (UK High Ct. of Justice, Family Div. 1989).
 - c. Fleeing Again? – If worried about fleeing again can get an Order for Issuance of Warrant in Lieu of Writ of Habeas Corpus.
 - d. Grave Risk – One defense to this and that is that no return of the child if there is a grave risk that the child would be placed in an intolerable situation or exposed to physical or psychological harm. Grave risk can be country or parent, but not a re-litigation of custody.
2. Department of State's Bureau of Consular Affairs is the agency that will assist a party in returning an abducted child to the United States. Some of the preventive measures that you take to prevent a child from being wrongfully taken to or wrongfully kept in another country, include the following:
 - a. Children's Passport Issuance Alert Program (CPIAP);
 - b. Passport Requirements for minors and detailed Orders when dealing with international issues;
 - c. Contacting the National Center for Missing and Exploited Children (the old Child ID kit); and

- d. In high conflict cases, the issuance of an order with injunction language is critical.
 3. Be Proactive in Your Investigation.
 - a. File a local law enforcement missing person report.
 - b. Contact Office of Children's Issues with the United States State Department.
 - c. Have local law enforcement contact the International Police Organization (INTERPOL) which can assist in the location of a child by producing a Yellow Notice that will notify INTERPOL when a specific child passes through an international border that is connected to the INTERPOL system. Additionally, INTERPOL Red Notices can be issued on the taking parent based on state or federal warrants. Ask local police to contact INTERPOL.
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INVESTIGATIVE TIP

Do not engage in kidnapping in some other jurisdiction. If your client has had their child missing get the report issued, get a child custody warrant or writ of habeas corpus, find the child, keep tabs on them discreetly and then find a way to execute the order. You are going to likely have to use contacts with law enforcement in the jurisdiction they are at. Also, refer your client to a lawyer who knows about this stuff. Few lawyers know how to move on this so, get the right one.

C. SERVICE OF PROCESS INTERNATIONALLY.

1. The Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”) – Details service of Hague Convention countries.
2. Inter-American Convention on Letters Rogatory - Letters rogatory are the customary method of obtaining judicial assistance from abroad in the absence of a treaty or executive agreement. Letters rogatory are requests from courts in one country to the judiciary of a foreign country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty. Letters rogatory may be used in countries where multi-lateral or bilateral treaties on judicial assistance are not in force to effect service of process or to obtain evidence if permitted by the laws of the foreign country. 22 CFR 92.54 provides a definition of letters rogatory.
3. DOJ’s way? – As of 2009 the DOJ outsourced the service of process function to the process service company Process Forwarding International in Seattle, Washington. It was a sole source contract and the exclusive way the government did this.

INVESTIGATIVE TIP

If the DOJ is outsourcing it that may be the answer. Also, remember what letters rogatory are – letter of request. That is all it is it is permissive in the jurisdiction that receives it. So, don't get too high and mighty on this court order. Read the order and ask the lawyer about enforcement.

THE END!!!