

Poverty Law Section Reporter

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Message from the Chair

Welcome to the inaugural issue of the Poverty Law Section Reporter. Our goal is to provide you information about what's happening in poverty law across the state. We hope to do this by informing you about what other poverty lawyers are doing in their cases, as well as current issues, cases, and developments related to poverty law issues.

We plan to publish this reporter quarterly with case digests, verdicts and settlements, legislative updates, and other news that will help you in your practice. We are open to your suggestions about how to make this more useful to you. We will learn as we go and hope to grow and change with your input. But our success is dependent on you – we need you to share your experiences (cases, developing issues, developing case law) with your poverty law colleagues. Poverty law is a distinct area of law, and there are so many highly qualified, experienced poverty lawyers in Texas. Poverty law is also a noble calling that supports our judicial system and democracy by keeping the courts open to everyone. Please be proud of your work and help your colleagues by sending your own trials, tribulations and success stories, whether in court or out of court, to jbalovich@trla.org.

Brenda Willett
Chair, 2007-2008

CASE DIGESTS

Consumer Law

Deemed Admissions May Prove Up Third-Party Debt Collector Claims. (Lesson: Be Sure to Move to Undeem Admissions!)

Rowlands v. Unifund, 2007 Tex. App. LEXIS 2332 (Houston, 14th Dist., March 27, 2007). In this suit for sworn account filed by a third-party debt collector, Defendant failed to timely respond to requests for admissions. The trial court granted summary judgment for the plaintiff. Court of appeals affirmed, holding that the deemed admissions were competent summary judgment evidence that established all elements of Plaintiff's breach of contract action. The defendant debtor moved to undeem the admissions *after* summary judgment was granted, and never obtained a ruling on his motion to undeem, and did not contest the deemed admissions on appeal.

Family Law

Visitation at the Discretion of Managing Conservator = Improper Denial of Access.

In re M.A.H., 2007 Tex. App. LEXIS 4558 (Texarkana, May 16, 2007). Grandmother sued to modify a custody order to obtain managing conservatorship of the children. The visitation order read that "visitation shall be under the supervision of GRANDMOTHER on the days and times prescribed by GRANDMOTHER." The court held that this order could effectively deny access to the children. Absent evidence supporting a finding that evidence should be denied or that specific orders were not appropriate, case must be reversed to specifically articulate time and conditions of access or provide justification for complete bar to access and visitation.

Refusing to Allow a Pro Se Litigant to Present Her Case and Requiring Her to Get a Lawyer in Order to Fight for Custody Violates Due Process.

In re SC, HAC, and CC, 220 S.W.3d 19 (San Antonio, Dec. 19, 2006). In this suit affecting parent-child relationship, the mother was served with citation and an order to appear on a date and time that was within her answer date. The mother showed up in court on the appearance date. The court held a brief recorded proceeding in chambers in which he told the mother that if she wanted custody, she would have to hire an attorney. The court then issued an order granting sole managing conservatorship to the father and giving the mother supervised visitation at times agreed upon by the parties. The court of appeals reversed and remanded holding that the trial court violated due process, and abused its discretion by deviating from the standard possession without any evidence to rebut the statutory presumptions in favor of joint managing conservatorship and standard possession. (Note: Appellant represented by Erica Schommer, TRLA, Weslaco.)

Court Can Modify Protective Order as Long as it is in Effect.

In re S.S., 217 S.W.3d 685 (Eastland, June 11, 2007). After their divorce, the wife obtained a protective order against the husband. The husband appealed, and the appellate court affirmed the protective order. The wife then filed a motion to modify the protective order to require the husband to pay for attorney's fees resulting from the unsuccessful appeal. The court upheld the modification under 87.001, which provides that the court may modify an existing order to exclude any item or include any item that could have been included in the order. As section 81.005(a) specifically provides that the court may assess attorney's fees, the attorney's fees award could have been included in the original order. The court rejected the husband's argument that changed circumstances were required, or that res judicata barred modifying the order. "Title IV of the Family Code governing family violence protective orders is a unique statutory scheme that provides specific statutory procedures."

Prove Up Must Contain Specific Evidence to Support Which Parent Gets Custody.

Vazquez v. Vazquez, 2007 Tex. App. LEXIS 4713 (Houston, 14th Dist., June 19, 2007). Husband filed a restricted appeal of a default divorce decree, disputing that there was evidence to support a finding of cruelty, the grant of conservatorship to the wife, child support, health insurance, and property division. The court held that the finding of a cruelty could not be based on an affidavit attached to an application for a protective order. The court also held there was no evidence regarding the *Holley v. Adams* factors, or any other evidence, from which the trial court could determine whether it was in the best interest of the children to live with their mother or their father. The mother's testimony that her being appointed managing conservator was in the best interest of the children was insufficient. [Lesson: Make sure that your prove ups are supported by some factual evidence.]

Leaving the Child with Grandparents is not Grounds to Modify Primary Custody in Temporary Orders.

In re Sanchez, 228 S.W.3d 214, (San Antonio, April 4, 2007). Father filed suit to modify primary custody of the children within one year of original order. Court denied temporary orders removing the mother as person who has right to determine residency. However, finding that she was leaving the children with her parents during the week while she attended school in another city, the court restricted her possession of the children to weekends and gave the father possession during the week as well as the sole discretion to decide whether the children are in day care. The court of appeals granted mandamus, and vacated the temporary orders. Section 156.006(b) limits a trial court's authority to render temporary orders that have the effect of changing the person with the exclusive right to determine primary residency under a final order absent a finding that the present environment of the children places them in danger. When temporary orders deprive a custodial parent of any discretion inherent in the right to determine residency, they effectively make this change. The

fact that the children were staying with their grandparents when a parent was available does not prove “necessity” to change the orders.

Trial Before the Answer Date Violates Due Process; also, Affidavit for Substitute Service Must Be Specific to Support Service on Nonparty.

In re J.M.I., 223 S.W.3d 742 (Amarillo, May 3, 2007). In this nonparent SACPR, substitute service on parents who were allegedly evading service was overturned because the affidavit in support of the motion for substitute service failed to disclose the number of attempts at personal service made or the calendar dates on which service was attempted. The parents did get served, but the trial court went to trial within twenty days of the date of service. The court held this violated due process.

Parental Presumption is Lost Once Parent Agrees to be JMC with Nonparent.

Gardner v. Gardner, 2007 Tex. App. LEXIS 5237 (San Antonio, May 9, 2007.) In this divorce case, the husband and wife agreed to be appointed joint managing conservators in mediation, and asked the court to determine who would be the parent to determine residency of two of the children. Following a trial, the trial court appointed the husband the parent with right to determine residency over the two children, including his stepson. The wife appealed, arguing that the evidence was not sufficient to overcome the parental presumption. The court of appeals held that the parental presumption in section 153.131 did not control because the parties had already agreed to joint managing conservatorship. “The only ‘custody’ issue before the court was which joint managing conservator was going to be awarded the right to determine the primary residency of [the children]. Thus, the presumption in section 153.131 does not apply.” The court rejects the El Paso court of appeals’ reasoning in *In re De La Pena*, 999 S.W.2d 521 (Tex. App.—El Paso 1999, no pet.).

Employment

Failing to Disclose a Deferred Adjudication is not Misconduct.

Kellum v. Texas Workforce Commission, 188 SW 3d 411 (Tex. App.—Dallas 2006). Employee failed to disclose his deferred adjudication on an employment application that asked if he had ever been convicted of any felonies. The employer subsequently fired him after doing a criminal background check; employee applied for unemployment benefits. TWC concluded that employee misrepresented that he had not been convicted of a felony, because he had to have been convicted to receive a deferred adjudication. The TWC denied benefits on the ground that this misrepresentation amounted to misconduct connected with work. Court of appeals reversed and rendered judgment in favor of employee. The alleged misrepresentation did not amount to misconduct because there was no evidence that it detrimentally affected orderly work and safety at the company. Nor was there any evidence of actual dishonesty, because the term conviction does not encompass deferred adjudications. Court refused to uphold denial on grounds raised by the employer that were not raised before the TWC. (Note: Appellant represented by Roger Gette, LANWT, Dallas).

Housing Law

To Prove a Title Dispute (to Deprive JP of Jurisdiction over an Eviction), Defendant Must Satisfy Statute of Frauds.

Padilla v. NCJ Development, Inc., 218 S.W.3d 811 (El Paso, March 1, 2007). Padilla’s home was foreclosed upon; the new owner filed suit for forcible detainer. At trial, Padilla offered a bill of exceptions with proof, including a partial writing and his oral testimony, that he had entered into a contract to buy back the property from the new owner. Padilla claimed that the court had no jurisdiction because title was at issue. The county court granted judgment to the new owner. Court affirmed, holding that the evidence of a new contract to buy back the property did not comply

with the statute of frauds; accordingly there was not sufficient evidence presented of a genuine title dispute to deprive the justice court of jurisdiction.

No Counterclaims in Eviction cases, but Tenant May File a New Suit in County Court, and then Move to Consolidate if the Eviction is Appealed.

H.K. Dev, Haid Du Duong, and Phuong Truong Tu, 2007 Tex. App. LEXIS 4494 (Houston, 1st Dist., June 7, 2007). The facts are too complicated. See heading.

Landlords and Property Owners must Prove they Served a 3-day Written Notice to Vacate to Survive Directed Verdict.

AMC Mortg. Servs. v. Shields, 2007 Tex. App. LEXIS 3574 (Dallas, May 9, 2007). AMC bought a property at a foreclosure sale and sought to evict the defendant. At trial, the attorney produced a 3-day written notice, but the attorney was the only witness and did not have personal knowledge of the letter. The county court granted a directed verdict, and the court of appeals affirmed. This case demonstrates the necessity of holding landlords to the burden of proving that a 3-day notice to vacate was served under Prop. Code § 24.005, a condition precedent to the filing of an eviction.

Subsidized Landlord Cannot Unilaterally Terminate a Subsidy Without Having Legal Grounds Under the Lease and Federal Regulations.

Jessie v. Jerusalem Apts., 2006 Tex. App. LEXIS 9142 (Tyler, Oct. 25, 2006). Subsidized landlord claimed tenant violated terms of her lease, and demanded she vacate. When she refused, the landlord increased the rent to fair market, and sought to evict for nonpayment. Court of appeals held that the landlord could only end the subsidy and tenancy on grounds stated in lease, which did not include nonpayment of the subsidized portion of the rent.

Eviction Order Obtained after a Bankruptcy Filing is Void.

Aremaco, Inc. v. Hardaway (In re Hardaway), 2007 Bankr. LEXIS 750 (Bankr. S.D. Tex., Corpus Christi Div., March 1, 2007). A purchaser defaulted on a contract for deed, and the seller foreclosed. The seller then filed an eviction lawsuit and obtained a judgment for eviction, but not before the purchaser filed for bankruptcy. Bankruptcy court held that the eviction order was in violation of the automatic stay and was therefore void.

Indigence issues

Appellate Court May Not Dismiss an Action Due to Failure to Timely File Affidavit of Indigence Without Allowing Reasonable Time to Cure.

Hood v. Wal-Mart Stores, Inc., 216 S.W.3d 829 (Tex. 2007) (per curiam). After losing on summary judgment, pro se plaintiff filed a notice of appeal to the court of appeals but did not pay a filing fee or affidavit of indigence. Upon receiving his appellate brief, the court of appeals notified him that the fee was past due and gave him 10 days to pay. Appellant did not pay, but filed an affidavit of indigence within the 10-day window. The court of appeals dismissed the case for want of prosecution. The Texas Supreme Court reversed and remanded, holding that a court of appeals may not dismiss an action due to a formal defect or irregularity in an affidavit of indigence without first allowing the petitioner a reasonable time to cure. An appellant's affidavit discharges the filing fee requirement unless a contest to it is sustained.

Verdicts and Settlements

Consumer law

No. C-1-CV-05-002681; *MRC Receivables Corp. v. Theresa Winebrenner*, County Court at Law No. 2, Travis County, Texas. Defendant's attorneys: Tracey Whitley and Mandi Matlock, TRLA, Austin.

Third-party debt collector filed suit claiming an \$11,000 debt and attorney's fees. Plaintiff failed to produce documents in discovery proving the debt. Defendant filed motion to compel and request for sanctions, and original counterclaim for violations of the Texas Debt Collection Act, Texas Deceptive Trade Practices Act, Fair Debt Collection Practices Act, common law unreasonable debt collection practices, and filing a frivolous pleading. Case settled for \$1,000 in damages paid to the debtor, and mutual dismissal with prejudice.

No. 107816; *Herring v. Cross*, County Court at Law 1, Jefferson County (Beaumont). Plaintiff's counsel: Robert Wharton, LSLA, Nacogdoches. Post-Rita hurricane home repair fraud cases. Plaintiff paid \$6,400 to contractor for poor quality work. No-answer default judgment awarded homeowner \$99,999.00 for fraud and breach of contract.

No. 1416; *Stewart v. O. Guerrero Construction, LLC* (JP Court, Precinct 8, Jefferson County (Port Arthur). Plaintiff's counsel: Robert Wharton. Post-Rita hurricane home repair fraud cases. Plaintiff paid \$3,000.00 to contractor. Post-answer default judgment awarded homeowner \$5,000.00.

Family Law

Basquez v. Basquez, Case No. (357th District Court, Cameron County, Texas. Respondent's attorney: Julia Raney, TRLA, Edinburg. A jury

appointed a battered immigrant wife sole managing conservatorship over her children with no geographic restriction after a 4-day trial in which the husband tried to introduce evidence that his wife was here illegally and could be deported.

Legislative Update

General

\$65.00 legal services fees approved. Continued funding for civil and criminal legal aid. HB 1265 amends Tex. Gov't Code § 81.054(j) (Eff. 9/1/07).

Family Law

DV victims can keep their addresses out of public record. SB 74, HB 597 amends CCP Ch. 56, Subch. C and Ch. 57B, Election Code

DV victims entitled to better unemployment compensation. HB 550, SB 142 amends Labor Code § 204.022 (Eff. Immediately).

Bail may be denied for batterers who violate protective orders. Penal Code § 25.07, CCP ch. 17 (Eff. 1/1/08, contingent on passage of constitutional amendment).

DV victims get free police reports. Adds CCP, art. 2.30, amends CCP art. 5.05 (Eff. 9/1/07)

MEPOs available for victims of sexual assault. SB 584, HB 1907 amends CCP art. 17.292(a), and Penal Code § 25.07.

Schools must train about dating violence. HB 121, SB 86 adds Educ.Code § 37.0831.

Large counties must have minimum standards for social study investigators. HB 772 amends Fam. Code ch. 107, subch. D (Eff. 9/1/07).

No contempt for delinquent child support of respondent shows up with proof that he or she is current. HB 779 amends Fam. Code § 157.162

(Eff. Immediately)

Housing Law

PHA may be liable under Texas Fair Housing Act. HB 2353 amends Local Gov't Code § 392.006 (eff 9/1/07).

Tax credit leases must state “good cause” for eviction. SB 1733 adds Gov't Code § 2306.6735.

Eviction citations must contain notice in Spanish with state bar number. SB 1483 amends Prop. Code § 24.0051 (eff 9/1/07).

Mobile home tenants get 180 days' notice of nonrenewal based on change in land use. HB 1460 amends §§ 94.051, 94.052, 94.053, and 94.204) (eff 1/1/08).

No lockouts unless it is in the lease and tenant gets key even if rent is still unpaid. HB 3101 amends Prop. Code § 92.0081 (eff 1/1/08).

Late fees must be stated in the lease and must be reasonable. HB 3101 amends Prop. Code § 92.019 (eff 1/1/08).

Landlords must provide 24-hour number for reporting health and safety emergencies. HB 3101 amends Prop. Code § 92.020 (eff 1/1/08).

Tenants get application fee back if they didn't receive tenant selection criteria. HB 3101 adds Prop. Code § 92.3515 (eff 1/1/08).

Colonias residents can sue for injunctive relief to get water and sewer service. HB 781 amends Gov't Code § 232.038.

Public Benefits

Medicaid extended for foster children who age out of system through age 23. HB 2404, SB 10 adds Human Resources Code § 32.02741 (eff 9/1/07).

Judicial review of administrative decisions

regarding Medicaid or food stamps. HB 75 amends Gov't Code § 2001.223(1) (eff 9/1/07).

Medicaid benefits must continue pending fair hearing decision. HB 2256 amends Gov't Code § 531.024 (eff 9/1/07).

Labor

Minimum wage increases to \$5.85 on 7/24/07; \$6.55 on 7/24/08; \$7.25 on 7/24/09.

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