No. 05 ____

In the Supreme Court of the United States

THOMAS C. STALEY,

Petitioner,

vs.

PAMELA S. STALEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In 2002, Thomas Staley and his wife, Pamela Staley, divorced via a contract of divorce. In that private contract, the Staleys agreed to an equitable division of their property and payment of their marital debts. They also agreed to terms on the education, residency, and financial support of their four minor children. The contract terms were then incorporated into a Final Decree of Divorce by a Texas court.

Within 77 days of the divorce, Pamela petitioned the divorce court to modify the Decree—which in effect also sought to modify the Staley contract—by allowing changes to the residency and educational status of their children. Thomas never agreed to any of these contractual changes, and Pamela did not rescind the contract nor did she return any of the valuable consideration she had received under the contract. In modifying the decree, the trial court never made any findings that the Staleys agreed to change the contract terms, or that those terms were originally based on fraud, duress, or suffered from unconscionability.

The case went to jury trial on the basis that the contract and Decree did not comply with Texas Family Code §153.134, which requires that any decree concerning divorce designate one of the spouses as having the "exclusive right to designate the primary residence of the child." The trial court asked the jury to determine whether Thomas or Pamela should be so designated, and the jury selected Pamela. The court entered final judgment accordingly, not only abrogating the contract terms, but also depriving Thomas of his Constitutional rights to equal protection of the laws and to parent his children.

Petitioner Thomas Staley presents the following questions:

1. Do Texas state statutes violate equal protection and destroy fundamental parental rights by requiring that one parent be designated as having "exclusive" power to determine a child's residence?

2. May a court unilaterally invalidate or change the terms of a binding contract by merely invoking a "best interests of the child" standard without finding that the parties either agreed to the changes or that the contract was originally based on fraud, duress, or unconscionability?

3. Is the "best interests of the child" standard unconstitutionally arbitrary on its face, or void for vagueness, making any judgment based on that standard likewise void?

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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

THOMAS C. STALEY respectfully petitions this Honorable Court for a writ of certiorari directed to the Supreme Court of Texas for the purpose of reviewing the decisions of the Texas appellate courts affirming the judgment of the 254th Judicial District Court, Dallas County, Texas, that destroyed Petitioner's valid contract rights without due process of law and violated his equal protection guarantees, and to invalidate two Texas statutes that infringe the Constitutional equal-protection and parental rights of fit Texas parents.

OPINIONS AND ORDERS BELOW

The final judgment of the 254th Judicial District Court, Dallas County, Texas, (titled "Order in Suit to Modify Parent-Child Relationship") is set forth in the Appendix (App.) at 15a-51a. The opinion of the Dallas Court of Appeals is set forth at App. 3a-14a. The order denying the Motion for Rehearing in the Court of Appeals is set forth at App. 2a. The order denying Petition of Review by the Supreme Court of Texas is set forth at App. 1a.

BASIS FOR JURISDICTION

The Supreme Court of Texas denied Petition for Review on 11/4/05. This made the judgment of the Dallas Court of Appeals the final judgment of the Texas courts. Certiorari is thus proper in accordance with 28 U.S.C. §1257 as a petition to review the final judgment or decree of the highest court in the State for violation of Petitioner's U.S. Constitutional

rights, and because a State statute is violative of rights guaranteed and protected by the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMEND. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of Indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, AMEND. XIV, SECTION 1:

All persons born or naturalized in the United States , and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS FAMILY CODE, §153.002

The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

TEXAS FAMILY CODE, §153.133(a):

(a) If a written agreement of the parents is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the agreement:

(1) designates the conservator who has the exclusive right to designate the primary residence of the child and:

(A) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or

(B) specifies that the conservator may designate the child's primary residence without regard to geographic location;

(2) specifies the rights and duties of each parent regarding the child's physical care, support, and education;

(3) includes provisions to minimize disruption of the child's education, daily routine, and association with friends;

(4) allocates between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151;

(5) is voluntarily and knowingly made by each parent and has not been repudiated by either parent at the time the order is rendered; and

(6) is in the best interest of the child.

TEXAS FAMILY CODE, §153.134(b):

(b) In rendering an order appointing joint managing conservators, the court shall:

(1) designate the conservator who has the exclusive right to determine the primary residence of the child and:

(A) establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence; or

(B) specify that the conservator may determine the

child's primary residence without regard to geographic location;

(2) specify the rights and duties of each parent regarding the child's physical care, support, and education;

(3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;

(4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151; and

(5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint managing conservatorship through litigation, except in an emergency.

STATEMENT OF THE CASE

Introduction.

Every day in every one of the United States, married people decide to divorce. In Texas, spouses are allowed by statute to enter into private contracts regarding the terms and conditions of their divorce as it pertains to child custody, financial support, and the education and residency of their children following the divorce. However, other Texas statutes and the habitual procedures of Texas courts deny fit parents their Constitutional rights to contract, to equal protection of the laws, and to parent their children free from undue government interference—all by merely invoking the phrase "best interests of the child" as an excuse to do whatever the court subjectively deems appropriate. In the process, grievous harm is inflicted on innocent citizens and their children by the very institutions where they repair for relief: the courts.

Factual History.

The following facts were proved by the submission of the Petitioner in the trial court below, and are substantially uncontroverted by Respondent.

In 2002, Petitioner Thomas Staley and Respondent Pamela Staley entered into a contract incident to their divorce. See App. at 159a; 191a; 194a-214a. The Staley contract provided that they would "co-parent" their minor children following the divorce, with the children spending approximately equal time with each parent. As part of their deal, Thomas conveyed to Pamela his valuable, separate-property home in Dallas and agreed to be responsible for all of the children's medical and educational costs; no further child support was to be given. It was also agreed that the Staley children would remain resident in both Dallas and Collin counties, and would continue their private education at Carrollton Christian Academy in Dallas. Due to the contract terms that determined residency, there was no need to designate either Thomas or Pamela as the parent with the "exclusive right to determine" the children's residence, and the Decree therefore made no such designation.

The Staley contract was adopted and made a Final Decree of Divorce by the 254th Judicial District Court, Dallas County, Texas on May 29, 2002. App. at 157a. That Decree specifically stated that it was "enforceable as a contract," App. at 159a, and that its terms were in the best interests of the Staley children. App. at 160a. Thomas conveyed the home to Pamela as agreed, and took over the responsibility of paying for the children's education and medical expenses.

However, within seventy-five days of the divorce, Pamela petitioned the court to modify the decree to allow her to move

the children to Wise County, Texas, so she could better care for her infirm mother. There were no allegations that the health or safety of the Staley children necessitated this relocation, nor were there any allegations that Thomas was an unfit or abusive parent or that he had breached the Staley contract. In her petition, Pamela alleged in boilerplate fashion that her request was "in the best interests" of her children but stated no reason why. Upon her petition—in an ex parte hearing—the Court awarded Pamela "temporary orders" on November 18, 2002, allowing her to relocate the children to Wise County, Texas, and take them out of private school at Carrollton Christian Academy and enroll them in public school in Decatur, Texas. These temporary orders also awarded Pamela monthly, financial child support contrary to the terms of the contract, without any pleadings on file seeking this relief (and hence without any notice to Thomas), and without any evidence that circumstances had changed justifying such an award.

Thomas never agreed to any of these changes. Instead, the changes to the contract were made by the court without regard for Thomas's vested rights and without any evidence that the contract had been originally procured by fraud, duress, or unconscionability—the classic reasons for setting aside a contract after it has been entered into. Instead, the court simply made these changes to the Staley contract by invoking the "best interests of the child" language from Texas statutes. After Thomas suffered under these "temporary" orders for over 13 months, on December 29, 2003, a final judgment was rendered that adopted the terms of the temporary orders almost verbatim.

Thomas alleges that this action by the Texas court was arbitrary and capricious, violated his parental rights, and derogated his rights to due process of law and equal protection as guarantied by the U.S. Constitution.

Thomas also alleges that Texas Family Code §§153.133(a) and 153.134(b) violate the Constitutional, equal-protection rights of fit Texas parents by requiring that one of them be granted legal rights superior to the other. These claims and arguments were all ignored by the Texas courts. Mr. Staley is thus required to bring these grievances to the bar of this Court for resolution and relief.

Procedural History.

Petitioner's due process and equal protection rights were litigated in the trial court (Final Order, App. at 15a). Petitioner made his Constitutional arguments to the Dallas Court of Appeals in Petitioner's Motion for Rehearing filed in that court on or about June 23, 2005. App. at 97a-156a. In that pleading, Petitioner raised the Constitutional issues related to Tex.Fam.Code §153.133[1] in Issues No. 1, 2 and 3, and raised the Constitutional issue relating to due process and impairment of contract in Issues No. 1 and 7, among others. These issues were not addressed in any fashion by that court,

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[1] The Dallas Court of Appeals was concerned with the impact of Tex.Fam.Code §153.134, rather than §153.133, which is wrong since a written divorce contract was involved. However, as Petitioner pointed out in that court, *both* statutes suffer from the same Constitutional infirmity, and *both* should be stricken. See Motion for Rehearing, App. At 123a-125a and footnote 34 ("To the extent Texas Family Code §153.133 'requires' appointment of one of two fit parents as having the exclusive right to determine residence, it is likewise unconstitutional").

and the Motion for Rehearing was denied without opinion. App. at 2a.

These same arguments were again raised in the Texas Supreme Court in Petitioner's Petition for Review filed on or about August 31, 2005. See Issues Presented Nos. 3, 7, and 9. App. at 59a-96a. The Texas Supreme Court, in denying the Petition, also refused to address these arguments or rule thereon, denying the Petition without opinion. App. at 1a.

The Petitioner's arguments are not mentioned or addressed in any of the lower courts' orders, opinions, or judgments, but only in Petitioner's pleadings. The Texas state courts were thereby afforded a fair opportunity to address these federal questions at the time and in the manner required by state law, and they refused to do so. These federal questions have thus been properly preserved for review by this Court.

REASONS FOR GRANTING THE WRIT

I. Do Texas statutes violate equal protection by requiring that one parent be designated as having the exclusive power to determine a child's residence?

A. Equal-Protection Rights Generally. The equal protection clause of the federal constitution requires that similarly-situated persons be treated similarly.[2] It is the definition of ***unequal*** protection to grant favoritism or special rights to either of two similarly-situated persons. There is no

[2] San Antonio ISD v. Rodriquez, 411 U.S. 1, 89 (1973)(Marshall, J., dissenting)(quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

Supreme Court precedent saying these rights are lost or diminished in any way by a divorce.

B. Parental Rights Generally. It is beyond argument that every fit parent has fundamental, constitutional rights to direct the care, custody, education, and upbringing of their children. These rights spring from the 1st Amendment freedom of association, the rights to privacy[3] and liberty, and the procedural and substantive due-process rights outlined in the 5th and 14th Amendments. Given their fundamental nature, these rights can be infringed by state action **only** in the narrowest of circumstances and only upon passing strict-scrutiny review.

In Troxel v. Granville,[4] this Court discussed and affirmed a dozen cases addressing the long history and foundational importance of these rights:

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a

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[3] It is immaterial to the analysis whether this privacy right is penumbral to the general provisions of the U.S. Constitution, penumbral to the Bill of Rights, or is found in the reservation-to-the-people clause of the 9th Amendment, or in the autonomy branch of privacy found in the substantive due process protection of the 14th Amendment.

[4] Troxel v. Granville, 530 U.S. 57, 65 (2000).

> home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438.[5]

C. Right to Direct Education. The right of parents to direct their children's education has been repeatedly recognized as a distinct, fundamental, constitutional liberty interest worthy of protection by the courts and preserved by the 14th Amendment.[6] It can only be modified or infringed

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[5] And this is only the *plurality* opinion. In an unprecedented manner, in every concurrence and dissent in Troxel, the Justices unanimously affirmed that the right to parent is a fundamental, inalienable Constitutional right.

[6] Troxel, 530 U.S. at 65-66; Thornbaugh v. American Coll. of Obst. & Gyn., 476 U.S. 747, 773 (1986)(Stevens, concurring);

by the application of specific Fourteenth Amendment protocols, including notice, full evidentiary hearing, and the state must prove—by clear and convincing evidence—that a compelling state interest is being protected and that the infringement is the least-restrictive means of fulfilling that interest (i.e., strict scrutiny).[7]

In Pierce v. Society of the Sisters,[8] the Supreme Court held that a parent's right to direct their child's education is a fundamental liberty right that cannot be disparaged by government actions or rulings:

> The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The Fifth Circuit has recently called the right of parents to put their children in a school of their choosing a "clearly established" right.[9] This right is so well-established, in fact, that a school superintendent was stripped of his qualified

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Weinberger v. Salfi, 422 U.S. 749, 771 (1975); Griswold v. Connecticut, 381 U.S. 479, 503 (1965).

[7] Saenz v. Roe, 526 U.S. 489 (1999); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982); San Antonio ISD v. Rodriquez, 411 U.S. 1, 16-17 (1973).

[8] Pierce v. Society of the Sisters, 268 U.S. 510, 534-535 (1925).

[9] Barrow v. Greenville ISD, 332 F.3d 844 (5th Cir. 2003).

immunity when he violated it.[10] Courts are just another state actor.[11] They are equally bound to abide by the Constitution as are school superintendents.

In this case, we have the same situation faced in Troxel: a disagreement between Petitioner and the trial court as to what is in the "best interests" of Petitioner's children. See Troxel, 530 U.S. at 72-73: "As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

D. Equal Protection *for Parents*. The above rules lead to four conclusions: (1) there can be no disparate treatment of either of two fit parents as it relates to their constitutional right to make decisions about their children, including choosing the children's residence and education; (2) there is a due-process presumption that both parents are fit and have not relinquished their fundamental right to parent; (3) operation of logic on points 1 and 2 must produce in each parent a right to equal, post-divorce possession of their children and to have equal control over the life decisions affecting those children; and (4) this presumption can only be overcome by clear and convincing evidence that one or both of the parents is unfit.

The two Texas statutes in question, Texas Family Code §§153.133 and 153.134, require that when a couple divorces, one of those parents ***must*** be named the parent with the "exclusive right" to decide the residency of the couple's minor

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[10] Id.

[11] Lehr v. Robertson, 463 U.S. 248, 266 n.24 (1983).

children from that point forward. This means that only one of two equally-qualified and identically-situated parents—neither of whom has been adjudicated "unfit" or otherwise incapable of making such basic decisions for their children—is allowed to retain a significant legal right while the other parent is completely and suddenly deprived of the exact same right they possessed only moments before the divorce decree was signed, said deprivation being imposed for no other reason than because "the law" says it must. This entire process is the antithesis of "equal" protection of the laws.[12]

Here, the Texas courts have chosen a well-worn path that veers from the Constitution in every important particular. First, those courts read Texas Family Code §153.134 as not just *allowing* the court to grant favoritism to one of two fit, similarly-situated parents if and when conditions warrant, but *requiring* it in *every* instance. Second, Texas courts have completely ignored the fundamental right to parent and the constitutional consequences attendant thereto regarding the equal-parenting rights belonging to ***both*** fit parents.[13] Finally,

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[12] Even if it could be argued that such an allocation "must be" made in an exigent circumstance, it cannot validly be made by the coin-flip of applying the "best interests of the child" (BIC) standard.

[13] Lehr v. Robertson, 463 U.S. 248, 265-66 (1983). See also Troxel, 530 U.S. at 68, where a majority of this Court held that fit parents are presumed to act in the best interests of their children: "First, the Troxels did not allege, and no court has found, that Granville was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children." The fact that Petitioner was not afforded that same presumption calls the Texas court's procedures into serious question.

the reviewing Texas courts did not even glance at the burden-of-proof issue. If they had, they would have seen that the trial court imposed only a preponderance[14] burden on Pamela to show—not that Thomas was unfit—but merely that the Staley children's "best interests" might be for them to live in Decatur.[15] The breach of constitutional protocol on each of these points is fatal to the underlying judgment.

The Court in Troxel was faced with a statute that allowed a court to change a fit parent's decisions to control the visitation privileges affecting their children when the judge, in his unfettered discretion, determined that such a change was in the child's "best interests." When confronted with such an amorphous standard as BIC, this Court said: "Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's

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[14] App. at 54a-55a (preponderance instruction). See Santosky v. Kramer, 455 U.S. 745 (1982)(severance of parental rights requires proof of grounds by "at least" a clear and convincing evidence burden). While Santosky involved 100% termination of all parental rights, the termination of even partial parental rights has an equally-devastating effect on both the parent and the child involved, and there is thus no rational distinction possible as to the burden of proof required. Here, Thomas's parental right to direct the education and select the residence of his children was terminated 100% by the court, even though others of his rights (like time spent with his children) were deeply impacted although not 100% terminated.

[15] App. at 55a, where the trial court instructed the jury that so-called "best interests" was to be their "primary consideration" in the case without providing any definition of *either* of those terms.

determination of the child's best interests." This standardless "standard" was too much for both the Washington Supreme Court and this Honorable Court,[16] and the statute was struck down as unconstitutional. Interestingly, this Court did not decide in Troxel the primary issue now presented:

Is the BIC standard unconstitutionally vague *on its face*?

This Court now has the opportunity to speak directly on that issue and decide if critical, life-altering decisions are going to continue to be made by the flip of a "best interests" coin, or if they will henceforth be made under time-tested, reviewable, and logical rules and procedures.

Here, the statutes in Texas requiring that one parent be afforded special rights concerning residence, in derogation of the other fit parent's right to be equally involved in that decision, is even more egregious than the statute in Troxel. Here, not only were fundamental rights impaired, but the express, binding terms of a valid contract were swept aside like so much rubbish. The Texas statute applied, §153.134, does not even expressly *require* that such a decision be in the child's best interests. In the Dallas Court of Appeals' opinion, the court said that the purpose of §153.134 was to ensure "stability in custodial issues." This sounds suspiciously like the justification *always* offered by a government entity when it tramples the people's Constitutional rights: "Give up your rights and we will give you peace and stability." One of the principal purposes of the U.S. Constitution is to ***prevent*** the government's forced imposition of exactly that trade-off. And when that trade-off is

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[16] In re Custody of Smith, 969 P.2d 21 (Wash. 1998), *aff'd sub nom.*, Troxel v. Granville, 530 U.S. 57 (2000).

nevertheless *not* prevented, our system offers yet another defense of Liberty: an application for a Writ of Certiorari to this Court.

If the Constitutional equal-protection rights of fit parents can be so cavalierly discarded by a court with the mere invocation of the term "best interests of the child," then our system of governance is in deep trouble. What is to stop a trial court from committing a parent to prison simply because the court feels the incarceration is in the "best interest of the [accused's] child"? If these talismanic words have the magical power that Texas courts deem them to have—capable of obliterating even our longest-lived and most-cherished Constitutional rights by their mere invocation—they are indeed a law unto themselves.

Justice Scalia once referred to best-interests as "venerable."[17] If that is the best defense one can muster for BIC—and it is—then BIC is long overdue to be relegated to the company of such venerables as Jim Crow.

The judgment of the Texas courts that Pamela be named as the conservator with the exclusive right to determine the Staley children's residence is unconstitutional and must be reversed. To the extent such a ruling is founded on the correct construction of Texas Family Code §§153.133 or 153.134, those statutes are unconstitutional on their face and must be stricken.

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[17] Reno v. Flores, 507 U.S. 292, 303 (1993).

E. Fit Parents Protect a Child's Best Interests. Yet another issue deserves consideration here. While a regimen of legal protections for children whose parents abuse or neglect them is surely just and necessary, where did our state legislators get the idea that the rights of children to their "best interests" are automatically superior to the fundamental Constitutional rights of their fit parents?

Fit parents are presumed to protect their children's best interests. However, the present-day children's-rights legal philosophy appears in its excess enthusiasm to have taken us from protecting society's most-vulnerable members to elevating children's rights above the at-least-equal rights of their fit parents. Like any other jurisprudence of excess enthusiasm (viz: *Buck v. Bell*) this must be rejected—not because an intense commitment to children is unattractive but because vague legal expressions of such a commitment are counterproductive of their stated goals.

During this ramping up of children's rights, the legislatures and courts in this country have been asleep at the switch in guarding against the dilution of *parental* rights. There is no balance evidenced in Texas family statutes; they simply declare that the rights of the children involved are the be-all and end-all of the entire debate—and the rights of parents be damned. In a more sinister vein, they evidence a form of government arrogance that says legislators, judges, social workers, and ad litems are better arbiters of what is in a child's best interests than are a child's fit parents. If statutes can really accomplish such a thing, implicitly or explicitly, then the entire concept of Constitutionally-protected "parental rights" has become truly mythological.

Here, unimpeded by Texas appellate courts' oversight responsibilities, the trial court has deprived Petitioner of two

fundamental and weighty Constitutional rights—the right to equal protection and the right to parent—in a manner that would be unheard of in any context outside divorce court. That court also essentially ignored the contract rights which Petitioner had paid valuable consideration to secure, and which both parties agreed to give and accept. The court even allowed Pamela to keep that contract consideration and—at the same time—allowed her to breach her concomitant obligations of performance. The trial court thus became a law unto itself, and substituted its own personal view of how the contract should be enforced (or, in this case, not enforced) in place of the actual, negotiated, and unambiguous agreement made by the parties to that contract. And, since there was no *legitimate* basis for what it did, the trial court simply took this action under the rubric of BIC. The court apparently believed this phrase gave it the absolute, king-like authority to trample ***all*** of Petitioner's Constitutional, parental, and contract rights as it saw fit—which is exactly what happened.

II. Texas statutes relating to determining the parent with exclusive authority to determine residence are unconstitutional as applied.

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[18]

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[18] Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

If Texas Family Code §§153.133 and 153.134 *as applied* require that one of two fit parents be appointed as the conservator with the exclusive right to determine the children's residence, then by definition the statutes require that one parent be granted rights superior to, and exclusive of, those of the other parent as regards the residence issue.

The application of the statutes as they are presently construed by Texas courts has the impermissible effect of depriving the second parent of his constitutional rights to parent and to contract. While this may be possible following strict scrutiny analysis, it is not possible without jumping through all the hoops necessary to deprive someone of his or her fundamental, constitutional rights. Since the Texas courts went through none of the mandatory due process requirements before depriving Thomas of his fundamental constitutional right to select his children's residence, the Texas judgment should be vacated.

III. The BIC standard is unconstitutionally void for vagueness, and any statutes or judgments based thereon are invalid.

A. Vagueness Generally. The BIC standard is hopelessly vague and hence its application is always arbitrary. It would allow, say, a militantly-racist judge to find that allowing a mother to move her child into an Aryan Nation's compound is in the child's best interests, whereas another judge would find the same request by the same mother morally abhorrent and never allow it.[19] The BIC standard is

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[19] See Mark Ellman, "Inventing Family Law," 32 U.C. Davis L. Rev. 855, 856, 860-863 (1999)(Texas's rule of discretion is most closely akin to the rule-failure discretion inherent in traffic rule 1).

not helpful because "it provides little real guidance to the judge, and his decision necessarily must reflect personal and societal values and mores."[20] This type of absolute power *never* passes Constitutional muster—by definition.

The BIC standard is also hopelessly ***overbroad*** because there are no objective, statutory criteria framing its definition.[21] It could easily result—and has in fact resulted—in such disparate decisions that it could truthfully be called a gloss for literally anything a judge or jury decides to do. The example of the racist judge given above is only one possible outcome that could spring from a "proper" application of that standard. This Court surely must recognize that the BIC standard is no standard at all, or more precisely, it is so vague, over-broad, and all-encompassing as to allow purely unfettered discretion to reside in the state actors charged with its implementation. As such, it is as unconstitutional as any other law struck down during the entire history of this Court's jurisprudence.[22]

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[20] Bellotti v. Baird, 443 U.S. 622, 655-56 (1979)(Stevens, concurring).

[21] With all due respect, the court in Holley v. Adams, 544 S.W.2d 367 (Tex. 1976), merely traded a single vague and subjective standard for nine equally-vague and similarly-subjective standards, several of which are also capricious in the bargain. Moreover, as applied in Texas courts, the Holley factors are routinely described as a "non-exhaustive list." In other words, if a court cannot find in the Holley factors some existing way of diminishing parental rights, it is always at liberty to make up a new one, *ad hoc*.

[22] This case falls squarely within the Santosky holding, that while domestic relations are typically the province of the state courts, this has never required this Court to "blink at clear Constitutional violations in state statutes." Santosky, 455 U.S. at 768, n. 18. As

Yet another problem with the BIC standard is that it gives no guidance for ***future*** behavior. Basically, "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[23] Under BIC (a great slogan but an unconstitutionally-vague standard), no one can know how to comport him/herself in a marriage and be confident that in a divorce their fundamental rights to parent won't be eviscerated to a point where they are reduced from the status of equal parent to "every-other-weekend visitor" of their child. This is indeed a vitriolic statement, but sadly, it is also true. ***Inconsistency*** in the application of the BIC standard is guaranteed because BIC is so open to the whims, habits, and personal biases of the particular judge or jury involved—inconsistency that daily plays itself out in the frightful confusion and injured lives of those affected by it.

The Washington Supreme Court has all but invalidated the BIC standard in that state:

> Short of preventing harm to the child, the standard of "best interests of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. . . . To suggest otherwise would be the logical equivalent to asserting that the state has

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demonstrated by the Texas Supreme Court's refusal to hear this case, Texas courts are (apparently) not overly concerned about people's federal constitutional rights, leaving the onus on this Court to correct these errors.

[23] Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966)(such standards are unconstitutional and void for vagueness).

> the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision.[24]

Finally, to the extent current law has placed parental rights in an ***inferior standing*** vis-a-vis their children's rights, it *again* violates equal protection. Who, after all, has the constitutional authority to say that children's *statutory* rights to enjoy their "best interests"[25] are automatically superior to their parents' *constitutional* rights to participate equally in parenting those children? Even if we could tell the future (which we cannot), who dares candidly say that the best interests of a child can be better determined by a court than by the child's fit parents? For the sake of maintaining judicial credibility and public confidence in the legal system, courts must be prevented from even *attempting* to make these decisions on such a flimsy basis.

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[24] In re Custody of Smith, 969 P.2d at 30-31.

[25] Whatever that means. An excellent way of seeing behind the BIC curtain is by analogy. Imagine a contest involving a child that pitted two fit parents versus the state. Surely it need not be elaborated upon that if the standard for deciding that contest was the undefined "Child's Highest Potential" (CHP), this Court would strike down CHP as irreparably vague and violative on its face of the rights of the parents. BIC is categorically indistinguishable from our imaginary CHP standard, infected with all its problems, and causing—today, in the United States, in millions of households—the same problems as would infect our households under a CHP regime. BIC—like CHP—makes an exceptional bumper sticker . . . and horrific law in application.

B. Unfettered Discretion in State Officers. There are few constitutional rules more settled than this one: unfettered discretion in the hands of government officials to regulate speech or conduct is anathema to the Constitution.[26]

Like any other statute that does not provide objective, readily-understood enforcement standards, the BIC statutes have no objective criteria or parameters that are binding on the state officials charged with their enforcement—the trial courts and juries of Texas. As such, they lack the constitutionally-required certainty which all *valid* statutes possess. Since the trial court's judgment was based on application of such statutes, it must be reversed.[27]

The reason unbridled discretion in the hands of government officials is unconstitutional relates to the very reason we have a Constitution and Bill of Rights in the first place: ***We, the people, do not trust the government.*** We have **never** allowed the great power of the state, which is so potentially destructive of our liberties, to reside in the hands of state actors without significant, articulated due process standards in place. We have **never** trusted government officials to be wise, knowing, and balanced in their control of

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[26] City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757-58, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

[27] The trial court instructed the jury that: "The best interests of the children shall always be the primary consideration in determining questions of (sic) the children." App. at 55a. Not only was this instruction grammatically incorrect and thus potentially confusing, but it was given to a lay jury without ***any*** definitions, examples, or other explanations of what the term "best interests" means. The boundaries of this *standard* were thus left entirely up to the jurors' biases, prejudices, predilections, and idiosyncracies.

the power we are of necessity required to yield to them, and historically we have excellent reasons to not trust them—particularly when their intentions are good.[28] Consequently, we entrust the ultimate protection of these rights to the wisdom and power of this Court.

Another reason for the requirement of objective, articulated standards is we want appellate courts empowered to conduct enlightened review of the exercise of discretion vested in lower courts. This task can only be intelligently undertaken if discretion is bounded by fact-based, reviewable criteria or standards.[29] As it is now, Mr. Staley cannot really challenge the best-interests finding because it is—by definition—a purely "discretionary" call by the court and thus, there is no way to point to the court's failure to comply with objective criteria in making its decision. Meaningful appellate review of such decisions (under an "abuse of discretion" review standard) is literally impossible.

C. An Alternative Standard. The argument might be raised that if the BIC standard is unconstitutional, then a legal cataclysm is in the making. That is, if both parents cannot agree on some aspect of their child's life, such as education or

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[28] Olmstead v. United States, 277 U.S. 438, 478 (1928)("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent").

[29] Indeed, the very definition of "abuse of discretion" is when a court acts without reference to any guiding rules or principles. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985), cert. denied, 476 U.S. 1159 (1986). An amorphous phrase such as "best interests of the child" cannot intelligently be called a "guiding rule or principle" without doing fatal violence to the terms "guiding," "rule," and "principle."

residence, how does a court decide which parent's wishes prevail?[30] The answer is simple: the only constitutionally-sound, logical, and non-speculative answer to this dilemma is grounded in the ancient doctrine of "status quo ante."

Application of this doctrine can be explained with an illustration. Suppose a husband and wife reside in McKinney, Texas and have one child who is attending McKinney Christian Academy. On the day the couple files for divorce, the status quo ante of this child is McKinney (for residence) and McKinney Christian Academy (for education). If one parent thereafter wishes to change the child's residence or school, then that parent must convince the other parent to agree, or alternatively must prove in court a constitutionally-sound basis for doing so.

If one parent wants to move to Alaska, for instance, that parent is free to do so but it cannot simply take the child along because to do so would change the status quo ante and thereby impair the fundamental parental rights of the other parent to choose the child's school and residence, and would deprive the other parent of equal access and time with the child. If the relocating parent wants to take the child to Alaska against the other parent's wishes, it bears the burden of convincing a court—not that the move is in some ethereal, speculative "best interests of the child"—but that the other parent is unfit. This is because ***each*** parent has ***individual, equal*** constitutional rights as a fit parent to participate in the upbringing of their children, and these rights cannot be infringed absent clear and convincing proof of unfitness—regardless of how much

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[30] This question does not actually arise in this case, because Thomas and Pamela have an enforceable ***agreement*** on these topics that should have controlled the outcome of any dispute.

"better" the judge or jury thinks it would be for the child to move to Alaska.[31] Without such proof, the child must stay in McKinney in order to preserve the status quo ante.

This doctrine cures every constitutional ill which infects the BIC standard. And many ills there are. Justice Kennedy opened the door to having a case such as this one directly challenge the "best interests of the child" standard on constitutional grounds: "The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. . . . I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship."[32] It is difficult to imagine more "unpredictable results" than occurred in this case (i.e., that an enforceable contract would be utterly ignored by a court of law; that children would be relocated without any showing of ***their*** interests being involved; that child support would be ordered, ex parte and in the complete absence of any pleadings seeking this relief). The BIC standard—far from providing consistency to the law—actually allows courts to lapse out of control.

As the first of many ills, the BIC standard is entirely ***speculative***. In a situation where change is sought, it asks a court to guess what the child will experience in his proposed-future school or residence, based mostly on sketchy,

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[31] Stanley v. Illinois, 405 U.S. 645, 651 (1972)(affirming the inalienable Constitutional rights inherent in parents).

[32] Troxel, 530 U.S. at 101 (concurring opinion). See also Lassiter v. Dep't of Social Services, 452 U.S. 18, 46 n.13 (1981)(so-called "best interests" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values).

incomplete information supplied NOT by an independent source, or even by both parents, but based only upon the *ipse dixit* of the parent who wants to make the move—which, to say the least, a fair observer might suspect could be filtered through some prism other than the child's best interests. On the other hand, status quo ante is based on objective, current and historical facts and circumstances susceptible of ordinary proof.

Second, the relevant scientific community has exposed the BIC standard as harmful to children and based upon a junk-science industry of unreliable assessments and evaluations. As attested in a recent review by national experts, published in the most prestigious of psychology journals:

> Standard measures of parent's and children's intelligence, personality traits, and emotional states are wholly inappropriate for custody evaluations . . . even the measures and constructs that have been designed specifically to assess child custody arrangements for individual children have no proven validity as predictors of a child's well-being in the care of one or the other of two disputing parents.[33]

Similarly, national experts in psychology and law have argued for years that much if not all of the mental-health testimony used to determine the so-called "best interests" of children is unreliable pseudoscience and would not survive competently-

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[33] See, Emery, R.E., Otto, R. K. and O'Donohue, W.T., *A Critical Assessment of Child Custody Evaluations*, Psychological Science in the Public Interest, Vol. 6, No. 1 (July, 2005) (pg i).

conducted Frye-Daubert-Kumho hearings.[34] Competent Frye-Daubert-Kumho hearings are, of course, never conducted in family-law cases because the entire financial structure of the custody-evaluation industry (in which both parties' attorneys are inextricably intertwined, and hence unlikely to "rock the boat") relies upon such pseudoscientific, Daubert-deficient testimony. This Court must review the hazards of the BIC standard—not only as a danger to the Constitutional rights of citizens, but as a continuing and deepening stain upon the integrity of the legal system.

As a further ill, BIC wholly discounts the fact that ***parents*** obtain personal benefits and enjoyment from parenting—separate and apart from the care and nurture their children experience. These rights and benefits are supposedly protected by our Constitution, and are fully accounted for by the status-quo-ante standard; yet they are, of necessity, completely ignored by the BIC standard—except by coincidence.

The only constitutionally-sound solution for protecting everyone's rights is to require a "status quo ante" presumption, and make the parent desiring to change the status quo overcome the other parent's constitutional rights to parent within that status quo. And the only way in which this could be done is to force the parent wanting the change to

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[34] Grove, W. M. and Barden, R.C., *Protecting the Integrity of the Legal System : The Admissibility of Testimony from Mental Health Experts Under Daubert/Kumho Analyses*, Psychology, Public Policy and Law, Vol 5, No. 1, 234-242 (2000)(excerpts reprinted in Fisher, George (Prof. Stanford Law School), *Evidence: University Casebook Series*, Foundation Press - West Group, New York, 2002, pg. 688)).

show, by clear and convincing evidence,[35] that the parent to be adversely affected is an unfit parent, or alternatively to show that the status quo ante is detrimental to the child's health or safety.[36]

Status quo ante would require courts to deal with present, determinable, evidentiary facts, and not allow them to make life-altering decisions based on unadulterated speculation about an uncertain future derived from the bald allegations and subjective preferences of a biased party, which are then reviewed by an ill-equipped decision-maker who needs not employ any objective standard to arrive at its ultimate, unreviewable, unappealable conclusion. This Court can—by accepting this case—ensure that what happens tomorrow will be better than what is happening today.

CONCLUSION AND PRAYER

Texas law is unconstitutional because it wrongfully deprives fit and suitable (albeit divorced) parents of their valid contract rights, denies them the equal protection of the laws, and makes it impossible for many of them to raise their children without undue, arbitrary, and debilitating government

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[35] Santosky v. Kramer, 455 U.S. 745, 769 (1982)(the *minimum* required evidentiary standard to determine the suitability of parents alleged to be unfit is clear and convincing evidence).

[36] This latter circumstance would fall under the "police power" or "parens patriae" function of the government. These doctrines, however, are only properly invoked to prevent an immediate, articulated danger to the life or safety of the child, not to satisfy the mere convenience or selfish preferences of one of two fit parents. Prince v. Massachusetts, 321 U.S. 158, 166 (1944)(police power); Wisconsin v. Yoder, 406 U.S. 205, 206 (1972)(parens patriae).

interference. Amazingly, Texas law and Texas courts accomplish these deprivations merely by invoking the vague, overbroad, and capricious "best interests of the child" standard. This Court should correct these flagrant violations of our most basic fundamental rights, and return the law to a condition where the U.S. Constitution and its Bill of Rights are more than insignificant words on paper.

Petitioner asks this Court to issue a writ of certiorari, and upon full briefing and review, reverse the judgment of the Texas state courts and remand for a new trial; and either strike the Texas statutes in question as unconstitutional or, in the alternative, remand the case for proper, strict-scrutiny review.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF TEXAS

Case No. 05-0703
05-04-00305-CV

[Filed November 4, 2005]

IN THE INTERESTS OF)
R.C.S., T.C.S., J.C.S., and)
M.C.S.,)
Minor Children.)
)

ORDER

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX B

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

Case No. 05-04-00305-CV

[Filed July 21, 2005]

IN RE R.C.S., T.C.S., J.C.S.,)
and M.C.S.,)
Minor Children.)
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ORDER

Before Justices Morris, Francis, and Lang-Miers
Appellant's June 23, 2005 Motion for Rehearing is **DENIED**.

/s/
JOSEPH B. MORRIS
JUSTICE

APPENDIX C

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

Case No. 05-04-00305-CV

[Filed April 28, 2005]

IN RE R.C.S., T.C.S., J.C.S.,)
and M.C.S.,)
Minor Children.)
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OPINION

Opinion By Justice Morris

In this appeal from an order modifying the parent-child relationship, appellant Thomas C. Staley contends the trial court had no subject matter jurisdiction to change the conservatorship arrangement set forth in its original decree of divorce. In addition, appellant argues the trial court erred in denying two motions to recuse, failing to equalize the peremptory challenges given to each party, overruling an objection to evidence of racial bias, and awarding both appellee and the ad litem their attorney's fees. Concluding appellant's arguments are without merit, we affirm the trial court's judgment.

I.

Appellant and appellee, his former wife, Pamela S. Staley, are the parents of four minor children. On May 29, 2002, the trial court signed a final decree of divorce ending their marriage and establishing appellant and appellee as joint managing conservators. The decree did not grant either parent the right to establish the primary residence of the children, but instead ordered "that the primary residence of all four children is established at two locations:" one location being the residence of appellee in Dallas County, Texas; the other of appellant in Collin County, Texas or Dallas County, Texas. The decree also ordered that the children attend a particular private school unless appellant and appellee mutually agreed otherwise. Neither party appealed the decree.

Approximately three months after the decree was signed, appellee filed a petition to modify the parent-child relationship stating that the circumstances had materially and substantially changed since the earlier decree was rendered. Specifically, appellee stated that her mother had become very ill requiring appellee to care for her in Decatur, Texas. Appellee requested that she be designated as the conservator with the exclusive right to determine the primary residence of the children without regard to geographical location. In the alternative, appellee requested that the children's residence be restricted to Wise County, Texas, or contiguous counties. Appellee also requested that the children be allowed to attend a different school than the school designated in the original decree. Appellee stated she had discussed these matters with appellant, but no agreement could be reached. In a supplemental petition, appellee also requested that the terms and conditions for possession and access be changed.

Appellant answered and filed his own counter-petition to modify the parent-child relationship seeking, among other things, to be named the conservator with the exclusive right to determine the primary residence of two of the children and to restrict the residency of all four children to Collin County, Texas, or contiguous counties. Appellant argued these changes were necessary because the conservatorship arrangement under the original divorce decree had become unworkable.

The issue of who was to establish the primary residence of the children was tried to a jury. An ad litem was appointed to represent the best interests of the children. On the first day of trial, appellant non-suited the portions of his counter-petition seeking modification of the children's residency. Thus, the sole issue submitted to the jury was whether the divorce decree should be modified to appoint appellee as the conservator with the exclusive right to determine the primary residency of the children in Wise County and contiguous counties. The jury answered "yes" with respect to all four children.

The remaining issues were tried to the court without a jury. The trial court signed a final order on December 29, 2003. Appellant now appeals from that order.

II.

In appellant's first issue, he contends the trial court lacked subject matter jurisdiction over appellee's petition to modify the parent-child relationship because the petition was not supported by a sufficient affidavit under section 156.102 of the Texas Family Code. The version of section 156.102 in effect at the time appellee filed her petition stated that if a party files suit "seeking to modify the designation of the

person having the exclusive right to determine the primary residence of a child . . . [within] one year after the date of the rendition of the order, the person filing suit shall execute and attach an affidavit as provided by Subsection (b)." TEX. FAM. CODE ANN. § 156.102 (Vernon 2002), *amended by* Act of May 27, 2003, 78th Leg., R.S., ch. 1036, § 20, 2003 Tex. Gen. Laws 2987, 2993 (current version at Tex. Fam. Code Ann. § 156.102(a) (Vernon Supp. 2004-05). Subsection (b) required that the affidavit supporting the petition to modify contain an allegation and supporting facts showing that either (1) the child's present environment was endangering his physical health or emotional development, (2) the person who had the exclusive right to determine the primary residence was seeking or consenting to the modification, or (3) the person who had the exclusive right to determine the primary residence had voluntarily relinquished primary care and possession of the child for at least six months and the modification was in the best interests of the child. *Id*. Appellant argues section 156.102 is jurisdictional and because appellee failed to submit a sufficient affidavit, the trial court did not have subject matter jurisdiction over her suit. It is unnecessary for us to address whether section 156.102 is jurisdictional in nature, however, because the section is inapplicable to appellee's petition to modify.

By its clear and unequivocal terms, section 156.102 is applicable only to suits seeking to "modify the designation of the person having the exclusive right to determine the primary residence of a child." *See id*. In this case, the decree of divorce appellee sought to modify did not designate a person with the exclusive right to determine the primary residence of the children. Instead, the decree designated two alternate locations as the primary residence of the children. Because appellee's suit sought an order designating a person with the right to determine the primary residence of the children in the

first instance, instead of a modification of the person so designated, section 156.102 does not apply to appellee's suit.

In holding that section 156.102 is not applicable in this case, we are mindful that the purpose section 156.102 is to promote stability in the conservatorship of children by preventing the re-litigation of custodial issues within a short period of time after the custody order is entered. *See Burkhart v. Burkhart*, 960 S.W.2d 321, 323 (Tex. App.-Houston [1st Dist.] 1997, writ denied). Such stability in custodial issues was meant to be achieved, however, by placing the power to designate the child's primary residence in a single conservator. It is for this reason that the legislature mandated that all orders appointing joint managing conservators include a designation of the conservator who has the exclusive right to determine the child's primary residence. *See* TEX. FAM. CODE ANN. § 153.134 (Vernon 2002). The divorce decree signed on May 29, 2002, ordered that appellant and appellee act as joint managing conservators, but failed to designate which conservator had the exclusive right to determine the children's residency. Therefore, the order was not in compliance with the requirements of the Texas Family Code. *See id*. By bringing suit to designate a conservator with the right to determine the children's primary residence, appellee was seeking to bring the divorce decree into compliance with the requirements of the Code. Appellee's suit, rather than seeking to disrupt the stability of the children's custody, sought instead to establish the stability that is created by vesting control of the children's residency in a single conservator. Because section 156.102 is inapplicable to appellee's petition, we conclude appellant's arguments under that section are without merit and we resolve his first issue against him.

In his second issue, appellant contends the trial court erred in its rulings on two different motions to recuse Judge Jeffrey Coen. The first motion sought to recuse Judge Coen after his assignment to the case as an associate judge; the second motion sought his recusal after he ascended to the district court bench and became the sitting judge of the court in which the parties' divorce case was pending. The first motion for recusal was filed by a trustee for Cromwell Holding Company, a party to the original divorce proceeding. According to the motion, then Associate Judge Coen demonstrated bias in favor of appellee by ordering that Cromwell be joined in the suit. Based on this order, Cromwell argued Coen was required to recuse himself under rules 18a and 18b of the Texas Rules of Civil Procedure.

Judge Coen denied Cromwell's motion, holding that rules 18a and 18b do not apply to associate judges appointed to hear matters under chapter 201 of the Texas Family Code. This decision was appealed to the sitting judge of the trial court who affirmed the denial of the motion. *See* TEX. FAM. CODE ANN. § 201.015 (Vernon 2002) (appeal to referring court). Despite the denial of the motion to recuse, Judge Coen did not hear any other matters in the suit before the trial court signed the divorce decree on May 29, 2002. We note again that no appeal was taken from the 2002 decree.

Appellant now attempts to challenge the denial of the first motion to recuse that he neither filed nor appealed. Appellant's challenge is not well taken because, among other things, any error in the trial court's denial of Cromwell's motion to recuse was waived when no party appealed from the May 29, 2002 divorce decree. *See In re Union Pacific Res. Co.*, 969 S.W.2d 427, 428, 41 Tex. Sup. Ct. J. 591 (Tex. 1998).

The second motion to recuse Judge Coen was filed by appellant in the current suit. The motion was filed after the conclusion of the jury trial, but before the remaining issues were tried to the court. At the time of the second motion, Judge Coen had assumed the district court bench in which this case was pending following the retirement of the previous presiding judge. Appellant argues in his motion to recuse that the judge demonstrated bias against him during the trial and, therefore, was required to recuse himself. Judge Coen declined to do so and, pursuant to Rule 18a of the Texas Rules of Civil Procedure, requested the presiding judge of the administrative judicial district to assign another judge to hear the motion.[1] A judge was assigned to the matter and, following a hearing, the judge denied the motion.

Appellant argues that the second motion to recuse was erroneously denied on the basis of untimeliness. The order denying the motion does not state the reason for the denial, however. Indeed, at the conclusion of the hearing on the motion to recuse, the judge stated that he concluded not only that the motion was untimely but also that he would deny the motion "based on not finding any bias or prejudice . . . ." Appellant makes no argument and does not point us to any evidence demonstrating that the motion was erroneously denied because of lack of evidence of bias or prejudice. Accordingly, we cannot conclude the trial court abused its discretion in denying the motion on that basis. We resolve appellant's second issue against him.

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[1] Appellant contends the trial court erred in failing to refer his motion to recuse to the presiding judge of the administrative district as required by Rule 18a. *See* TEX. R. CIV. P. 18a. This complaint is not supported by the record The record clearly shows the motion was referred.

Appellant's third issue addresses the actions of the ad litem during the jury trial. Specifically, appellant contends the trial court erred in allowing the ad litem a full number of jury strikes and in permitting the ad litem to elicit evidence about appellant's alleged racial bias.[2] With respect to the jury strikes, appellant complains that the ad litem and appellee were aligned in interest and, therefore, both the ad litem and appellee should not have been allowed six peremptory challenges. Generally, each party to a civil action in district court is entitled to six peremptory challenges. *See* TEX. R. CIV. P. 233. In a case with multiple parties, any litigant may make a motion to equalize the number of challenges so that no litigant or side is given an unfair advantage as a result of the alignment of the parties. *See id.* In determining how the peremptory challenges are to be allocated, the court must consider any matter brought to its attention concerning the ends of justice and the elimination of an unfair advantage.

After the conclusion of voir dire examination and before the parties exercised their peremptory challenges, appellant timely moved that the strikes be equalized. *See In re M.N.G.*, 147 S.W.3d 521, 532 (Tex. App.-Fort Worth 2004, pet. denied). In arguing that the appellee and the ad litem were aligned, however, appellant merely stated that the ad litem had "essentially rendered his opinion with [appellee]." Appellant did not point to any statements, filings, or other actions by the ad litem that would demonstrate that his advocacy of the children's best interests was so aligned with

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[2] Appellant's statement of the third issue in his brief includes a general sub-issue questioning the extent of the ad litem's participation at trial. Appellant's arguments, however, are confined to the matters of the ad litem's jury strikes and his elicitation of evidence regarding prejudice. Our analysis is confined solely to the two specific matters argued by appellant.

appellee's interests in the litigation that allowing him a full number of peremptory challenges would result in an unfair advantage or defeat the ends of justice.

On appeal, appellant attempts to demonstrate that the ad litem and appellee were aligned by pointing to three pre-trial matters in which both the ad litem and appellee were opposed to appellant. The matters involved appellee's attempt to exclude evidence that the divorce decree was agreed, appellant's attempt to have the suit for modification dismissed, and appellant's motion for protective order relating to evidence of funds available to him. The fact that the ad litem's position on these three matters was consistent with appellee's does not demonstrate alignment of the parties.

The ad litem's position at trial was that the conservatorship arrangement under the 2002 decree was unworkable and should be changed. Until the day of trial, appellant also took the position that the conservatorship arrangement needed to be modified. The fact that the ad litem was advocating a change in the conservatorship arrangement, and did not want the suit dismissed or evidence to come before the jury that would imply the arrangement under earlier decree was acceptable, shows only that he believed a change was in the best interests of the children and does not necessarily indicate any alignment with appellee. Similarly, evidence of funds available to appellant, his financial status, and his honesty about his finances, are issues that are as important to the representing the children's best interests as appellee's.

Appellant also points to the fact that both the ad litem and appellee argued against appellant's objection to the ad litem participating at trial. Agreement on the proper role of the ad litem at trial does not indicate alignment on the issues

involved in the suit. After examining the record, we conclude there was nothing before the trial court at the time it made its ruling on the motion to equalize peremptory challenges that would indicate that the ad litem and appellee were aligned to the extent that allowing them each to exercise their normal allotment of six challenges would result in an unfair advantage to any party.[3]

Appellant's second complaint about the actions of the ad litem concerns the ad litem's questioning of one of the children at trial. The ad litem asked appellant's daughter about an incident involving appellant, and she testified that during a dinner her father, who she said had been drinking heavily, began making racial comments. Appellant objected and moved that the testimony be stricken. The trial court overruled the objection and denied appellant's later motion for a mistrial.

Appellant argues the trial court committed reversible error when it allowed the ad litem to "inject evidence of [appellant's] alleged racial prejudice." In support of this contention, appellant cites three cases for the proposition that "incurable, reversible error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity." *See Texas Employers' Ins. Assoc. v. Guerrero*, 800 S.W.2d 859, 866 (Tex. App.-San Antonio 1990, writ denied); *see also, Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 22 Tex. Sup. Ct. J. 394 (Tex. 1979); *Texas Employers' Ins. Assoc. v. Haywood*, 153 Tex.

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[3] Appellant additionally notes several other instances of conduct which he believes show that the ad litem and appellee were aligned in interest. This conduct occurred either during or after the trial, however, and could not have been considered by the trial judge at the time he made his ruling.

242, 266 S.W.2d 856 (Tex. 1954). In all three cases, however, the prejudice about which the court was concerned was the *jury's*, not the party's. It is forbidden for counsel to appeal to a jury's racial or ethnic prejudice when advocating for or against a party. *See Guerrero*, 800 S.W.2d at 866. Nothing in the cases cited by appellant suggests that evidence of a *party's* racial prejudice is inadmissible, particularly when the issue before the jury is that party's custody of children. We conclude appellant's arguments in support of his third issue are without merit and we resolve the issue against him.

In his fourth and final issue, appellant complains of the trial court's awards of attorney's fees to appellee and the ad litem. It is within the trial court's sound discretion to award reasonable attorney's fees in a suit affecting the parent-child relationship. *See* TEX. FAM. CODE ANN. § 106.002 (Vernon 2002). Appellant argues the trial court abused its discretion in awarding appellee her attorney's fees because she created the conditions under which the conservatorship arrangement set forth in the May 29, 2002 divorce decree became unworkable. Therefore, according to appellant, all the litigation costs were created by appellee's own actions. In making these arguments, appellant is simply attempting to reargue his position on the merits of appellee's petition to modify. Appellee prevailed on her motion to modify and we have concluded that appellant's challenges to that ruling are without merit. Appellant's contention that appellee should not have succeeded in her attempt to modify the conservatorship arrangement does not persuade us that the trial court abused its discretion in awarding her attorney's fees. *See Norris v. Norris*, 56 S.W.3d 333, 346 (Tex. App.-El Paso 2001, no pet.).

Appellant also argues the trial court was under the mistaken impression that it was required to award appellee her attorney's fees because the trial court's order states "because

the Petitioner, [appellee], was successful in the jury trial, she is entitled to a judgment for her attorney's fees . . ." It is certainly within the trial court's discretion to award a prevailing party attorney's fees based on the merits and success of their claims. Nothing in the trial court's order suggests that its award of attorney's fees was made as a result of perceived obligation rather than an exercise of discretion. Appellant does not challenge the evidence supporting the amount of the award. Accordingly, we conclude the trial court did not abuse its discretion in awarding appellee her attorney's fees.

Appellant's challenge to the trial court's award of fees to the ad litem is similar to his challenge to appellee's award of fees. Once again, appellant argues it was appellee's conduct that caused the parties to incur costs such as the ad litem fee. As stated above, appellant's attempt to reargue the merits of appellee's suit is misplaced. Appellant also argues the appointment of the ad litem was unnecessary because the trial court had already appointed a psychologist to determine the best interests of the children. The role of the psychologist and the role of the ad litem are very different, however. Additionally, appellant does not point to any evidence in the record showing that he objected to the appointment of the ad litem to represent the children. We resolve appellant's fourth issue against him.

We affirm the trial court's judgment.

JOSEPH B. MORRIS
JUSTICE

APPENDIX D

IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 254TH JUDICIAL DISTRICT

NO. 99-11284-R 3

[Filed December 29, 2003]

IN THE INTEREST OF)
)
REBEKAH CHRISTIAN STALEY,)
THOMAS CHRISTIAN STALEY,)
JOSEPH CHRISTIAN STALEY,)
and MERCY CHRISTIAN STALEY,)
MINOR CHILDREN)
)

ORDER IN SUIT TO MODIFY PARENT-CHILD RELATIONSHIP

On August 4, 2003 through August 8, 2003, came on to be heard the above entitled and numbered cause.

PAMELA S. STALEY, Petitioner, appeared in person and through her attorney of record, Nancy Gail Huggins, and announced ready for trial.

THOMAS C. STALEY, Respondent, appeared in person and by attorney of record, Brian Loughmiller and James Nygaard, and announced ready for trial.

Also appearing was Charles E. Miller Jr., appointed by the Court as Guardian ad Litem of the children the subject of this suit.

A jury having been previously demanded, a jury consisting of twelve good and lawful jurors was duly empaneled, and the case proceeded to trial.

At the conclusion of the evidence, the Court submitted the case to the jury on the single issue of where the children should reside. The jury returned a verdict, finding that the children should reside in ~~Decatur~~ Wise and Contiguous, Texas, and judgment was rendered on the verdict.

Thereafter, the case came to be heard on non-jury issues before the Sitting Judge of the Court on October 14, 2003, October 15, 2003, November 12, 2003, and November 19, 2003.

PAMELA S. STALEY, Petitioner, appeared in person and through attorney of record, Nancy Gail Huggins, and announced ready for trial.

THOMAS C. STALEY, Respondent, appeared in person and through attorney of record, Susan Barilich, and announced not ready for trial, filed a Motion for Continuance which the Court denied.

Also appearing was Charles E. Miller Jr., appointed by the Court as Guardian ad Litem for the children the subject of this suit.

Jurisdiction

The Court, after examining the record and the evidence and argument of counsel, finds that it has jurisdiction of this case and of all the parties it has continuing, exclusive jurisdiction over the children who are the subjects of this case. All persons entitled to citation were properly cited.

Record

The record of testimony was duly reported by Shantel Beheler, Court Reporter for the 254th District Court of Dallas County, Texas.

Children

The Court finds that the following children are the subject of this suit:

Name:	REBEKAH CHRISTIAN STALEY
Sex:	Female
Birthplace:	Dallas, Texas
Birthdate:	December 30, 1985
Present residence:	400 S. Trinity, Decatur, Texas 76234
Home state:	Texas

Name:	THOMAS CHRISTIAN STALEY
Sex:	Male
Birthplace:	Dallas, Texas
Birthdate:	September 2, 1987
Present residence:	400 S. Trinity, Decatur, Texas 76234
Home state:	Texas

Name:	JOSEPH CHRISTIAN STALEY
Sex:	Male
Birthplace:	Dallas, Texas
Birthdate:	May 8, 1989
Present residence:	400 S. Trinity, Decatur, Texas 76234
Home state:	Texas

Name:	MERCY CHRISTIAN STALEY
Sex:	Female
Birthplace:	Dallas, Texas
Birthdate:	September 27, 1991
Present residence:	400 S. Trinity, Decatur, Texas 76234
Home state:	Texas

Findings

The Court finds that there has been a material and substantial change in circumstances in regard to the possession and/or rights, duties and powers of the parent Joint Managing Conservators, and as to the child support. The Court further finds, based on the testimony, that the possession schedule has become unworkable under the current conditions, and therefore makes the following modification.

Rights and Duties of Parent Joint Managing Conservators

IT IS ORDERED that, at all times PAMELA S. STALEY and THOMAS C. STALEY, as parent Joint Managing Conservators, shall each have the following **rights and duties**:

1. the **right** to receive information from the other parent concerning the health, education, and welfare of the children;

2. the **duty** to inform the other parent in a timely manner of significant information concerning the health, education, and welfare of the children;

3. the **right** to confer with the other parent to the extent possible before making an important decision concerning the health, education, and welfare of the children;

4. the **right** of access to medical, dental, psychological, and educational records of the children;

5. the **right** to consult with all physicians, dentists, or psychologists of the children;

6. the **right** to consult with school officials concerning the children's welfare and educational status, including school activities;

7. the **right** to attend school activities;

8. the **right** to be designated on the children's records as a person to be notified in case of an emergency;

9. the **right** to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and

10. the **duty** to name the other parent Joint Managing Conservator on any of the children's medical or educational forms which require both parents or parent to be notified in case of an emergency;

11. the **right** to manage the estates of the children to the extent the estates have been created by the parent or the parent's family.

IT IS ORDERED that, during their respective periods of possession; PAMELA S. STALEY and THOMAS C. STALEY, as parent Joint Managing Conservators, shall each have the following **rights and duties**;

1. the **duty** of care, control, protection, and reasonable discipline of the children;

2. the **duty** to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

3. the **right** to direct the moral and religious training of the children; and

4. the **right** to consent for the children to medical, dental, and surgical treatment during an emergency involving immediate danger to the health and safety of the children;

IT IS ORDERED that PAMELA S. STALEY, as a parent Joint Managing Conservator, shall have the following **rights and duties**:

1. the **exclusive right** to establish the primary residence of the children in Wise or Contiguous Counties, Texas;

2. the **duty** of care, control, protection, and reasonable discipline of the children;

3. the **duty** to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

4. the **right** to direct the moral and religious training of the children; and

5. the exclusive **right** to consent to medical, dental, and surgical treatment involving invasive procedures and to consent to psychiatric and psychological treatment of the children;

6. the exclusive **right** to receive and give receipt for periodic payments for the support of the children and to hold or disburse these funds for the benefit of the children;

7. the **right** to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

8. the **right** to consent to marriage and to enlistment in the armed forces of the United States;

9. the exclusive **right** to make all decisions concerning the children's education;

10. ~~The **right** to the services and earnings of the children~~;

11. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the **right** to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government; and

12. ~~The **duty** to manage the estates of the children to the extent the estates have been created by community property or the joint property of the parents~~.

IT IS ORDERED that THOMAS C. STALEY, as a parent Joint Managing Conservator, shall have the following **rights and duty**:

1. the **right** to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

2. the **right** to consent to marriage and to enlistment in the armed forces of the United States;

3. the **right** to obtain, at his sole cost and expense, all medical, dental, surgical, psychiatric and psychological, and educational records of the children without the need to contact the other parent Joint Managing Conservator for her approval.

4. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the **right** to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government; and

~~5. The **duty** to manage the estates of the children to the extent the estates have been created by community property or the joint property of the parents.~~

<u>Possession Order</u>

The Court finds that the following provisions of this Possession Order are intended to and do comply with the requirements of Texas Family Code. IT IS ORDERED AND DECREED that the parent Joint Managing Conservators are ORDERED to comply with all terms and conditions of this Possession Order. IT IS ORDERED AND DECREED that this Possession Order is effective immediately and applies to all periods of possession occurring on or after the rendition of this Possession Order. IT IS, THEREFORE, ORDERED AND DECREED:

(a) <u>Definitions</u>

1. In this Possession Order "school" means the primary or secondary school in which a child is enrolled in the Decatur public school district where the children primarily reside.

2. In this Possession Order "child" includes each child who is a subject of this suit, whether one or more.

(b) <u>Specified Terms for Possession</u>

IT IS ORDERED AND DECREED that parent Joint Managing Conservator, THOMAS C. STALEY, shall have possession of the children under the specified terms set out in this Possession Order, commencing ~~November 20, 2003~~ December 18, 2003.

(c) <u>Parents Who Reside 100 Miles or Less Apart</u>

Except as otherwise explicitly provided in this Possession Order, parent Joint Managing Conservator, THOMAS C.

STALEY, shall have the right to possession of the children as follows:

1. Weekends—On weekends, beginning at the time the child's school is regularly dismissed, if school is in session, or if school is not in session, beginning at 5:00 p.m., on the first, third, and fifth Thursday of each month, and ending at 8:30 a.m. on Monday or the time the child's school resumes after the weekend.

2. Weekend Possession Extended by a Holiday---Except as otherwise explicitly provided in this Possession Order, if a weekend period of possession by THOMAS C. STALEY begins on a Thursday that is a school holiday during the regular school term or a federal, state, or local holiday during the summer months when school is not in session, or if the period ends on or is immediately followed by a Monday that is such a holiday, that weekend period of possession shall begin at the time the children's schools are regularly dismissed on the Wednesday immediately preceding the Thursday holiday or school holiday and shall end at the time school resumes after that school holiday if school is in session, or shall end at 6:00 p.m. on the following Monday if school is not in session, as applicable.

The following provisions govern possession of the children for vacations and certain specific holidays, and supersede conflicting weekend periods of possession. Joint Managing Conservator, THOMAS C. STALEY, shall have possession of the children as follows:

1. Christmas Holidays in Even-Numbered Years — In even-numbered years, beginning at the time the child's

school is regularly dismissed on the day the children are dismissed from school for the Christmas school vacation and ending at noon on December 26.

2. Christmas Holidays in Odd-Numbered Years — In odd-numbered years, beginning at noon on December 26 and ending at 6:00 p.m. on the day before schools resume after that Christmas school vacation.

3. Thanksgiving in Odd-Numbered Years — In odd-numbered years, beginning at the time the children's schools are regularly dismissed on the day the children are dismissed from school for the Thanksgiving holiday and ending at 6:00 p.m. on the following Sunday after that Thanksgiving holiday.

4. Spring Break in Even-Numbered Years — In even-numbered years, beginning at the time the children's schools are regularly dismissed on the day the children are dismissed from school for the school's spring vacation and ending at the time school resumes after that vacation.

5. Extended Summer Possession by parent Joint Managing Conservator, THOMAS C. STALEY —

Parent Joint Managing Conservator, THOMAS C. STALEY, shall have extended summer possession of the children beginning at 5:00 p.m. on the third Sunday in June of each year, and ending at 5:00 p.m. on the first Sunday in August of each year.

6. ~~Children's Birthdays – If parent Joint Managing Conservator, THOMAS C. STALEY, is not otherwise entitled under this Possession Order to present~~

~~possession of each child on that child's birthday, parent Joint Managing Conservator, THOMAS C. STALEY, shall have possession of each child on that child's birthday, beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that THOMAS C. STALEY picks up that child from PAMELA S. STALEY's residence and returns that child to that same place, if applicable~~.

7. ~~Father's Day Weekend – Each year, beginning at 6:00 p.m., on the Father's day, provided that if parent Joint Managing Conservator, THOMAS C. STALEY, is not otherwise entitled under this Possession Order to present possession of the children, he shall pick up the children from parent Joint Managing Conservator, PAMELA S. STALEY's residence and return the children to that same place, if applicable~~.

Notwithstanding the weekend periods of possession ORDERED for parent Joint Managing Conservator, PAMELA S. STALEY, it is explicitly ORDERED that parent Joint Managing Conservator, PAMELA S. STALEY, shall have possession of the children as follows:

1. Christmas Holidays in Odd-Numbered Years — In odd-numbered years, beginning at the time school is dismissed for the Christmas school vacation and ending at noon on December 26.

2. Christmas Holidays in Even-Numbered Years—In even-numbered years, beginning at 12:00 noon on December 26, and ending at 6:00 p.m. on the day before school resumes after that Christmas school vacation.

3. Thanksgiving in Even-Numbered Years — In even-numbered years, beginning at the time the children's schools resume after the Thanksgiving holiday.

4. Spring Break in Odd-Numbered Years — In odd-numbered years, beginning at the time school is dismissed for the school's spring vacation, and ending at 6:00 p.m. on the day before school resumes after that vacation.

5. Summer Weekend Possession by Parent Joint Managing Conservator, PAMELA S. STALEY — If parent Joint Managing Conservator, PAMELA S. STALEY, gives parent Joint Managing Conservator, THOMAS C. STALEY, written notice forwarded personally to Parent Joint Managing Conservator, THOMAS C. STALEY, by certified mail, return receipt requested, before May 1 of a year, parent Joint Managing Conservator, PAMELA S. STALEY, shall have possession of the children on two weekends, beginning at 5:00 p.m. on Friday, and ending at 8:00 p.m. on the following Sunday during the extended summer possession by parent Joint Managing Conservator, THOMAS C. STALEY, in that year, provided that parent Joint Managing Conservator, PAMELA S. STALEY, picks up the children from parent Joint Managing Conservator, THOMAS C. STALEY's residence, and returns the children to that same place. Failure to forward written notice, by certified mail, return receipt requested, to parent Joint Managing Conservator, THOMAS C. STALEY, before May 1 of each year, will waive parent Joint Managing Conservator, PAMELA S. STALEY's right to have possession of the children on any two weekends during the extended summer possession by

parent Joint Managing Conservator, THOMAS C. STALEY, in that year. Mother may not elect the Father's Day Weekend period.

6. ~~Children's Birthdays – If parent Joint Managing Conservator, PAMELA S. STALEY, is not otherwise entitled under this Possession Order to present possession of each child on that child's birthday, parent Joint Managing Conservator, PAMELA S. STAELY, shall have possession of each child on that child's birthday, beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that PAMELA S. STALEY picks up that child from THOMAS C. STALEY's residence and returns that child to that same place, if applicable~~.

7. ~~Mother's Day Weekend – Each year, beginning at 6:00 p.m. on the Friday preceding Mother's day, and ending at 6:00 p.m. on Mother's Day, provided that if parent Joint Managing Conservator, PAMELA S. STALEY, is not otherwise entitled under this Possession Order to present possession of the children, she shall pick up the children from parent Joint Managing Conservator, THOMAS C. STALEY's residence and return the children to that same place, if applicable~~.

ORDERED that the Terms & Conditions of Possession may be modified by the parties only upon written agreement.

IT IS ORDERED that Parent Joint Managing Conservator, PAMELA S. STALEY, shall have the right of possession of the children at all other times not specifically designated in this Possession Order for parent Joint Managing Conservator, THOMAS C. STALEY.

~~IT IS FURTHER ORDERED that Joint Managing Conservator, PAMELA S. STALEY, shall have the **sole right** to make all educational and medical decisions regarding the children~~.

IT IS FURTHER ORDERED that neither parent Joint Managing Conservator shall schedule any event if it will conflict with any period of possession of a child or children by the other parent Joint Managing Conservator with the exception of any school event, any school-sponsored event, or any summer select baseball or softball program by either or any of the children.

In an attempt to minimize disruption of the children's education, daily routine, extracurricular events, and association with friends, both parent Joint Managing Conservators are ORDERED, at all times, to consult with the children and to take into consideration the wishes and desires of the parties' minor children.

<u>Telephone Access to Children</u>

The Court finds that telephone access has been an issue in the past in this case, therefore, the following orders shall be effective immediately for the benefit and welfare of the children.

IT IS ORDERED that the children are to have reasonable unlimited access to each parent by telephone, however, it is further ORDERED that no parent shall have any right to install a telephone in the other parent Joint Managing Conservator's home.

IT IS FURTHER ORDERED that either parent Joint Managing Conservator may provide a mobile phone to any

child of the parties for that child's use, but the parent Joint Managing Conservator providing a mobile phone to a child shall incur the entire cost of such mobile phone.

Child Support

In accordance with Texas Family Code section 154.130, the Court makes the following findings and conclusions regarding the child-support order made in Open Court in this case:

1. the application of the guidelines in this case would be unjust or inappropriate inasmuch as the Court finds that the Respondent, THOMAS C. STALEY, has free use and benefit of a residence and continues to have personal use of other items provided for his benefit, and therefore those benefits are considered, under the statutes, to be derived income.

2. The Court further finds that Respondent, THOMAS C. STALEY, is under-employed based on past ability to work for the entities which he has managed. Based on the Respondent's lifestyle, as demonstrated before the Court by the evidence, the Court finds that Respondent's net monthly resources are in excess of $6,000.00 per month, and that there are also expenses that are incurred for the children, which include ~~the trust expenses, and others~~ reimbursements by the trust which would normally be paid by a parent. ~~and which are reimbursable to Respondent~~. The child support award is based on 35% of $6,000.00.

3. the amount of net resources available to PAMELA S. STALEY are $2,133.60 per month; and

4. the number of children before the Court is four (4).

IT IS ORDERED that THOMAS C. STALEY is obligated to pay and shall pay to PAMELA S. STALEY child support of $2,100.00 per month, for four (4) children, with the first payment being due and payable on December 1, 2003, and a like payment being due and payable on the 1st day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified below:

1. any child reaches the age of 18 years, provided that, if a child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma or enrolled in courses for joint high school and junior college credit pursuant to section 130.008 of the Texas Education Code, the periodic child-support payments shall continue to be due and paid until the end of the month in which a child graduates from high school;

2. any child marries;

3. any child dies;

4. any child's disabilities are otherwise removed for general purposes; or

5. further order modifying this child support.

Thereafter, THOMAS C. STALEY is ORDERED to pay to PAMELA S. STALEY child support for three (3) children of $1,800.00 per month, due and payable on the 1st day of the first month immediately following the date of the earliest occurrence of one of the events specified in items 1. through 4. above and a like sum of $1,800.00 due and payable on the

1st day of each month thereafter until the next occurrence of one of the events specified above.

Thereafter, THOMAS C. STALEY is ORDERED to pay to PAMELA S. STALEY child support for two (2) children of $1,500.00 per month, due and payable on the 1st day of the first month immediately following the date of the earliest occurrence of one of the events specified in items 1. through 4. above and a like sum of $1,500.00 due and payable on the 1st day of each month thereafter until the next occurrence of one of the events specified above.

Thereafter, THOMAS C. STALEY is ORDERED to pay to PAMELA S. STALEY child support for one (1) child of $1,200.00 per month, due and payable on the 1st day of the first month immediately following the date of the earliest occurrence of one of the events specified in items 1. Through 4. Above and a like some of $1,200.00 due and payable on the 1st day of each month thereafter until the next occurrence of one of the events specified above.

IT IS ORDERED that all payments shall be made through the Texas Child Support Disbursement Unit at P.O. Box 659791, San Antonio, Texas, 78265-9791, and thereafter promptly remitted to PAMELA S. STALEY for the support of the children.

IT IS FURTHER ORDERED that the Dallas County Child Support Office shall monitor the child support account, and it is further ORDERED that THOMAS C. STALEY shall pay a $36.00 monitoring fee, payable to the Dallas County Child Support Office, 600 Commerce Street, Suite 128, Dallas, Texas 75202-6632, each year so long as child support is required to be paid as provided above.

~~IT IS ORDERED that periodic payments of child support shall not be discharged in any bankruptcy proceedings~~.

On this date the Court authorized the issuance of an "employer's Order to Withhold From Earnings for Child Support."

All payments of child support shall be identified with Obligor, THOMAS C. STALEY's name; Obligee, PAMELA S. STALEY' name, cause number, and the date on which the withholding occurred.

IT IS FURTHER ORDERED that THOMAS C. STALEY shall notify this Court and PAMELA S. STALEY by U.S. certified mail, return receipt requested, of any change of address and of any termination of employment. This notice shall be given no later than seven (7) days after the change of address or the termination of employment. This notice or a subsequent notice shall also provide the current address of THOMAS C. STALEY and the name and address of his current employer, whenever that information becomes available.

IT IS ORDERED that, on the request of a prosecuting attorney, the attorney general, the friend of the court, or PAMELA S. STALEY, the Clerk of this Court shall cause a certified copy of the "Employer's Order to Withhold From Earnings for Child Support" to be delivered to any employer. IT IS FURTHER ORDERED that the Clerk of this Court shall attach a copy of subchapter C of chapter 158 of the Texas Family Code for the information of any employer.

Health Insurance

IT IS ORDERED that medical support in the form of health insurance shall be provided for the children as follows:

1. THOMAS C. STALEY's Responsibility — It is the intent and purpose of this order that THOMAS C. STALEY shall, at all times, provide medical support for the children. IT IS THEREFORE ORDERED that, as additional child support, THOMAS C. STALEY shall provide medical support in the form of health insurance for the parties' children, for as long as child support is payable under the terms of this Order, as set out herein.

2. Definition — "Health insurance" means insurance coverage that provides basic health-care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services, and may be provided in the form of an indemnity insurance contract or plan, a preferred provider organization or plan, a health maintenance organization, or any combination thereof.

3. Insurance through THOMAS C. STALEY's Employment, Union, Trade Association, or Other Organization — The Court finds that the children are currently enrolled as beneficiaries of a health insurance plan provided by THOMAS C. STALEY. IT IS ORDERED that THOMAS C. STALEY shall, at his sole cost and expense, keep and maintain at all times in full force and effect the health insurance coverage that insures the parties' children. THOMAS C. STALEY is ORDERED to provide verification of the purchase of the insurance to PAMELA S.

STALEY at her last known address, including the insurance certificate number and the plan summary, no later than fourteen (14) days following the issuance of the policy.

4. Claim Forms — Except as provided in paragraph 6. below, the party who is not carrying the health insurance policy covering the children is ORDERED to submit to the party carrying the policy, within ten (10) days of receiving them, any and all forms, receipts, bills, and statements reflecting the health-care expenses the party not carrying the policy incurs on behalf of the children. All documents shall be transmitted in legible form.

   The party who is carrying the health insurance policy covering the children is ORDERED to submit all forms required by the insurance company for payment or reimbursement of health-care expenses incurred by either party on behalf of the children to the insurance carrier within ten (10) days of that party's receiving any form, receipt, bill, or statement reflecting the expenses. All documents shall be transmitted in legible form.

5. Constructive Trust for Payments Received — IT IS ORDERED that any insurance payments received by the party carrying the health insurance policy covering the children from the health insurance carrier as reimbursement for health-care expenses incurred by or on behalf of the children shall belong to the party who incurred and paid those expenses. IT IS FURTHER ORDERED that the party carrying the policy is designated a constructive trustee to receive any insurance checks or payments for health-care expenses

incurred and paid by the other party, and the party carrying the policy shall endorse and forward the checks or payments, along with any explanation of benefits received, to the other party within three (3) business days of receiving them.

6. Filing by Party Not Carrying Insurance — In accordance with article 3.51-13 of the Texas Insurance Code, IT IS ORDERED that the party who is not carrying the health insurance policy covering the children may, at that party's option, file directly with the insurance carrier with whom coverage is provided for the benefit of the children any claims for health-care expenses, including but not limited to medical, hospitalization, and dental costs.

7. Secondary Coverage — IT IS ORDERED that nothing in this Order shall prevent either party from providing secondary health insurance coverage for the children at that party's sole cost and expense. IT IS FURTHER ORDERED that if a party provides secondary health insurance coverage for the children, both parties shall cooperate fully with regard to the handling and filing of claims with the insurance carrier providing the coverage in order to maximize the benefits available to the children and to ensure that the party who pays for health-care expenses for the children is reimbursed for the payment from both carriers to the fullest extent possible.

8. Compliance with Insurance Company Requirements — Each party is ORDERED to conform to all requirements imposed by the terms and conditions of the policy of health insurance covering the children in order to assure maximum reimbursement or direct

payment by the insurance company of the incurred health-care expense, including but not limited to requirements for advance notice to carrier, second opinions, and the like. Each party is ORDERED to attempt to use "preferred providers," or services within the health maintenance organization, if applicable; however, this provision shall not apply if emergency care is required. Disallowance of the bill by a health insurer shall not excuse the obligation of THOMAS C. STALEY to make payment, unless THOMAS C. STALEY follows the procedure to contest payment set forth in paragraph 12, page 22 herein, however, if a bill is disallowed or the benefit reduced due to the failure of a party to follow procedures or requirements of the carrier, that party shall be wholly responsible for the increased portion of that bill.

If health insurance coverage for the children is provided through a health maintenance organization (HMO) or preferred provider organization (PPO), the parties are ORDERED to use health-care providers who are employed by the HMO or approved by the PPO whenever feasible. If health-care expenses are incurred by using that HMO or PPO plan, THOMAS C. STALEY is ORDERED to pay one hundred (100%) percent of all reasonable and necessary health-care expenses not paid by insurance and incurred by or on behalf of the parties' children, including, without limitation, any co-payments for office visits or prescription drugs, the yearly deductible, if any, and medical, surgical, prescription drug, mental health-care services, dental, eye care, ophthalmological, and orthodontic charges, for as long as child support is payable under the terms of this order.

If the children are enrolled in a health-care plan that is not an HMO or a PPO, THOMAS C. STALEY is ORDERED to pay one hundred (100%) percent of all reasonable and necessary health-care expenses not paid by insurance and incurred by or on behalf of the parties' children, including, without limitation, the yearly deductible, if any, and medical, surgical, prescription drug, mental health-care services, dental, eye care, ophthalmological, and orthodontic charges, for as long as child support is payable under the terms of this Order.

9. Payment of Uninsured Expenses — IT IS ORDERED that the party who pays for a health-care expense on behalf of the children shall submit to the other party, within ten (10) days of receiving them, all forms, receipts, bills, and explanations of benefits paid reflecting the uninsured portion of the health-care expenses the paying party incurs on behalf of the children.

10. Exclusions — The provisions above concerning uninsured expenses shall not be interpreted to include expenses for travel to and from the health-care provider or nonprescription medication.

11. Reasonableness of Charges — ~~IT IS ORDERED that PAMELA S. STALEY shall have the right to determine reasonableness and necessity of the charges for health-care expenses and such~~ that the reasonableness of the charges shall be presumed on presentation of the bill to a party and that disallowance of the bill by a health insurer shall not excuse THOMAS C. STALEY's obligation to

make payment or reimbursement as otherwise provided herein in paragraph 12 page 22 herein.

12. Second Opinions --- IT IS ORDERED that THOMAS C. STALEY shall have the right to obtain a second opinion, at his sole cost and expense, regarding the necessity for health-care for the parties' minor children. IT IS FURTHER ORDERED that in the event THOMAS C. STALEY obtains a second opinion, in writing, from a doctor, dentist or other health-care or mental health professional, stating there is no meaningful benefit to the child for the treatment proposed by PAMELA S. STALEY or incurred by PAMELA S. STALEY, then the presumption of the necessity shall be entitled to be rebutted; otherwise, the presumption of the necessity shall hold.

13. Information Required — IT IS ORDERED that a party providing health insurance shall furnish to the other party the following information no later than the thirtieth (30th) day after the date the notice of the rendition of this Order is received:

(a) the Social Security number of the party providing insurance;

(b) the name and address of the employer of the party providing insurance;

(c) whether the employer is self-insured or has health insurance available;

(d) proof that health insurance has been provided for the children; and

(e) the name of the health insurance carrier, the number of the policy, a copy of the policy and schedule of benefits, a health insurance membership card, claim forms, and any other information necessary to submit a claim or, if the employer is self-insured, a copy of the schedule of benefits, a membership card, claim forms, and any other information necessary to submit a claim.

IT IS FURTHER ORDERED that any party carrying health insurance on the children shall furnish to the other party a copy of any renewals or changes to the policy no later than the fifteenth (15th) day after the renewal or change is received.

IT IS FURTHER ORDERED that a party providing health insurance shall provide to the other party any additional information regarding health insurance coverage that becomes available to the party providing insurance. IT IS FURTHER ORDERED that the information shall be provided no later than the fifteenth (15th) day after the date the information is received.

14. Termination or Lapse of Insurance — If the health insurance coverage for the children lapses or terminates, the party who is providing the insurance is ORDERED to notify the other party no later than the fifteenth (15th) day after the date of termination or lapse. If additional health insurance is available or becomes available to THOMAS C. STALEY for the children, THOMAS C. STALEY must notify PAMELA S. STALEY no later than the fifteenth (15th) day after the date the insurance becomes available.

THOMAS C. STALEY must enroll the children in a health insurance plan at the next available enrollment period.

15. Place of Transmittal — IT IS ORDERED that all bills, invoices, statements, claims, explanations of benefits, insurance policies, medical insurance identification cards, other documents, and written notices, as well as payments, required to be transmitted by one party to the other under the health-care coverage and health insurance provisions of this order shall be transmitted by the sending party to the ~~residence~~ address of the receiving party as stated on page 26 herein.

16. WARNING — A PARENT ORDERED TO PROVIDE HEALTH INSURANCE WHO FAILS TO DO SO IS LIABLE FOR NECESSARY MEDICAL EXPENSES OF THE CHILDREN, WITHOUT REGARD TO WHETHER THE EXPENSES WOULD HAVE BEEN PAID IF HEALTH INSURANCE HAD BEEN PROVIDED.

IT IS ORDERED that the child support as prescribed in this Order shall be exclusively discharged in the manner ordered and that any direct payments made by THOMAS C. STALEY to PAMELA S. STALEY or any expenditures incurred by THOMAS C. STALEY during his periods of possession of or access to the children, as prescribed in this Order, for food, clothing, gifts, travel, shelter, or entertainment are in addition to and not in lieu of the support ordered in this Order.

IT IS ORDERED that the provisions for child support in this order shall be an obligation of the estate of THOMAS C. STALEY and shall not terminate on the death of THOMAS C. STALEY. Payments received for the benefit of the children from the Social Security Administration, Department of Veterans Affairs, other government agency, or life insurance shall be a credit against this obligation.

Medical Notification

Each party is ORDERED to inform the other party within eight (8) hours of any medical condition of the parties' children requiring surgical intervention, hospitalization, or both.

Educational Expenses of the Children

IT IS ORDERED that ~~THOMAS C. STALEY shall pay, as additional child support~~, the educational expenses of the children. Shall be paid in accordance with the Decree of divorce with the exception of the private school tuition. ~~to those expenses incurred in the purchase of books and supplies used in the children's coursework, the purchase of required school uniforms, if any, worn daily by the children, school lunches, and expenses associated with school events or athletics~~.

Required Information

The information required for each party by section 105.006(a) of the Texas Family Code is a follows:

Name:	**PAMELA S. STALEY**
Social Security number:	463-90-5585
Driver's license number and issuing state:	07106559 - Texas
Current residence address:	400 S. Trinity, Decatur, TX 76234
Mailing address:	Same as above
Home telephone number:	(940) 627-3744
Name of employer:	Grandeur Design
Address of employment:	1845 FM 51 South, Decatur, TX
Work telephone number:	(940) 627-6278

Name:	**THOMAS C. STALEY**
Social Security number:	446-02-1772
Driver's license number and issuing state:	07035385- Texas
Current residence address:	FM 544, Celina, TX
Mailing address:	P.O. Box 1209, Frisco, TX 75034
Home telephone number:	(972) 382-4318
Name of employer:	Self Employed
Address of employment:	
Work telephone number:	(972) 335-5899

Name:	**REBEKAH CHRISTIAN STALEY**
Social Security number:	631-74-2125
Driver's license number and issuing state:	19981927
Current residence address:	400 S. Trinity, Decatur, TX 76234
Mailing address:	Same as above
Home telephone number:	(940) 627-3744

Name:	**THOMAS CHRISTIAN STALEY**
Social Security number:	631-74-2118
Current residence address:	400 S. Trinity, Decatur, TX 76234
Mailing address:	Same as above
Home telephone number:	(940) 627-3744

Name:	**JOSEPH CHRISTIAN STALEY**
Social Security number:	634-14-9584
Current residence address:	400 S. Trinity, Decatur, TX 76234
Mailing address:	Same as above
Home telephone number:	(940) 627-3744

Name:	**MERCY CHRISTIAN STALEY**
Social Security number:	631-74-0479
Current residence address:	400 S. Trinity, Decatur, TX 76234
Mailing address:	Same as above
Home telephone number:	(940) 627-3744

Required Notices

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVERS LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED

CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND STATE CASE REGISTRY CONTINUES AS LONG ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the

clerk. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Central File Maintenance, P.O. Box 12048, Austin, Texas 78711-2048.

Warnings

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

Attorney's Fees

The Court further finds that because the Petitioner, PAMELA S. STALEY, was successful in the jury trial, she is entitled to a judgment for her attorney's fees, and that a fair and reasonable fee is $96,652.80. The Court grants judgment to PAMELA S. STALEY in the amount of $96,652.80 for the use and benefit of Nancy Gail Huggins.

~~The purpose of the attorney fee award made herein is to supplement the child support awarded to PAMELA S. STALEY herein by freeing her from the obligation to pay her attorney and allowing her to devote all of her available resources to the support of the minor children. It is, therefore, ORDERED that the obligation to pay attorney's fees constitutes child support for the benefit of PAMELA S. STALEY and the minor children. It is FURTHER ORDERED that the attorney's fees awarded shall not be dischargeable in any bankruptcy proceeding~~.

IT IS ORDERED that good cause exists and the Court awards PAMELA S. STALEY a judgment of $96,652.80 for the reasonable and necessary legal services rendered by Nancy Gail Huggins through the trial of the case. Said judgment shall bear interest at the rate of ~~ten (10%~~) 5% percent per year compounded annually from the date of rendition until paid. The judgment, for which let execution issue, is awarded against THOMAS C. STALEY, Respondent.

IT IS ORDERED that Nancy Gail Huggins may enforce the judgment in her own name.

IT IS FURTHER ORDERED that PAMELA S. STALEY shall recover from THOMAS C. STALEY her reasonable and necessary attorney's fees should she prevail and she is

awarded a judgment in the additional sum of $25,000.00 in the event of an appeal to the Court of Appeals; and she is awarded a judgment in the additional sum of $10,000.00 for application to the Supreme Court and, she is awarded a judgment in the additional sum of $7,500.00 if the application is granted.

The Court further finds that the Guardian ad Litem's fees are reasonable and necessary, and sets those reasonable and necessary fees at $58,269.00.

IT IS ORDERED that CHARLES E. MILLER JR. is awarded the sum of $58,269.00 as attorney's fees for legal services rendered as Guardian ad Litem.

The Court further finds that there have been previous payments to the Guardian ad Litem under Court order but there remains outstanding temporary interim fees ~~as follows~~. The Court further finds there are temporary interim ad litem fees due and owing to CHARLES E. MILLER JR. from PAMELA S. STALEY, Petitioner, in the amount of $4,500.00, and CHARLES E. MILLER JR. is awarded a judgment against PAMELA S. STALEY in that amount for temporary interim ad litem fees to CHARLES E. MILLER JR. The Court further finds there are temporary interim ad litem fees due and owing to CHARLES E. MILLER JR. from THOMAS C. STALEY, Respondent, in the amount of $9,550.00, and CHARLES E. MILLER JR. is awarded a judgment against THOMAS C. STALEY in that amount for interim ad litem fees to CHARLES E. MILLER JR.

The Court further finds that there remains to be paid to the Guardian ad Litem, CHARLES E. MILLER JR. the sum of $28,269.00 from PAMELA S. STALEY and THOMAS C. STALEY, and the Court hereby awards CHARLES E.

MILLER JR. a judgment in the amount of $28,269.00 against PAMELA S. STALEY and THOMAS C. STALEY, jointly and severally. The judgment shall bear interest at the rate of ~~ten (10%)~~ 5% percent per year compounded annually from the date of judgment, for which let execution issue. The Court FURTHER ORDERS that THOMAS C. STALEY shall indemnify and hold PAMELA S. STALEY harmless for any money PAMELA S. STALEY is ~~ordered~~ required to pay on said judgment.

The Court further finds that the Guardian ad Litem, CHARLES E. MILLER JR. is entitled to additional reasonable and necessary fees if this case be appealed by either party.

IT IS FURTHER ORDERED that CHARLES E. MILLER JR. shall recover from THOMAS C. STALEY and PAMELA S. STALEY, jointly and severally, should the guardian prevail, his reasonable and necessary attorney's fees and he is awarded a judgment in the additional sum of $17,500.00 in the event of an appeal to the Court of Appeals; a judgment in the additional sum of $7,500.00 for application to the Supreme Court and, if the application is granted, a judgment in the additional sum of $5,000.00.

These judgments shall bear interest at the rate of ~~ten (10%)~~ 5% percent per year compounded annually from the date of judgment, for which let execution issue.

The Court FURTHER ORDERS that THOMAS C. STALEY shall indemnify and hold PAMELA S. STALEY harmless for any money PAMELA S. STALEY is ~~ordered~~ required to pay on said above judgments.

~~IT IS ORDERED AND DECREED that all of the terms and provisions of this Order, including child support imposed by this Order, shall not be suspended during any appeal, and shall be in full force and effect~~.

<u>Relief Not Granted</u>

IT IS ORDERED that all relief requested in this case and not expressly granted is denied. All other terms of the ~~prior orders~~ Decree of Divorce not specifically modified in this Order shall remain in full force and effect.

<u>Date of Order</u>

This order judicially PRONOUNCED AND RENDERED in Court at Dallas, Dallas County, Texas, on November 19, 2003, and further noted on the court's docket sheet on the same date, but signed on December 29, 2003.

/s/ ____________________________
Judge Presiding

APPROVED FOR ENTRY AS TO FORM AND SUBSTANCE:

____
PAMELA S. STALEY, Petitioner

____
THOMAS C. STALEY, Respondent

APPROVED AS TO FORM ONLY:

____

NANCY GAIL HUGGINS, Attorney for Petitioner
SBN 10201500
10830 N. Central Expressway, Suite 130
Dallas, Texas 75231
(214) 739-0275 - Phone
(214) 739-5397 - Fax

____

SUSAN BARILICH, Attorney for Respondent
Godwin Gruber, LLP
SBN 01738450
1201 Elm Street, Suite 1700
Dallas, Texas 75270
(214) 939-4400 - Phone
(214) 760-7332 - Fax

____

CHARLES E. MILLER JR., Guardian ad Litem
SBN 14127600
18601 LBJ Freeway, Suite 705
Mesquite, Texas 75150
(972) 681-3272 - Phone
(972) 681-1069 - Fax

APPENDIX E

IN THE DISTRICT COURT
254TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Case No. 99-11284-R

[Filed August 8, 2003]

IN THE INTERESTS OF)
REBEKAH CHRISTIAN STALEY,)
THOMAS CHRISTIAN STALEY,)
JOSEPH CHRISTIAN STALEY AND)
MERCY CHRISTIAN STALEY,)
Minor Children.)

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions

which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the court, that is, what you have seen and heard in this courtroom, together with the law given you by the court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys, and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other means. Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless you are otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No."

The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever

a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless you are otherwise instructed.

The best interest of the children shall always be the primary consideration in determining questions of the children.

You will need to consider the qualifications of the parent without regard to the sex of the party or the child or their marital status in determining whether to designate a conservator as the primary custodial parent, or designate a geographical area of residence.

The public policy of this state is to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of a child; provide a safe, stable, and nonviolent environment for a child; and encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

The present order designates neither parent conservator as the conservator who has the exclusive right to determine the primary residence of REBEKAH CHRISTIAN STALEY, THOMAS CHRISTIAN STALEY, JOSEPH CHRISTIAN STALEY and MERCY CHRISTIAN STALEY.

You are instructed that for the decree of divorce signed May 29, 2002 to be modified regarding the residence of the children, it must be proved that:

1. The circumstances of the children or of PAMELA S. STALEY or THOMAS C. STALEY have materially and substantially changed since May 29, 2002; and

2. The appointment of PAMELA S. STALEY as the conservator who has the exclusive right to determine the primary residence of the children would be in the best interest of the children.

Question No. 1

Should the present order to appoint PAMELA S. STALEY as the conservator who has exclusive right to determine the primary residence of the children in Wise County and contiguous counties?

Answer "Yes" or "No" as to each child:

REBEKAH CHRISTIAN STALEY	YES
THOMAS CHRISTIAN STALEY	YES
JOSEPH CHRISTIAN STALEY	YES
MERCY CHRISTIAN STALEY	YES

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked. It is the duty of the presiding juror:

1. To preside during your deliberations,

2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,

3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,

4. To vote on the questions,

5. To write your answers to the questions in the spaces provided, and

6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should any-one attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ __________________________
JUDGE JEFFERY V. COEN

Certificate

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

(To be signed by the presiding juror if unanimous.)

/s/ ______________________
PRESIDING JUROR

APPENDIX F

IN THE SUPREME COURT OF TEXAS

Case No. 05-0703

[Filed August 31, 2005]

IN THE INTERESTS OF)
R.C.S., T.C.S., J.C.S., and)
M.C.S.,)
Minor Children.)
)

PETITION FOR REVIEW

Submitted by:

James A. Pikl
JAMES A. PIKL, P.C.
P.O. Box 2939
McKinney, Texas 75070

ATTORNEY FOR PETITIONER
THOMAS STALEY

IDENTITIES OF PARTIES AND COUNSEL

Thomas C. Staley (Petitioner in the Supreme Court)

Pamela Staley (Respondent in the Supreme Court)

Rebekah Christian Staley, a minor child of Thomas and Pamela Staley

Thomas Christian Staley, a minor child of Thomas and Pamela Staley

Joseph Christian Staley, a minor child of Thomas and Pamela Staley

Mercy Christian Staley, a minor child of Thomas and Pamela Staley

Brian Loughmiller (Petitioner's jury-trial counsel)
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201 W. Virginia Street
McKinney, Texas 75069

Susan Barilich (Petitioner's bench-trial counsel)
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14221 Dallas Parkway, Suite 1500
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Julia Pendery (Petitioner's former appellate counsel)
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STATEMENT OF THE CASE

(1) Concise description of the nature of the case:

This case concerns a Texas divorce involving minor children. The parents, Tom and Pamela Staley, entered into a pre-divorce, omnibus agreement which dealt with every aspect of their divorce, including the future residence, education, custody, control, and support of their minor children. The agreement was adopted by the trial court as the Final Decree of Divorce. Because the agreement/decree provided that both Tom and Pamela would "co-parent" their children, it did not name either Tom or Pamela as the parent with the exclusive right to decide the children's residence, but rather—with the express agreement of both parties—ordered that the primary residence would be established at two locations: (1) with their mother, and (2) with their father, both within a specifically-defined geographic area. This was done to assure a true co-parenting relationship.

Less than three months after the Decree was entered, Pamela filed a petition to modify it. In that petition, she asked to be named the parent with the exclusive right to determine the children's residence without regard to the previously-agreed-to and -ordered geographic restraint. She supported this request with an affidavit. Temporary orders were enacted during an ex parte hearing on November 11, 2002 allowing Pamela to move 65 miles away to Decatur. On the morning of trial, Pamela filed her second and third affidavits. Following trial, the trial court modified the Decree and named her the parent with the exclusive right to determine residence, and allowed her to keep the children in Decatur where Pamela had already moved, contrary to the express agreement of the parties, after accepting Tom's consideration.

Tom argued that the Family Code prohibited changing the children's residence within one year of the Decree in the absence of proof of specific circumstances that do not exist in this case. At both the trial court and the Court of Appeals, this argument was rejected. The Court of Appeals held that the "stability" provision of Texas Family Code §156.102 does not apply unless the original decree expressly names one parent with the "exclusive" right to decide residence under §§153.133 or 153.134.

The trial and appellate courts also made other fundamental errors that will be briefed if this Petition is granted.

(2) The name of the judge who signed the order or judgment appealed from:

Hon. Jeffery V. Coen, District Judge.

(3) The designation of the trial court and the county where located:

254th Judicial District Court, Dallas County, Texas.

(4) The disposition of the case by the trial court:

Order of contempt issued against Petitioner dated 4/28/03. Final Order in Suit to Modify Parent-Child Relationship dated 12/29/03.

(5) The parties in the court of appeals:

Nominal parties: Rebekah Christian Staley, Thomas Christian Staley, Joseph Christian Staley, and Mercy Christian Staley, minor children of Tom and Pamela Staley.

Real parties in interest: Petitioner Tom Staley and Respondent Pamela Staley.

Guardian ad litem: Charles E. Miller, Jr.

(6) The district of the court of appeals:

Fifth District of Texas at Dallas.

(7) The names of the justices who participated in the court of appeals, the author of the opinion for the court, and the author of any separate opinion:

Justice Morris (author of the court's opinion)

Justice Francis

Justice Lang-Miers

(8) The citation for the court of appeals' opinion, if available, or a statement that the opinion was unpublished:

In re R.C.S., 167 S.W.3d 145 (Tex. App. – Dallas 2005, pet. pending).

(9) The disposition of the case by the court of appeals:

The court affirmed the judgment of the trial court in all particulars.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal in accordance with Texas Government Code §22.001(a)(3) and (6). A

timely motion for rehearing was filed in the Court of Appeals, which was denied on July 21, 2005. This makes this Petition due filed on or before September 6, 2005 (45 days from date of order overruling motion for rehearing is September 4, 2005, which is a Sunday. The next day, September 5, 2005, is Labor Day). See TRAP 4.1(a) and 53.7(a)(2).

ISSUES PRESENTED

Issues 3 through 10 were not addressed by the Court of Appeals, although they were briefed in that court on motion for rehearing. Petitioner will seek their review in accordance with TRAP 53.4. Only issues 1 and 2 are briefed in this Petition.

1. **Texas Family Code §156.102 states that provisions in divorce decrees establishing children's residence may be modified within their first year only upon petition and affidavit—with proof—showing that the child's present environment is endangering the child's physical health or significantly impairing its emotional development. No such affidavit was ever filed in this case. Did the trial court violate the statute when it modified the decree and allowed the children to be moved?** TRAP 56.1(a)(3), (5), (6).

2. **Texas Family Code §156.102 applies to this case because, even though the divorce decree did not name an "exclusive" parent with the right to determine residency of the Staley children, the decree did provide for stable, agreed residency for the Staley children that should not have been modified absent statutory good cause within the first year following the date of the decree. Did the**

Court of Appeals err in deciding the statute did not apply? TRAP 56.1(a)(3), (5), (6).

3. The Court of Appeals determined that the Texas Family Code (§§153.133 and 153.134) requires that one of two fit parents must be given the exclusive right to determine their children's residence. If the Court of Appeals' interpretation and application of these statutes are correct, then the statutes are unconstitutional either on their face or as applied. (Not briefed in Petition). TRAP 56.1(a)(3), (4), (5), (6).

4. When a court is asked to deprive a U.S. citizen of fundamental constitutional rights, the court must use a clear-and-convincing burden of proof, not preponderance-of-the-evidence. The trial court used the preponderance-of-the-evidence burden when it repudiated Tom's rights concerning access to his children. Is the trial court's failure to utilize the correct burden of proof sufficient reason to remand the case to be decided under the correct standard? (Not briefed in Petition). TRAP 56.1(a)(3), (4), (5), (6).

5. In order to find a person guilty of criminal contempt, the court must provide the accused with specific procedural protections. Here, Tom Staley did not get any notice that the contempt issue on the "verbal" order would be taken up by the court on the date of that hearing, and he was therefore unable to present witnesses or evidence in his defense or arrange for adequate criminal-defense counsel. Must the contempt finding against Tom be set aside because it is procedurally and constitutionally infirm? (Not briefed in Petition). TRAP 56.1(a)(4), (5), (6).

6. In order to pass constitutional muster, a statute may not grant unfettered discretion to any state officer charged with its implementation. The Texas Family Code employs a "best interests of the child" standard which gives unfettered discretion to district courts implementing the standard. Is the "best interests of the child" standard unconstitutionally vague or overbroad, and did use of that standard by the district court violate Tom's constitutional rights to be free from arbitrary state action? (Not briefed in Petition). TRAP 56.1(a)(3), (4), (5), (6).

7. The version of Texas Family Code §153.134 applicable to this case (Vernon's Texas Statutes, 2002) states that orders appointing joint managing conservators must include a designation of the conservator with the exclusive right to decide residence *only if there is no agreement between the parties otherwise*. Here, the parties contractually agreed that there would be no such exclusive parent, nor was one needed. Does §153.134 even apply under these facts? (Not briefed in Petition). TRAP 56.1(a)(3), (5), (6).

8. In order to change the Staley children's residence, the court must find clear and convincing evidence that their father is an unfit parent. The only evidence presented to the trial court on change of residence showed that Pamela's *mother* was impacted by the status quo ante. Is such evidence insufficient as a matter of law to justify modification of Tom's and the Staley children's rights as reflected in the contractual, final Decree of Divorce? (Not briefed in Petition). TRAP 56.1(a)(3), (5), (6).

9. Agreements relating to custody, child support, and property settlement, even if incorporated into a final divorce decree, are construed and enforced in the same manner as any other contracts under Texas law. Tom and Pamela Staley had such a contract. Were Tom's contractual rights—which are guaranteed by the Constitution as inviolate—violated by the trial court's orders? (Not briefed in Petition). TRAP 56.1(a)(4), (5), (6).

10. Texas divorce decrees are final judgments for purposes of res judicata. The decree in this case was an agreed final judgment. Did the court's interpretation and application (or non-application) of the governing statute, Texas Family Code §156.102, improperly abrogate the res judicata effect of a final judgment as recognized by the Texas Supreme Court? (Not briefed in Petition). TRAP 56.1(a)(3), (4), (5), (6).

STATEMENT OF FACTS

The Court of Appeals correctly stated the nature of the case, but only as it relates to the issues addressed in its opinion. The Court of Appeals failed to address many of the issues of concern in this appeal, and therefore did not provide a comprehensive statement of the full nature of the case.

The Facts and Procedural Background Pertinent to the Issues or Points Presented for Review in this Petition are as follows. All references to the record are from the record in the Dallas Court of Appeals.

1. Prior to their divorce, the Staleys entered into an omnibus agreement relating to the termination of their marriage.

This agreement provided for division of their property, payment of their debts, and further provided for the post-divorce status, residency, education, custody, and support of their minor children.

2. This agreement was adopted by the trial court and became the Final Decree of Divorce, entered on May 29, 2002. Record at 319-66. The Decree expressly stated that it was "enforceable as a contract" (Record at 319, 320), and that its provisions were in the best interests of the Staley Children (Record at 321).

3. The Decree did not provide for either of the Staleys to be the parent with the "exclusive" right to decide the residence of their minor children. Instead, it provided for "co-parenting" by both of the Staleys, and specified the residence of the Staley children as being approximately equally divided between Pamela's residence in Dallas and Tom's residence in Collin County. The Decree also did not provide for payment of periodic child support to either parent, but instead made an more-than-equitable division of the marital property estate, and arranged for Tom to pay all educational and medical expenses of the children such that neither party would need any additional periodic child support payments. Id.

4. On July 2, 2002, thirty-four days after the Decree was signed by the court, Pamela filed a motion to modify it. Record at 383-94. This motion was subsequently superceded by the SAPCR filed by Pamela identified below.

5. On August 13, 2002, seventy-five days after the decree was signed, Pamela filed a SAPCR petition seeking to modify the Decree. Record at 489-98. In her petition,

she asked to be named the parent with the exclusive right to determine the residence of the Staley children and permanently move them out of the agreed-upon geographic area. Record at 491. Pamela's sole grounds for this request was that she claimed her mother's illness "required" her to relocate to Decatur, Texas, and she wanted to take the Staley children with her. Record at 494-97.

6. Tom opposed the lawsuit (Record at 499-506), and repeatedly argued to the trial court that the terms of the agreement and Decree he and his wife had entered into should not be disturbed. Record at 555-58; 598-99; 610-15; 624-26; 628-29; 631-34. These requests were all denied.

7. The trial court conducted hearings on the SAPCR petition and entered a judgment modifying the Decree to give Pamela the exclusive right to determine the residence of the Staley children. Record at 715-48 and Appendix (1)(A). It is from this judgment that Tom has appealed.

8. Tom also reserves the right to appeal his contempt conviction. Record 559-65. He will supply all facts relating to that issue if and when this Petition is granted. TRAP 53.4.

SUMMARY OF THE ARGUMENT

The trial court conducted a hearing on a SAPCR filed to change the Staley children's residence within one year of entry of the divorce decree, and entered judgment allowing Pamela to change the Staley children's residence to Wise County, Texas—all without jurisdiction, without having the required statutory evidence before it, and in derogation of the

clear purposes of Texas Family Code §156.102. Not only did these actions by the trial court conflict with the controlling statutory scheme, but the proof offered by Pamela in support of her petition was insufficient as a matter of law.

The appellate court held that even in the presence of a binding contract in which two fit parents have agreed to be "joint" conservators with equal right to determine the residency of their children, Texas law requires instead that one of them be designated as having the "exclusive" right to determine residency. This is an infringement not only of the parties' contractual rights, but also of their U.S. constitutional rights of equal protection, liberty, privacy, due process, the fundamental right to court hearings that are fundamentally fair, and the fundamental right to parent. If the lower courts are *incorrect* in their interpretation of the statutes in question, then the judgment below must be reversed. If, on the other hand, the lower courts are *correct* in their construction of those statutes, then either Pamela did not fulfill all statutory requirements (insufficiency of evidence), or the statutes are unconstitutional either on their face or as applied (Issue 3, not briefed here), and in either event the judgment below must be reversed.

ARGUMENT

1. **Texas Family Code §156.102 states that provisions in divorce decrees establishing children's residence may be modified within their first year only upon petition and affidavit—with proof—showing that the child's present environment is endangering the child's physical health or significantly impairing its emotional development. No such affidavit was ever filed in this case. Did the trial court violate the statute when it modified the decree and allowed the children to be moved?** Issue concerns TRAP 56.1(a) factors (3), (5) and (6).

Pamela filed this SAPCR based on alleged "changed circumstances" that she said justified changing the residence of the Staley children. The statutory basis for this request was §156.102.[1] This statute is jurisdictional in that failure to file an affidavit alleging one of the three statutorily-required "circumstances" deprives the trial court of the ability to even hold a hearing on the petition.

The initial evidence presented to the trial court with the Petition to Modify on 8/13/02 was Pamela's four-page affidavit. Record at 494-97. In this affidavit, Pamela testified only about the health problems ***her mother*** was experiencing, and stated in conclusory fashion that Pamela supposedly needed "to be present on an almost full time basis to care for her (sic) mother, the children's maternal grandmother, and to

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[1] All references herein to statutes (§_____) are to the Texas Family Code unless otherwise indicated.

relocate to an area that would make her (sic) presence more practical and meaningful to her (sic) mother's care."[2]

In Graves v. Graves,[3] the court reversed an order modifying a divorce decree within one year because it found the affidavit filed in support did not provide evidence sufficient to justify the order as a matter of law. In that case, the affidavit stated the movant's daughter "may be" in danger of physical or emotional harm due to the fact that the mother's violent, live-in boyfriend was in constant, close proximity to the child. The court said:

> We hold that this affidavit is insufficient to satisfy the requirements of the Family Code because it does not allege any facts that show that the daughter's present environment may endanger her physical health or significantly impair her emotional development. The affidavit does not state whether the existence of the boyfriend detrimentally affects the child nor does it even assert that the separation from her father in any way endangers the child or damages her emotional development.[4]

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[2] Curiously, this portion of Pamela's affidavit is written in the third person. The affidavit is also self-contradictory in that Pamela claims she needs to care for her mother on an "almost full time basis," but then *also* claims that she will be teaching school (presumably full-time) in Decatur.

[3] Graves v. Graves, 916 S.W.2d 65 (Tex. App. – Houston [1st Dist.] 1996, no writ).

[4] Id. at 69. See also In re A.S.M., 2005 WL 1993327 (Tex. App. – Fort Worth 8/18/05, no pet. hist.)(not designated for publication).

Here, Pamela's first affidavit made absolutely ***no*** claims that the Staley children's physical or emotional health was even in issue—much less "endangered"—from their present environment. But, based solely on this affidavit, the trial court held a hearing, ex parte, during which it entered temporary orders allowing Pamela to keep the Staley children in Wise county (where she had previously moved them in direct violation of the Final Decree of Divorce); took away Tom's equal possessory rights and replaced them with "visitation;" ordered Tom to pay Pamela over $1,200 per month in child support (increased later to $2,100 per month); and stripped Tom of his right to make important educational decisions for his children.

Then, on the morning of trial *some 12 months later*, Pamela filed a second and then a third affidavit. Record at 606 and Appendix (2)(A). In her second affidavit, Pamela discussed some vague "concerns" she had relating to the children, but since she is not a doctor, psychologist, or a trained mental health worker, her concerns were not based on anything other than her personal feelings and the vague, hearsay statements of her children concerning nightmares and "chaotic" visitation. As for "harm to emotional development," this affidavit only states: "[Tom] exerted great pressure upon the children which significantly impaired their emotional development."[5] The third affidavit—notarized by the trial judge himself on the morning the trial started—merely stated that the children were feeling "pressure" (which Pamela naturally attributed to Tom's conduct, rather than to her own conduct or something else entirely), and alleged instances of

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[5] If allegations such as those stated by Pamela—even those in her second and third affidavits—are in and of themselves sufficient "facts" to satisfy §156.102(b), then that statutory requirement is meaningless.

self-mutilation and destructive behavior (which could have been caused by any number of factors, but which Pamela, of course, blamed on Tom).

In other words, these were merely allegations of *opinion*, not fact—and not very good allegations at that. Even though Pamela had four whacks at it (i.e., in the Petition itself and in three separate affidavits), she utterly failed to offer any provable **facts** that:

(1) the children's present residence situation was endangering their physical health or significantly impairing their emotional development;

(2) the person who had the exclusive right to designate primary residence of the children had consented to the modification and modification was in the children's best interest; or

(3) the person who had the exclusive right to designate primary residence had voluntarily relinquished the primary care and possession of the children for at least six months and modification was in the children's best interest.[6]

As to the quantum of evidence provided, this is a classic case of bad-faith filing. Pamela's first affidavit (in which she testified about the perceived need to care for her mother) is not suitable grounds—as a matter of law—to disturb the stability mandated by §156.102. The trial court should have thus immediately dismissed the SAPCR without further action. Instead, the court granted temporary orders—ex parte

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[6] See Texas Family Code §156.102(b).

and without notice—which not only provided the relief sought but granted extensive, additional relief not even requested in the petition. Record at 624-30.

The allegations Pamela made in her affidavits are insufficient as a matter of law to deny Tom's constitutional rights to have possession, care, and educational control of his children in a manner he deems proper, and as was agreed to in the Staley's contract and Decree. Yet, that was literally all the "proof" the trial court had available to it before dispatching Tom's serious and significant constitutional parental rights.[7] There was not only insufficient evidence on

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[7] The right of fit parents to parent their children is as fundamental a right as our nation's Founders could have imagined. It is pre-constitutional. It is pre-governmental. It is pre-civilizational. It is one of those bedrocks for the protection of which people establish any kind of government in the first place. And, in the uniquely-American context of the relationship between citizen and government, it is one of the few rights that when the government fails in its duty to provide protection, the very legitimacy of that government is called into question. See, e.g., Troxel v. Granville, 530 U.S. 57, 65-66 (2000), and the numerous cases cited therein in all six published opinions, *including the dissents*!

Troxel is the only case this Court needs to read to understand the importance with which the United States Supreme Court currently views parental rights and the role of the Constitution in protecting the parent-child relationship. Although this Honorable Court has held that Troxel—a case about visitation—is inapposite to cases about custody, the dicta and citations in Troxel nevertheless present a good summary of U.S. Constitutional law on the fundamental nature of the rights implicated in every parent-child relationship. Those rights are fundamental, and shared by all fit parents, not just fit parents arbitrarily designated as "custodial" pursuant to state statutes that presume *a priori* that one fit parent

the issue of whether the children were in danger under the status quo, there was **no** evidence.[8] The trial court thus lacked subject-matter jurisdiction to conduct a hearing on Pamela's petition, and it should have dismissed the petition for want of jurisdiction. Since the Court of Appeals failed to correct this error, its judgment must be reversed.

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must be treated differently from another fit parent. Fundamental rights must not be so easily derogated if they are to remain rights at all.

[8] If this were not true, then the "concerns" Pamela expressed in her second and third affidavits would remain any time Tom had possession of the children. The Court will note that the judgment does not take away all of Tom's rights to have periodic possession of his children, nor did Pamela even ask for this relief. Therefore, Pamela's accusations in her affidavit do not square with the relief she was seeking. If she really believed what she said in her last two affidavits, wouldn't she have been asking to curtail Tom's possessory rights in their totality? These affidavits were thus nothing more than lawyer-created, disingenuous, and purposely-vague fabrications, as anyone who cares to look can plainly see. Sadly, it is common knowledge within the legal profession that such affidavits are used on a regular basis and accepted by the courts with rarely a sideways glance. This isn't a mere unfortunate "reality" on which this Court is powerless to act. It's a commonplace problem that promotes flagrant violations of the most fundamental rights imaginable, rights which this Court is constitutionally empowered to protect.

(2) Texas Family Code §156.102 applies to this case because, even though the divorce decree did not name an "exclusive" parent with the right to determine residency of the Staley children, the decree did provide for stable, agreed residency for the Staley children that should not have been modified absent statutory good cause within the first year following the date of the decree. Did the Court of Appeals err in deciding the statute did not apply? Issue concerns TRAP 56.1(a) factors (3), (5) and (6).

The Texas Family Code requires that one of two divorcing parents be given the "exclusive" right to determine the children's residence, supposedly to avoid conflicts regarding residency decisions. This in turn is probably designed to promote some measure of stability in the residency situation of the children by preventing bickering between the parents on this important issue.

There are two ways one parent can acquire the exclusive right to designate the children's residence: by agreement of the parents under §153.133(a)(1), or by order of the court under §153.134(b)(1). In either case, one of the parents is given the exclusive right to decide the children's residence and the other is deprived of this right. Leaving aside for the moment the unconstitutional nature of a court's order under §153.134(b)(1)(i.e., it violates equal protection and the rights of all fit parents to parent their children; Issue 3), the obvious, ultimate ***purpose*** of the appointment is to ensure the children's residence stability.[9]

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[9] The Code Construction Act, which allows the Court to plumb the purposes of a statute during its construction, is fully applicable to the family code. See Tex. Gov't Code Ann. §311.002; Vasquez v. State, 739 S.W.2d 37, 43 (Tex. Crim. App. 1987); In re A.M.,

Section 156.102 denies either parent, including the so-called "exclusive parent," the right to change the children's residence during the first year following the divorce without showing compelling, police-power-type reasons. The obvious purpose of this "stay put" rule is *also* to promote peace, security, and residence stability for children experiencing a divorce—at least for one year.[10]

The three statutes in issue, §§153.133, 153.134 and 156.102, are thus meant to work together. They are different tools, but they all attempt to promote the same end result: residence stability for children of divorce.[11] To read §156.102 as inapplicable unless §153.133/.134 has also been followed is like saying you are not allowed to put a protective bandage over an abrasion without first stitching it—even if stitching is not required.

The trial court's reasoning for why §156.102 did not apply was because *the jury trial* was scheduled outside one year of the decree being signed, even though the filing for modification was made within 75-days of the decree's entry

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101 S.W.3d 480, 484 (Tex. App.---Corpus Christi 2002, pet. filed).

[10] Why the legislature decided to ensure this stability for a short period of only one year is unknown. What is readily known is that *residence stability* is the goal of this statute.

[11] By making these arguments, Tom does not agree that these statutes actually serve the purposes for which the legislature created them. He instead argues that they are unconstitutional infringements on his and other parents' fundamental rights to parent their children, are mostly counter-productive to the goals of assisting Texas families in their enjoyment of long-term peace and stability, and actually create far more strife than they cure.

and the trial was scheduled by the court itself. This was clearly error. Then, the trial court's ruling was affirmed by the Court of Appeals, but on an entirely different basis. The Dallas Court of Appeals opined:

> By its clear and unequivocal terms, section 156.102 is applicable only to suits seeking to "modify the designation of the person having the exclusive right to determine the primary residence of a child." See id. In this case, the decree of divorce appellee sought to modify did not designate a person with the exclusive right to determine the primary residence of the children. Instead, the decree designated two alternate locations as the primary residence of the children. Because appellee's suit sought an order designating a person with the right to determine the primary residence of the children in the first instance, instead of a modification of the person so designated, section 156.102 does not apply to appellee's suit.[12]

Both of these rulings undermine the public-policy purpose behind §156.102. That statute is designed to ensure stability in the residence of children of divorce for at least one year.[13] Such children are always more or less traumatized by the separation of their parents, the law gives them some semblance of peace and security by prohibiting changes to their residence within the first year of the divorce absent very

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[12] In re R.C.S., 167 S.W.3d 145, 148 (Tex. App. – Dallas 2005, pet. pending).

[13] See Mobley v. Mobley, 684 S.W.2d 226, 229 (Tex. App. – Fort Worth 1985, writ dism'd)(discussing the public policy "stability" purpose behind the predecessor statute to §156.102, and the quantum of proof necessary to overcome it).

compelling circumstances. It makes no difference to such children whether the divorce decree happens to contain a provision naming one of their parents as the parent with the "exclusive" right to determine residency. Unless proof is made that the children are in physical or emotional danger from their present living situation, a court is supposed to refuse to even hold a hearing on a motion to modify within the first year of a divorce.[14]

The exclusive authority to decide residence is a fearsome power that can be easily abused. In order to temper the power the exclusive parent has, §156.102 makes sure that that parent does not unnecessarily disturb the children's peace and security during the first year following the divorce—to the detriment not only of the children but of the other parent as well.

Taking the statute at face value, in the scenario where the trial court has simply made a mistake or otherwise left out a designation under §153.134, a proper course might be to appoint an exclusive parent, but then to still enforce §156.102 so that residence stability is maintained. To say that §156.102 does not apply because the original decree lacks a designation under §153.134 is basically saying that residence stability is not of any concern to the court. This is in essence what the Court of Appeals held. That ruling is, at best, an "over-reading" of the statute that is not compelled either by the language of the statute or by a thoughtful analysis of the purposes behind it.

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[14] Section 156.102(c). See Deleon v. Periman, 530 S.W.2d 174, 176 (Tex. App. – Amarillo 1975, orig. proceeding)(discussing the fact that unless the initial affidavit contains the proper statutory allegations, the trial court must refuse to schedule a hearing on the petition).

Even though the Decree did not appoint either Tom or Pamela as having the exclusive right to determine residency, both Tom and Pamela had already agreed to have their children's residence in Dallas and Collin counties as evidenced by their agreement/decree. Thus, even if the court was to find that Pamela should be named the parent with the right to determine residency, she had already made that determination in May 2002 as part of the Decree. Why should the fortuity of

(a) the Decree not designating her as "exclusive" parent, and

(b) her subsequent petition to be so designated,

allow Pamela to change or renege on her agreement and modify the Decree within a year of the Decree date?

The focus cannot be—and should not be—on Pamela. It must be on the Staley children and their residence stability, which was totally frustrated by what the lower courts did here. This seems so contrary to logic and common sense—not to mention contrary to the best interests of the Staley children and antithetic to a reasonable construction of the statutes in question—that the lower courts' rulings simply cannot be correct.

CONCLUSION AND PRAYER

Since the Court of Appeals' opinion is published, and since it contains such a potentially-harmful error of law, this Court should grant this Petition and correct the Court of

Appeals' error before it becomes a permanent—and disastrous—part of the state's jurisprudence.[15]

Tom Staley requests the Supreme Court grant this Petition, order full briefing on all issues presented, and after consideration of the case, reverse the judgment modifying the decree, set aside his contempt conviction, and order further proceedings in keeping with proper Constitutional doctrine and the rule of law. Mr. Staley also prays for such other and further relief as is just.

RESPECTFULLY SUBMITTED:

James A. Pikl
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ATTORNEY FOR PETITIONER
THOMAS STALEY

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[15] The In re R.C.S. case has already been cited by subsequent courts for the proposition under review here. See In re A.S.M., 2005 WL 1993327 (Tex. App. – Fort Worth 8/18/05, no pet. hist.)(not designated for publication)(upholding sanctions for filing modification suit shortly after entry of agreed decree), and Ellason v. Ellason, 162 S.W.3d 883, 886 (Tex. App. – Dallas 5/13/05, no pet.). The time to fix this problem is ***now***.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August 2005, a true and correct copy of the foregoing PETITION FOR REVIEW was forwarded by U.S. mail, postage pre-paid, to the following:

Bruce K. Thomas
Law Office of Bruce K. Thomas
6060 N. Central Expressway, Suite 560
Dallas, Texas 75206

Charles E. Miller, Jr.
18601 LBJ Freeway, Suite 705
Mesquite, Texas 75150

Hon. Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

/s/__________________________
James A. Pikl

APPENDIX

Required Content.

(1) The judgment from which relief in the court of appeals was sought

(2) The jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law

(3) The opinion and judgment of the court of appeals

(4) The text of any rule, regulation, ordinance, statute, constitutional provision, or other law on which the argument is based

Optional Content.

(5) Copy of Pamela Staley's third affidavit. This document is missing for some reason from the official Record at the Court of Appeals, but was filed in that court without objection as Exhibit 8(c) to Appellant Thomas C. Staley's Brief.

Texas Family Code §153.133. Agreement for Joint Managing Conservatorship

(a) If a written agreement of the parents is filed with the court, the court shall render an order appointing the parents as joint managing conservators only if the agreement:

(1) designates the conservator who has the exclusive right to designate the primary residence of the child and:

(A) establishes, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or
(B) specifies that the conservator may designate the child's primary residence without regard to geographic location;

(2) specifies the rights and duties of each parent regarding the child's physical care, support, and education;

(3) includes provisions to minimize disruption of the child's education, daily routine, and association with friends;

(4) allocates between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent provided by Chapter 151;

(5) is voluntarily and knowingly made by each parent and has not been repudiated by either parent at the time the order is rendered; and

(6) is in the best interest of the child.

(b) The agreement may contain an alternative dispute resolution procedure that the parties agree to use before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.

Texas Family Code §153.134. Court-Ordered Joint Conservatorship

(a) If a written agreement of the parents is not filed with the court, the court may render an order appointing the parents

joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:

(1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators;

(2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest;

(3) whether each parent can encourage and accept a positive relationship between the child and the other parent;

(4) whether both parents participated in child rearing before the filing of the suit;

(5) the geographical proximity of the parents' residences;

(6) if the child is 12 years of age or older, the child's preference, if any, regarding the appointment of joint managing conservators; and

(7) any other relevant factor.

(b) In rendering an order appointing joint managing conservators, the court shall:

(1) designate the conservator who has the exclusive right to determine the primary residence of the child and:

(A) establish, until modified by further order, a geographic area within which the conservator shall maintain the child's primary residence; or

(B) specify that the conservator may determine the child's primary residence without regard to geographic location;

(2) specify the rights and duties of each parent regarding the child's physical care, support, and education;

(3) include provisions to minimize disruption of the child's education, daily routine, and association with friends;

(4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent as provided by Chapter 151; and

(5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.

Texas Family Code §156.102. Modification of Exclusive Right to Determine Primary Residence of Child Within One Year of Order.

(a) If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit shall execute and attach an affidavit as provided by Subsection (b).

(b) The affidavit must contain, along with supporting facts, at least one of the following allegations:

(1) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development;

(2) that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or

(3) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child.

(c) The court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in Subsection (b) are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing.

Texas Government Code § 22.001. Jurisdiction.

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

(e) For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their

respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.

Texas Government Code §311.002. Application.

This chapter applies to:

(1) each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program;

(2) each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature;

(3) each repeal of a statute by a code; and

(4) each rule adopted under a code.

Texas Rule of Appellate Procedure 53.4. Points Not Considered in Court of Appeals.

To obtain a remand to the court of appeals for consideration of issues or points briefed in that court but not decided by that court, or to request that the Supreme Court consider such issues or points, a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing.

Texas Rule of Appellate Procedure 53.7. Time and Place of Filing.

(a) Petition. The petition must be filed with the Supreme Court clerk within 45 days after
the following:

• • •

(2) the date of the court of appeals' last ruling on all timely filed motions for rehearing.

APPENDIX G

COURT OF APPEALS FOR THE
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

Case No. 05-04-00305

[Filed June 23, 2005]

IN THE INTERESTS OF	)
R.C.S., T.C.S., J.C.S., and	)
M.C.S.,	)
Minor Children.	)
	)

Appellant Thomas C. Staley's
Motion for Rehearing

On Appeal from the 254th Judicial District Court
Dallas County, Texas
Cause No. DF99-11284-R

Submitted by:

James A. Pikl
JAMES A. PIKL, P.C.
P.O. Box 2939
McKinney, Texas 75070

Attorney for Appellant and Movant

INTRODUCTION

Once upon a very short time ago, in a land not so far away, lived a prince. The prince loved his people, and tried to decide fairly and judiciously all matters brought before him. The prince rarely used the term "off with his head" although everyone knew he could make such an order stick if he really wanted to.

The prince always dressed elaborately for his work. His raiment—which the people gave him as an enduring sign of his authority—was glorious. Ancient and venerable, the flowing robe of many colors provided a sense of reassuring calm to the prince when he wore it. The symbolism which the robe embodied also infused a familiar, comforting feeling in the people; in a word, it made them feel safe.

The prince was also quite fastidious. He insisted that his appearance be perfect when he took his throne; after all, the people deserved nothing less. In order to fulfill this particular goal, the prince employed dozens of highly-trained, experienced attendants whom the prince entrusted to regularly inform him concerning every thread, fold and stitch. And, to ensure a final check on his appearance, the prince had the hallway to his courtroom lined with mirrors so he could personally *inspect every aspect of his overall image.*

On the day of our story, the prince awakens, rested and ready. His chief courtier is waiting for him, as usual, in the dressing room of the royal residence. As the prince approaches, however, he notes with concern that his customary attire is not draped on the dressing hooks. The chief tells the prince that today, he will be adorned in a brand-new, high-tech suit of clothes rather than the old, familiar one. When the prince inquires as to why, the courtier

only says: "Enlightened self-interest, Your Highness. It is out with the old, in with the new," which the prince finds to be a very strange explanation indeed. But over many years and through many battles, the prince has grown to trust his courtiers and therefore goes along with the plan. The prince dresses—somewhat self-consciously—and, accompanied by his many attendants, begins the procession to his courtroom.

This is a story of one particular day in the life of our prince. In many ways, dear reader, one might think this day was the same as countless others before it. But one would be wrong. Indeed, the utter uniqueness of this day will become vividly apparent through the telling of the rest of this story.

Tom Staley's present counsel admittedly comes to this dance at the 11th hour. Steeped as he is not in the cauldron of "family law," but rather in the cooler waters of civil rights and complex, commercial litigation, he approaches this case from a decidedly-different perspective. While the protocol is each of these systems may vary, the issues addressed here are fundamental enough that the process is hindered, rather than helped, by standing on ceremony. Instead, these issues must be confronted head-on.

This Motion issues a brave and—under contemporary Texas family-law realities—long-overdue challenge. It boldly asks the Court to look beyond case precedent that has been hammered out on a hundred unconstitutional anvils, and focus instead on truth, justice, and what life in a divorce court really means to fit Texas parents. It asks the Court to take a fresh, critical look at a system that has been broken for too long, and to suspend the current popular assumptions that either the system can't be fixed, or that the system isn't all that bad, or that the responsibility for fixing the system is exclusively legislative. And most importantly, it seeks justice on the

particular and specific claims made by the parties in this case, especially as those claims exemplify the greater issues that face all Texas citizens.

Tom Staley asks the court to scrutinize certain statutes under a Strict Scrutiny standard. There are two situations in which a Strict Scrutiny analysis is required. One is when a fundamental constitutional right is involved. In this case, *two* fundamental rights are at stake.

The right of fit parents to parent their children is as fundamental a right as our nation's Founders could have imagined. It is pre-constitutional. It is pre-governmental. It is pre-civilizational. It is one of those bedrocks for the protection of which people establish any kind of government in the first place. And in the uniquely-American context of the relationship between citizen and government, it is one of the few rights that when the government fails in its duty to provide protection, the very legitimacy of that government is called into question.

The second fundamental right at stake in this case is Fundamental Fairness. Trials that are fundamentally fair are the *sine qua non* of American jurisprudence. An essential element of a fair trial is utilization of an evidentiary standard that provides adequate protection for the interest at stake. In Texas family courts, under the authority of Texas Family Code §105.005, we are currently using the same evidentiary standard we use for traffic tickets: Preponderance. Preponderance is a constitutionally-insufficient evidentiary standard for dealing with the parent-child relationship—not just when the State seeks to terminate the relationship, but in any proceeding in which fundamental parental rights are implicated.

The challenge is now before this Court. We can either embrace it or run from it. But one thing is certain: this challenge will not go away. It is simply too important.

"Fiat justitia, ruat coelum."[1]

ISSUE 1

If this court's interpretation and application of Texas Family Code §153.134 is correct, then the statute is unconstitutional either on its face or as applied.

The prince first approaches the three-sided mirrors of state and federal "constitutionality." These mirrors are so important that whenever the prince notices his reflection is suspect in any particular, he cancels court for the day. The federal mirror's three panels—procedural due process, substantive due process, and equal protection—each cast a slightly different reflection. Likewise, the state mirror, while it is somewhat more ornate and expansive than its federal counterpart, also includes three panels—due course, due process and equal protection—each of which informs the prince concerning important aspects of his appearance. Because of their differences, the prince always looks into all six panels very carefully.

As he approaches the mirrors on this particular day, however, he is distracted by one loud courtier proclaiming: "The view is marvelous. Nothing for you to worry about, your Highness. Please, we are in a hurry; let's move along."

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[1] Let justice be done though the heavens may fall.

Unfortunately, this particular courtier has a personal agenda that is at odds with the prince presenting an immaculate appearance, and his flattery and advice are thus tainted and woefully inaccurate. Nevertheless, the prince is swayed by this incessant voice, and today passes by the mirrors with hardly a sideways glance for himself. The young apprentice is shocked at the prince's seeming indifference to so important a matter.

Staley hereby challenges the constitutionality of various statutes found in the Texas Family Code.

As the supreme law of the land, the Constitution is to be honored and respected even in the face of statutes and court decisions that seem to ignore or impugn it.[2] It is the business of the appellate courts to ensure that the rigorous standards and rules of constitutional jurisprudence are scrupulously adhered to at all times.

General rules.

Any constitutional challenge begins with the familiar, two-step process of evaluating the substantive rights involved (substantive due process or due course) to determine what exactly the rights are and what level of constitutional protection they are afforded by law (i.e., strict scrutiny, intermediate review, or rational basis). The court then decides what procedures are used to enforce or curtail those

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[2] U.S. Constitution, art. 6. Given the importance to Texas law raised by these next several issues, they fall under the "fundamental error" doctrine, and therefore may be addressed by the Court on rehearing. See **In re K.A.F.**, 2005 WL 784089 (Tex. 2005); ***Mason v. Our Lady Star of Sea Catholic Church***, 154 S.W.3d 816 (Tex. App. – Houston [14th Dist.] 2005, no pet. hist.).

rights (procedural due process). Once these preliminaries are determined, the court can begin the deliberative process of evaluating the dispute.[3]

In this appeal various fundamental constitutional rights are involved including the right to parent, the right to fair trial, and the right to counsel, among others. For all of the rights involved in this case, U.S. Supreme Court precedent requires that the highest level of scrutiny—Strict Scrutiny—be employed. In strict-scrutiny review, the burden is on the state to prove, by clear and convincing evidence that: (a) the statute or other infringement furthers a compelling state interest, and (b) the means selected to fulfill the interest are the least-restrictive available.

Since the Texas statutes at issue and the trial court's judgment unquestionably infringe upon Tom Staley's fundamental constitutional rights as a parent, there is a presumption that they are unconstitutional, a presumption it is necessary for the state to rebut, if it can.[4] It is beyond dispute that **none** of the required constitutional review has been done by the courts or the state at this time.

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[3] **Ingraham v. Wright**, 430 U.S. 651, 672 (1977); **Howard v. Grinage**, 82 F.3d 1343, 1249-50 (6th Cir. 1996)(contains an excellent synopsis of the interplay between substantive and procedural due process).

[4] **Harris v. McRae**, 448 U.S. 297, 312 (1980); **Zablocki v. Redhail**, 434 U.S. 374, 388 (1978). The Texas Attorney General has been notified of this constitutional challenge. Texas Civil Practice & Remedies Code §37.006(b). See Certificate of Service.

Facial challenge.

This Honorable Court has construed Texas Family Code §153.134 as requiring that one of two fit parents must be given the exclusive right to establish the residency of the couple's children. However, if this Court's construction of that statute is correct—and it may well be—then the statute itself is unconstitutional on its face.

It is beyond argument that every fit parent has a fundamental, constitutional right to direct the care, custody, education, and upbringing of their children. This right springs from the 1st Amendment freedom of association, the right to privacy,[5] liberty, and procedural and substantive due process. This right can be infringed by state action only in the narrowest of circumstances and only following strict scrutiny analysis. There is no precedent saying this right is lost or diminished in any way by a divorce.

In **Troxel v. Granville**,[6] the U.S. Supreme Court

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[5] It is immaterial to the analysis whether this privacy right is penumbral to the general provisions of the U.S. Constitution, penumbral to the Bill of Rights, or is found in the reservation-to-the-people clause of the 9th Amendment, or in the autonomy branch of privacy found in the substantive due process protection of the 14th Amendment.

[6] **Troxel v. Granville**, 530 U.S. 57, 65 (2000). **Troxel** is pretty much the only case the Court needs to read to understand current constitutional law on these subjects. A copy of the case is appended to this Motion.

discussed and affirmed a dozen cases discussing the history and foundational importance of this right:[7]

> The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska,* 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

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[7] And this is only the plurality opinion. In an unprecedented manner, in every concurrence and dissent in **Troxel**, the Justices unanimously affirmed that the right to parent is a fundamental, inalienable Constitutional right.

can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438.

The equal protection clauses of the state and federal constitutions require that similarly-situated persons be treated similarly. It is the definition of unequal protection to grant favoritism or special rights to either one of two fit parents.

These rules lead to four conclusions: (1) there can be no disparate treatment of either of two fit parents as it relates to their constitutional right to make decisions about their children, including choosing the children's residence and education; (2) there is a presumption that both parents are fit and have not relinquished their fundamental right to parent; (3) operation of logic on points 1 and 2 must produce in parents a right to equal, post-divorce possession of their children and to have equal control over the life decisions affecting those children; and (4) this presumption can only be overcome by clear and convincing evidence that one of the parents is unfit.

Here, the court has chosen a well-worn path that veers from the Constitution in every important particular. First, the court has read §153.134 as not just *allowing* the court to grant favoritism to one of two fit, similarly-situated parents, but to *require* it. Second, the court has completely ignored the fundamental right to parent and the constitutional consequences attendant thereto regarding the equal-parenting rights belonging to both fit parents.[8] Finally, this court did not even look at the burden of proof issue. If it had, it would have seen that the trial court imposed a preponderance[9]

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[8] **Lehr v. Robertson**, 463 U.S. 248, 265-66 (1983).

[9] C.R. at 617.

burden on Pam to show—not that Tom was unfit—but only that the Staley Children's "best interests"[10] might be for them to live in Decatur. The breach of constitutional protocol on each of these points is fatal to the underlying judgment.

The argument might be raised that if the statute as construed by this Court is unconstitutional, then we are lost without guidance in these situations. That is, if both parents cannot agree on some aspect of their child's life, such as education or residence, how does a court decide which parent's wishes prevail?[11] The answer is exquisitely simple but not simplistic. The only constitutionally-sound, logical, and non-speculative answer to this dilemma is grounded in a doctrine that could be called the "status quo ante."

This doctrine can be explained with an illustration. Suppose a husband and wife reside in McKinney and have one child who is attending McKinney Christian Academy. On the day the couple divorces, the status quo ante of this child is McKinney (for residence) and McKinney Christian Academy (for education). Now, if one or the other parent wishes to change the child's residence or school, then that parent must prove a constitutionally-sound basis for doing so.

If mom wants to move to Canada, she is free to do so but she cannot simply take the child with her because to do so would be improperly changing the status quo ante and thereby

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[10] For the remainder of this Motion, we refer to "best interests" without the quotation marks simply to eliminate visual clutter. By removing the marks, we are not importing any qualitative characteristics to this phrase.

[11] This question does not arise in this case, however, because Tom and Pam have an enforceable agreement on these topics.

impairing the fundamental parental rights of the father to equal access and time with the child. If she wants to take the child with her, she bears the burden of convincing a court—not that the move is in some ethereal, speculative best-interests-of-the-child—but that the father is unfit as a parent. This is because the father has constitutional rights as a fit parent to equally participate in the upbringing of his children, and these rights cannot be impinged upon absent clear and convincing proof of unfitness. Without such proof, the child must stay in McKinney in order to preserve the status quo ante. Mom can leave, but the child must stay—unless dad waives his rights and agrees that the child may go.

This doctrine cures every constitutional virus infecting the best interests of the child standard.[12] First, the best-interests standard is entirely speculative. It asks a court to *guess* what the child will experience in his proposed-future school or residence, based mostly on sketchy, incomplete information supplied NOT by both parents, but by the one who wants to make the move—which, to say the least, an objective observer might suspect could be filtered through some prism other than

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[12] And many "ills" there are. Justice Kennedy, in his concurring opinion, has opened the door to having a case such as this one challenge the "best interests of the child" standard on constitutional grounds. **Troxel**, 530 U.S. at 101: "The best interests of the child standard has at times been criticized as indeterminate, leading to unpredictable results. . . . I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship."

The American Bar Association, Law Day 2002, noted that the "best interests of the child" standard is no standard at all.This paper may be viewed at: (http://www.abanet.org/publiced/lawday/talking/child_bestinterest.html).

the child's best interests. On the other hand, status quo ante is based on objective, current facts and circumstances susceptible of ordinary proof.

Second, the best-interests standard is arbitrary and hopelessly vague. It would allow, say, a militantly-homosexual judge to find that allowing a lesbian mother to move her child into a homosexual nudist colony is perfectly acceptable, whereas another judge would find the same request by the same mother morally abhorrent and never allow it.[13] The best-interests standard is not helpful because "it provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores."[14]

Basically, "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[15] Under the best-interests standard (a great slogan but an unconstitutionally-vague test), no one can know how to comport him/herself in a marriage and be confident that in a divorce their fundamental right to parent won't be essentially eviscerated to where they are reduced from the status of equal parent to an every-other-weekend "visitor" of

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[13] See "Inventing Family Law," 32 U.C. Davis L. Rev. 855, 856 (1999).

[14] **Bellotti v. Baird**, 443 U.S. 622, 655-56 (1979)(Stevens, concurring).

[15] **Giaccio v. Pennsylvania**, 382 U.S. 399, 402-03 (1966)(such standards are unconstitutional).

their child. This is a tough statement but it is accurate, and this Court must face up to it squarely. There is no assurance of consistency in the application of the best-interests standard because it is so open to the whims and personal biases of the particular judge or jury involved. On the other hand, proving unfitness under status quo ante is based on tried and true criteria and objective facts and standards subject to full appellate review.

Third, the best-interests standard takes absolutely **no account** of the constitutional rights of the parent adversely affected. These rights cannot be so easily trampled upon. All fit parents have fundamental, equal rights to parent their children, and those rights can only be infringed for unfitness or surrendered voluntarily by the parent. On the other hand, status quo ante preserves <u>both</u> parents' constitutional rights in full.

The Washington Supreme Court has all but invalidated the best-interests standard in that state:

> Short of preventing harm to the child, the standard of "best interests of the child" is insufficient to serve as a compelling state interest overruling a parent's fundamental rights. . . . To suggest otherwise would be the logical equivalent to asserting that the state has the authority to break up stable families and redistribute its infant population to provide each child with the "best family." It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a "better" decision.[16]

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[16] **<u>In re Custody of Smith</u>**, 969 P.2d at 30-31.

To the extent current law has placed children's rights in a superior standing vis-a-vis their parents' rights, it also violates equal protection. Who, after all, has the constitutional authority to say that children's *statutory* rights to enjoy their best interests (whatever that means) are superior to their parents' *constitutional* rights to participate equally in parenting those children? The answer is: no one. Even if we could tell the future (which we can't), who dares candidly say that the best interests of the child can be better determined by a court than by the child's fit parents? The answer is: no one. For the sake of maintaining judicial credibility and public confidence in the court system, Texas' courts must quit trying to make these decisions.

The ***only*** constitutionally-sound solution to protecting ***everyone's*** rights is to adopt a "status quo ante" presumption and make the parent desiring to change the status quo overcome the other parent's constitutional rights to parent within that status quo. And the only way in which this could be done is to show, by clear and convincing evidence,[17] that the parent to be adversely affected is an unfit parent, or alternatively to show that the status quo ante is detrimental to the child's health or safety.[18] In this way, we are at least

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[17] **Santosky v. Kramer**, 455 U.S. 745, 769 (1982)(clear and convincing evidence is the minimum standard required by U.S. constitutional doctrine of due process).

[18] One would think that in this alternative scenario, both parents would agree to relocate their child if its continuing health and safety were at risk. Indeed, a court could well determine that if one parent acted in such a way as to harm their children—for instance, by "preventing the children from seeing and being with their father"—that parent would be deemed unfit by definition. **Entwhistle v. Entwhistle**, 61 A.D.2d 380, 420 N.Y.S.2d 213 (2d

dealing with present, determinable, evidentiary facts and not unadulterated speculation about an uncertain future based upon the allegations of a biased party.

The Court in **Troxel** was faced with a statute that allowed a third person to change a fit parent's decisions to control the visitation privileges affecting their children when a judge, in his unfettered discretion, determined that such a change was in the child's best interests. When confronted with such an amorphous standard as best interests of the child, the Court said: "Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." This standardless "standard" was too much for both the Washington Supreme Court and the U.S. Supreme Court,[19] and the statute was struck down as unconstitutional. Interestingly, the U.S. Supreme Court did not decide the primary issue now presented to this court: is the best-interests-of-the-child standard *itself* unconstitutionally vague on its face? This court has the opportunity today to speak on that issue and to shoot the first shot in a major constitutional battle that is now ramping up all over the country.

Here, the statute in Texas *requiring* that one parent be afforded special rights concerning residence, in derogation of the other fit parent's right to be equally involved in that decision, is even more egregious than the statute in **Troxel**.

Dept. 1978)(finding that mother who violated an agreement and deprived the children of access to their father was "unfit").

[19] **In re Custody of Smith**, 969 P.2d 21 (Wash. 1998), *aff'd sub nom.*, **Troxel v. Granville**, 530 U.S. 57 (2000).

The Texas statute doesn't even expressly require that it be in the child's best interests in order to deprive a fit parent of his constitutional right to decide his child's residence—it just removes those rights by fiat. In the panel's earlier opinion, the court said that the purpose of §153.134 was to ensure "stability in custodial issues." This may or may not be correct. However, even if correct, the legislature simply does not have the authority to place expediency or stability above the constitutional, equal rights of fit Texas parents. Neither do the courts.

The court's order that Pam be named as the conservator with the exclusive right to determine the Staley Children's residence, therefore, is unconstitutional and must be reversed. To the extent such a ruling is founded on the proper construction of Texas Family Code §153.134, that statute is unconstitutional on its face and must be stricken.

As-applied challenge.

The Staleys forged an agreement, presented it to the trial court, and had it entered as the court's final judgment. If Pam is allowed to immediately violate that agreement and judgment with impunity because the statute allegedly makes their agreement non-compliant with statutory edict, then the statute is unconstitutional as applied.

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the

denial of equal justice is still within the prohibition of the constitution.[20]

A. Equal protection. If the statute as applied requires that one of two fit parents be appointed as the conservator with the *exclusive* right to determine the children's residence, then by definition the statute requires that one parent have rights superior to those of the other parent as regards the residence issue even in the face of an enforceable contract to the contrary and contrary to equal protection principles.

The application of the statute as it is presently construed by the court would have the impermissible effect of depriving the second parent of his equal constitutional rights to parent and to contract. While this may be possible following strict scrutiny analysis, it is not possible without jumping through all the hoops necessary to deprive someone of his or her fundamental, constitutional rights. Since the court went through *none* of the necessary steps to deprive Tom of his fundamental constitutional right to select his children's residence, the trial court's judgment should be reversed.

B. Education. The right of parents to direct their children's education has been repeatedly recognized as a fundamental, constitutional liberty interest, worthy of protection by the courts,[21] and preserved by the 14th Amendment. It can only be modified, altered, or infringed by the application of specific Fourteenth Amendment protocols,

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[20] **Yick Wo v. Hopkins**, 118 U.S. 356, 373-74 (1886).

[21] **Troxel v. Granville**, 530 U.S. 57, 65-66 (2000); **Thornbaugh v. American Coll. of Obst. & Gyn.**, 476 U.S. 747, 773 (1986)(Stevens, concurring); **Weinberger v. Salfi**, 422 U.S. 749, 771 (1975); **Griswold v. Connecticut**, 381 U.S. 479, 503 (1965).

including notice, full evidentiary hearing, and the requirement that ***the state***—by clear and convincing evidence—prove that a compelling state interest is being protected and that the infringement is the least-restrictive means of fulfilling that interest.[22]

Pam brought forward no evidence that leaving the Staley Children in school at Carrollton Christian Academy would harm them. Therefore, there was no just cause to change the status quo ante. The trial court's decision to allow this change thus violated the Constitution[23] by interfering with Tom's rights as a fit parent to direct his children's upbringing, including choosing which school they would attend.

In **Pierce v. Society of the Sisters,**[24] the Supreme Court held that a parent's right to educate their children in a private Christian school is a fundamental liberty right that cannot be disparaged by government actions or rulings:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of

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[22] **Saenz v. Roe**, 526 U.S. 489 (1999); **Mississippi Univ. for Women v. Hogan**, 458 U.S. 718, 732-33 (1982); **San Antonio ISD v. Rodriquez**, 411 U.S. 1, 16-17 (1973).

[23] It also violated the court's judgment, since the court only retained jurisdiction to "clarify and enforce" the decree. C.R. at 344.

[24] 268 U.S. 510, 534-535 (1925), cited recently in **Troxel v. Granville**, *supra.*

> the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

The Fifth Circuit has recently called the right of parents to put their children in a school of their choosing a "clearly established" right.[25] This right is so well known, in fact, that a school superintendent was stripped of his sovereign immunity when he violated it.[26]

Courts are just another state actor. They are equally bound to abide by the Constitution as are school superintendents. Since the trial court ignored Tom's constitutional right to control the education of his children, the court violated the Constitution and its error must be corrected.

C. Child support. At the time the Staleys divorced, the law allowed divorcing parents to agree to any child support arrangement they and the court deemed sufficient and proper given the family's financial resources and needs.[27] Such arrangements are routinely upheld by the courts.[28]

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[25] **Barrow v. Greenville ISD**, 332 F.3d 844 (5th Cir. 2003).

[26] **Id.**

[27] Texas Family Code, §154.124 (2002).

[28] See, e.g., **Ruhe v. Rowland**, 706 S.W.2d 709 (Tex. App. – Dallas 1986, no writ).

Here, Tom provided the following child support in his contract with Pam:

(A) he conveyed to Pam free-and-clear ownership of the real estate and home in Dallas that had previously been his separate property;

(B) he agreed to be solely responsible for payment of all medical care, educational expenses and tuition, and health insurance for each of the Staley Children until their 18th birthday; and

(C) he agreed to be responsible for payment of all community debts of the marriage.[29]

Given this generous financial arrangement, it must be assumed that the parties chose this particular and specific course to alleviate the need for the more commonplace regime of periodic child support payments, and therefore agreed no monthly support would be paid by either of them. This is the only logical explanation as to why there is no provision for monthly child support or maintenance in the original decree, a decree fully approved by Judge Dee Miller—a highly-experienced domestic-court judge—just before she retired. Otherwise, this Court must find that Judge Miller simply *didn't know* the Texas statutes on child support, or knew them

[29] Pam was also going to get approx. $700,000 from a trust set up for the Staley Children. See the Compromise Settlement Agreement, CR at 349-366.

but flagrantly ignored them. This would be a problematic finding given Judge Miller's esteemed reputation.

D. Residence. Instead of abiding by the final decree's terms, Pam almost immediately violated those provisions by moving the Staley Children to Wise County, purportedly because her mother was sick and needed support which only Pam could supply and which supposedly could not be given from 60 miles away in Dallas. Of particular note, there was no evidence presented to the trial court showing that Pam's mother could not have moved to Dallas if she needed Pam's constant attention. There was no evidence that Pam's caring for her mother would benefit the Staley Children in any manner. And—most importantly—there was no evidence that the Staley Children would be harmed in any way by staying with Tom even if Pam elected to move. Thus, it appears that Pam's move to Decatur was prompted, not by the Staley Children's needs, or even by Pam's own needs, but rather by the irrelevant—even if serious—needs and desires of Pam's *mother*. This hardly seems like the type of evidence sufficient to support or excuse Pam's wholesale renunciation of the divorce decree and breach of the Staley's contract relating to their children, much less her imposition on Tom's constitutional rights to parent. Judge Coen, Judge Miller's successor and a judge brand-new to the district bench, apparently thought it was. He was wrong.

When Judge Coen renounced Judge Miller's earlier judgment/decree, he violated the doctrine of res judicata, as codified in part in §156.102, and effectively blessed Pam's violation of the decree's obligations <u>and</u> Pam's breach of her contract with Tom Staley. This was not a simple balancing of two competing sets of constitutional rights, or if it was, it was botched. Pam has a constitutional right to move wherever she wants, but Tom also has a clearly-established constitutional

right to choose how and where his children are educated and where they live. If Pam chooses to move, she is making the choice as to which of *her rights* take priority in *her life*. But to modify *Tom's rights* to have his children reside with him and to have them educated in a Christian school, based solely upon the personal and purely-discretionary act of *Pam* choosing to move to Decatur, sacrifices Tom's rights on the altar of his ex-wife's personal preferences.

ISSUE 2

> **In order to pass constitutional muster, a statute may not grant unfettered discretion to any state officer charged with its implementation. The Texas Family Code employs a "best interests of the child" standard which gives unfettered discretion to district courts implementing the standard. Is the "best interests of the child" standard unconstitutionally vague or overbroad, and did use of that standard by the district court violate Tom's constitutional rights to be free from arbitrary state action?**

There are few constitutional rules more settled than this one: unfettered discretion to regulate speech or conduct, in the hands of government officials, is anathema to the Constitution. In **City of Dallas v. MD II Entertainment, Inc.**,[30] this court held a statute unconstitutional because the statute failed this test:

> [T]he test examines whether the regulation is so vaguely worded that enforcement officials are given

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[30] 974 S.W.2d 411, 414 (Tex. App. – Dallas 1998, no writ).

> overly broad discretion to apply the law in a discriminatory and arbitrary manner, thus encouraging erratic [decisions].

Like a criminal statute that does not provide objective, readily-understood enforcement standards, the best-interests-of-the-child standard has no objective criteria or parameters for use by the state officials charged with its enforcement—the trial courts and juries of Texas. As such, it is unconstitutionally vague or overbroad. Since the trial court's judgment was based on application of this standard, it must be reversed.[31]

The main reason unbridled discretion is unconstitutional relates to the very reason we have a Constitution and Bill of Rights in the first place: We, the people, ***do not trust the government.*** We have never allowed the great power of the state, which is so potentially destructive of our liberties, to reside in the hands of state actors without significant, articulated due process standards in place. We have never trusted government officials to be wise, knowing, and balanced in their control of the power we are of necessity required to yield to them—and historically we have excellent

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[31] The trial court instructed the jury that: "The best interests of the children shall always be the primary consideration in determining questions of the children." C.R. at 617. Not only was this instruction grammatically incorrect, but it was given to a lay jury without any definitions, examples, or other explanation of what the term "best interests" means. The outer limits of this *standard* were thus left entirely up to the jurors' biases, prejudices, predilections, and idiosyncracies.

reasons to not trust them, particularly when their intentions are good.[32]

Another reason for the requirement of objective, articulated standards is we want appellate courts empowered to conduct enlightened review of the exercise of discretion vested in lower courts. This task can only be intelligently undertaken if discretion is bounded by objective, reviewable criteria or standards. As it is now, Tom can't challenge the best-interests finding because it is—by definition—merely a "discretionary" call by the jury and thus, there is no way to point to the jury's ignoring or failing to comply with objective criteria in making their decision. At present, meaningful appellate review of such decisions is literally impossible.

The best-interests-of-the-child standard is hopelessly vague. There are **no** objective, statutory criteria framing its definition.[33] It could easily result—and has in fact resulted—in such disparate decisions that it could truthfully be

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[32] **Olmstead v. United States**, 277 U.S. 438, 478 (1928)("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent").

[33] With all due respect, the court in **Holley v. Adams**, 544 S.W.2d 367 (Tex. 1976), merely traded a single vague and subjective standard for nine equally-vague and equally-subjective standards, several of which are capricious in the bargain. Moreover, as applied in Texas' appellate courts, the **Holley** factors are routinely described as a "non-exhaustive list." In other words, if the state can't find in the **Holley** factors some existing way of diminishing parental rights, it's always at liberty to make up a new one, *ad hoc*. However, the careful review and detailed analysis done by the **Holley** court is a *good* method of reviewing evidence in a case in which a parent's fundamental rights to parent are at stake, as they are here.

called a gloss for literally *anything* a judge or jury decides to do. The example of the lesbian mother given above is only one possible outcome that could spring from a rigorous implementation of that standard. This court must assemble all of its intellectual resources to see—and then the moral courage to articulate—that the best-interests standard is no standard at all, or more precisely, it is so vague, broad, and all-encompassing as to allow purely unfettered discretion to reside in the state actors charged with its implementation. As such, it is unconstitutional.

Chief Justice Rehnquist once referred to best-interests as venerable. If that is the best defense one can muster for best interests—and it is—then best interests is long overdue to be relegated to the company of such venerables as Jim Crow.

ISSUE 3

The version of Texas Family Code §153.134 applicable to this case states that orders appointing joint managing conservators must include a designation of the conservator with the exclusive right to decide residence *only if there is no agreement between the parties otherwise*. Here, the parties agreed that there would be no such exclusive parent, nor was one needed. Does §153.134 even apply under these facts?

The prince hustles down the hallway to the next mirror, the mirror of "statutory construction." This mirror is very tall and wide, and the prince always stares long and hard into it for any glimpse of a problem. Today when he asks his several courtiers: "How do I look?" they all reply: "Fabulous, your Highness." Satisfied with this affirmation, although a wee bit troubled by what he himself sees, the prince moves on.

As the prince looked into the mirror, the young apprentice also looked. But the apprentice saw something quite different from what all the older attendants were telling the prince. The apprentice wondered why the courtiers—some of whom have been in the prince's service for dozens of years—didn't speak up and tell the prince the problem which the novice apprentice noticed all too clearly.

The panel held in its original opinion that Texas Family Code §153.134 "mandate[s] that all orders appointing joint managing conservators include a designation of the conservator who has the exclusive right to determine the child's primary residence." This is correct under the terms of §153.134 only if a written agreement is not filed by parents. It ignores the fact that §153.134—by its own terms—simply does not apply under our facts.[34]

The statute in question provides as follows (emphasis added):

> (a) ***<u>If a written agreement of the parents is not filed with the court</u>***, the court ***<u>may</u>*** render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering the following factors:
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> . . .

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[34] To the extent Texas Family Code §153.133 "requires" appointment of one of two fit parents as having the exclusive right to determine residence, it is likewise unconstitutional.

(b) In rendering an order appointing joint managing conservators, the court shall:

(1) designate the conservator who has the exclusive right to determine the primary residence of the child and;

(A) establish, until modified by further order, a geographic area consisting of the county in which the child is to reside and any contiguous county thereto within which the conservator shall maintain the child's primary residence; or

(B) specify that the conservator may determine the child's primary residence without regard to geographic location.

This statute's obvious purpose is to make sure that one person has the ability to break any "ties" if there is a disagreement about where the children will reside. But there will never be any ties to break, and hence no need for a tie-breaker, if the decree itself expressly and conclusively establishes residence. The Texas legislature's intent on this matter is indicated by the 2003 repeal of Texas Family Code §153.136, which presumed that the best interests of the child *usually* was served by the court appointing one of the conservators as the person with the exclusive right to designate the child's primary residence. In its repeal of §153.136, the legislature showed uncommon wisdom. For contemporary American families trying to withstand our nation's divorce hurricane, the requirement of a "primary child residence" no longer remotely comports with reality (laying aside for the moment the question of constitutionality). What makes a house a child's *home* is the dedication of

parents and the love within it, not an *a priori* legal requirement for a single, favored, physical address.

The Staleys, of course, did have an express agreement regarding residency[35] which became part of a final, agreed judgment.[36] The Staleys determined and agreed in advance precisely where the Staley Children would reside such that neither parent needed to be the one to determine the children's primary residence. The original decree did not violate the statute but rather *complied with it* by including a clause that made appointment of an exclusive decision-maker unnecessary. Judge Miller was sufficiently convinced, due to the agreement, that no exclusive decision-maker was needed and wisely recognized she had no jurisdiction to appoint one.

But even in the absence of an agreement, the statute says the court—when deciding whether to appoint a so-called exclusive parent—must first consider a laundry list of factors relating to the children's interests, such as: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the ability of the parents to give first priority to the child's welfare and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the child and the other parent; (4) whether both parents participated in child rearing before suit was filed; (5) the geographical proximity of the parents' residences; (6) if the child is 12 years of age or older, the child's preference, if any, regarding

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[35] C.R. at 324.

[36] **McCray v. McCray**, 584 S.W.2d 279, 281 (Tex. 1979)(agreed judgment afforded same finality as any other judgment; court must construe it using ordinary rules of contract interpretation).

the appointment of joint managing conservators; and (7) any other relevant factor.

In this case, the record is totally devoid of any proof concerning any of these seven areas of import, except number 5.[37] Pointedly, there is nothing in the record reflecting that Judge Coen heard evidence about or considered any of these issues before he decided on 11/11/02 to grant *ex parte* default Temporary Orders. Given this complete lack of evidence, perhaps this monumental change in the earlier decree was made because Tom and his lawyer failed to show up for the temporary-orders hearing.

Who knows?

What we **do** know is that Judge Coen made sure he never considered the only evidence from this list that was available—the statements of preference by two of the Staley Children. He even held Tom in criminal contempt for *attempting* to provide those statements to the court.

In dozens of places in the Family Code, the legislature indicates its preference that divorcing parties reach agreement on the various rights and obligations they will have post-divorce. This is good public policy in every case. And it is especially important in domestic cases where innocent children are impacted—sometimes severely—by the decisions and agreements of their divorcing parents. The Staleys attempted to achieve an express, legislative preference by entering into an agreement which is omnibus as to all post-divorce issues they anticipated would come about, including the children's residence, choice of school, and child support.

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[37] C.R. at 496.

And the agreement was adopted and approved by Judge Miller. This court now basically chastises the Staleys by characterizing their agreement as violating the statute, which it does not, and violating common sense, which it does not. Such a decision, juxtaposed against the clear legislative preference for making agreements, sends mixed signals to the Staleys and all other parents similarly situated.

Contrary to this Court's original opinion, Pam did not "seek[] to bring the divorce decree into compliance with the requirements of the Code." Instead, the record establishes without dispute that she almost instantaneously *violated* the decree and *breached* the Staleys' agreement regarding the children's residence. Pam simply cannot be allowed to flaunt the law. The Court's failure to correct this error is contrary to the plain language and underlying intent of the statute, and should be reversed on rehearing.

ISSUE 4

Texas Family Code §156.102 states that provisions in divorce decrees naming the parent with exclusive right to decide residence may be modified within their first year only upon petition and affidavit—with proof—showing that the child's present environment is endangering the child's physical health or significantly impairing its emotional development. No such affidavit was ever filed in this case. Did the court violate the statute when it modified the decree to give Pam that right?

It is questionable whether this statute applies in this case for at least two reasons. First, it only applies to cases where there is a "parent with the exclusive right to decide residence" under the terms of the subject decree (which is not the case

here). Second, even if it applies, there was no proper affidavit or proof submitted by Pam triggering the statute.

Instead of filing a proper affidavit and supporting proof demonstrating that the Staley Children's status-quo residence was endangering their physical health or significantly impairing their emotional development, Pam instead filed two different types of affidavits.[38] In the first one, she alleged only that her mother was in need of care and that it would be more convenient if she and the Staley Children moved to Decatur.[39]

Then, right before trial began—obviously now recognizing the insufficiency which plagued her initial filing—Pam filed her second affidavit in which she made conclusory allegations based on hearsay, wholly without the required supporting proof, which failed to show any danger to the Staley Children's physical health, and failed to show any significant impairment of their emotional development would occur from their status quo.[40] It is as if Pam and her attorneys were scrambling to find *any* support for their disingenuous petition, and just threw against the wall some statutory language and

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[38] The two affidavits are attached to this Motion for the Court's ease of reference.

[39] C.R. at 494-497. Indeed, the stresses noted by Pam in this affidavit could well have been caused by her decision to distance the children from their father. The literature is full of clinical studies showing that children deprived of the love and nurture of both parents suffer far-higher instances of emotional stress, obesity, sleep disorders, nervousness, drug abuse, teen pregnancy, and many more-serious psychological ailments.

[40] C.R. at 606-609.

unsupported conclusions, hoping some of it would stick.

The statute does not apply here. Even if it did, Pam did not comply with it. Since application of this statute was the underlying basis for the trial court's judgment, that judgment should be vacated.

ISSUE 5

When the court is asked to deprive a U.S. citizen of fundamental constitutional rights, the court must use a clear-and-convincing burden of proof, not preponderance-of-the-evidence. The trial court used the preponderance-of-the-evidence burden when it repudiated Tom's rights concerning access to his children. Is the trial court's failure to utilize the correct burden of proof sufficient reason to remand the case to be decided under the correct standard?

The prince moves on to the "burden-of-proof" mirror. Here, the prince never fails to look carefully, for he knows that if his appearance is not perfect in this mirror, his entire day will be ruined.

When he begins to examine his appearance, he notices that something is not right. However, when he inquires of his chief attendant, he hears: "Your Highness, you have important work before you. One look is as good as another. Do not concern yourself with such trivial matters." The prince, usually a stickler on such important points, elects to listen to his attendant and forgets that if this mirror does not reflect a consistent and true appearance, his work will suffer mightily. No one else notices—or points out—that the prince's original concerns might be valid. The young

apprentice follows along, dumbfounded at what he is observing.

Under settled constitutional jurisprudence, before a court can enter an order affecting a fundamental constitutional right, the court must first be presented with clear and convincing evidence (a) that the state's actions are designed to advance a compelling governmental interest, and (b) that the means to achieve that end are the least intrusive possible. The burden of proof required to carry such a claim is Clear and Convincing evidence, not Preponderance.[41]

The burden of proof is a reflection of society's concern for the consequences of wrong decisions. The more severe the consequences of a bad decision, the higher the burden of proof. A good argument can be made that destroying a parent's fundamental rights to parent has consequences every bit as severe as stripping a man of his freedom—a consequence for which society imposes a beyond-a-reasonable-doubt standard. But even if that penultimate burden is not implicated, surely a parent's rights deserve more protection than that given to a citizen embroiled in a purely-commercial dispute—preponderance.[42] That is where clear and convincing comes in.

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[41] **Interest of G.M.**, 596 S.W.2d 846, 847 (Tex. 1980)(holding that clear and convincing evidence standard must be met in cases where change to fundamental parental rights is in issue); **Neiswander v. Bailey**, 645 S.W.2d 835, 835-36 (Tex. App. – Dallas 1982, no writ)(holding that appellate court uses a higher standard of review than factual sufficiency when a clear-and-convincing standard of proof applies).

[42] **May v. Anderson**, 345 U.S. 528, 533 (1952).

The state has two sources of power to interfere in family matters: the police power and *parens patriae*. However, the exercise of both these powers to deprive parents of their rights is restricted to those situations where the present circumstances jeopardize the child's health or safety.[43] And in either scenario, before the state may interfere and change a parent's decisions, the court must see clear-and-convincing evidence that the child is facing a clear and present danger. "It is clear from Supreme Court precedent that some harm threatens the child's welfare before the state may constitutionally interfere with a parent's right to rear his or her child."[44] Indeed, the doctrine of *parens patriae* has been invoked as the reason to NOT terminate the rights of parents concerning their children.[45]

Here, the trial court's records do not reflect that the court employed a clear-and-convincing-evidence standard when Pam sought to modify the parent child relationship between Tom and his children. Indeed, just the opposite is proven.[46] Pam needed to prove that Tom was an unfit parent by clear and convincing evidence. She did not do so. The judgment

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[43] **Prince .v Massachusetts**, 321 U.S. 158, 166 (1944)(police power); **Wisconsin v. Yoder**, 406 U.S. 205, 206 (parens patriae).

[44] **In re Custody of Smith**, 969 P.2d at 29.

[45] **Santosky v. Kramer**, 455 U.S. 745, 766-67 (1982).

[46] According to the court's charge, the only burden-of-proof instruction given to the jury was the preponderance standard. See C.R. at 617, where "preponderance" was defined and where the trial court instructed the jurors to use this standard in answering all questions posed to them.

should therefore be reversed and the case remanded to see if Pam can prove her case using the correct burden of proof.

ISSUE 6

> **In order to change the Staley Children's residence, the court must find clear and convincing evidence that their father is an unfit parent. The only evidence presented to the trial court on change of residence showed that Pam's *mother* was impacted by the status quo ante. Is such evidence insufficient as a matter of law to justify modification of Tom's rights as reflected in the contractual, final Divorce Decree?**

The only evidence presented to the trial court with the Petition to Modify on 8/13/02 was Pam's four-page, self-serving, contradictory affidavit.

In this affidavit, Pam mostly testified about the health problems her mother was experiencing, and stated in conclusory fashion that Pam is supposedly required "to be present on an almost full time basis to care for her (sic) mother, the children's maternal grandmother, and to relocate to an area that would make [Pam's] presence more practical and meaningful to her (sic) mother's care. I am the sibling best able to care for [the mother] during her period of convalescence and disability."[47]

In the second affidavit, Pam merely states some concerns she has, but since she is not a doctor, psychologist, or mental health worker, her concerns are not based on anything other

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[47] C.R. at 495.

than her personal feelings and hearsay statements of her children. Pointedly, the Petition and affidavits made no allegations and offered no proof that Tom was an unfit parent, nor that any of the children were being harmed in any way by the status quo ante.

Pam instead tried to convince the trial court that her mother's health problems should justify her breach of the divorce decree. Then, once she breached the decree and moved to Decatur, she asked the court to find that the children would be harmed by having to **move back** to Dallas and attend school at Carrollton Christian Academy. This is the logical equivalent of a person violating a restraining order by moving from Texas to Alaska, and then arguing that the violation should be excused because it would be inconvenient to make them come back to Texas.

In addition, Pam's first affidavit is internally inconsistent. It claims *simultaneously* that Pam needs "to be present on an almost full time basis to care for her (sic) mother." But then on the very next page, it states that Pam will be teaching 7th and 8th grade language arts at Calvary Christian Prep school in Decatur, presumably full time. Pam's affidavit also makes inaccurate statements about the Staley Children's recent whereabouts when it says "the child's (sic) present address, whereabouts, and places lived are all set out in the Final Decree of Divorce entered in this matter and all information contained in that document is still current."[48] Attached to Tom's affidavit filed in response, however, is a facsimile letter from Pam dated 8/8/02, in which Pam states in relation to the children: "we have been in Decatur since the end of May [2002] and now find it necessary that we establish

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[48] C.R. at 496-97.

permanent residence in Decatur in order to care for mom."[49] Pam's 8/8/02 facsimile letter preceded the filing of her Petition to Modify by just five days.

Finally, at trial in August and October 2003, Pam failed to come forward with any clear-and-convincing proof that leaving the Staley Children with their father would harm them.

Instead of violating the decree and contract, Pam could have chosen to go to Decatur and leave the Staley Children in the care and custody of their father. This is what Pam should have done when she felt she needed to be near her mother. Pam's perceived need to care for her mother is not suitable grounds to deny Tom's constitutional and contractual rights to have equal possession of, care for, and educate his children in a manner he deems proper and as was agreed in the Staley's contract and decree executed just a few weeks before.

There was not only insufficient evidence presented on the issue of whether Tom was an unfit father, there was NO evidence. As such, the court erred and its judgment demonstrates an abuse of discretion. The jury and consequently the court must have arrived at their conclusion by some means other than consideration of relevant evidence. Tom's constitutional rights to due process were violated and the trial court's orders and judgments should be set aside.

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[49] C.R. at 505 (copy attached for ease of reference).

ISSUE 7

Agreements relating to custody, child support and property settlement, even if incorporated into a final divorce decree, are construed and enforced in the same manner as any other contract under Texas law. Pam and Tom Staley had such a contract. Were Tom's contractual rights violated by the trial court's orders, and did this Court fail to address and correct that error in its original opinion?

Near the hallway's end is the "sanctity of contract" mirror. In this mirror, the prince is provided a different view of the world every time since—by their tilting the glass or bending the frame—the size, shape and brightness of the reflection is determined by the parties to the dispute he is about to adjudicate. As each dispute is different, so too is every reflection in this mirror different from all the others.

The one rule the prince always observes about this mirror is that he never tries to distort the reflective surface itself, but only attempts to view his reflection in the best, most reasonable light he can. To do this, he often stands in different locations, sometimes even "in the shoes of" the parties. Today, when the prince looks into this mirror he forgets the mirror is "inviolate" and, not pleased with his reflection, actually reaches out and bends the corners of the mirror inward to improve his reflection. The young apprentice marvels at this breach of protocol, and wonders why the courtiers are not reminding the prince of the rules relating to this mirror.

Contracts are inviolate. This rule is found in the U.S. Constitution, article 1, sec. 10, and in the Texas Constitution, article 1, sec. 16. The Constitution prohibits the

state—including the courts—from making any laws or judgments that impugn the right to contract or the rights or remedies contained within private, lawful contracts. Instead, the sole job of the courts is to construe contracts (if necessary) and then enforce them as written.

The authority to make a binding contract incident to divorce is found in Texas Family Code §7.006 (emphasis added):

> Agreement Incident to Divorce or Annulment.
> (a) To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under another rule of law.
> (b) If the court finds that the terms of the written agreement in a divorce or annulment are just and right, **those terms are binding on the court**. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
> (c) If the court finds that the terms of the written agreement in a divorce or annulment are not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing.

The Texas statutory law applicable to this case—from 2002—allowed a provision in a divorce decree that made the decree enforceable as a contract. Texas Family Code §154.124 (2002), provided (emphasis added):

Agreement Concerning Support.
(a) To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for support of the child and for modification of the agreement, including variations from the child support guidelines provided by Subchapter C.
(b) If the court finds that the agreement is in the child's best interest, the court shall render an order in accordance with the agreement.
(c) Terms of the agreement in the order may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as contract terms **unless provided by the agreement.**
(d) If the court finds the agreement is not in the child's best interest, the court may request the parties to submit a revised agreement or the court may render an order for the support of the child.

Here, the Staley divorce decree, which was approved by Judge Miller before she retired, expressly provides as follows:

> The Court finds that the parties have entered into a written agreement as contained in this Decree by virtue of having approved this Decree as to both form and substance. **To the extent permitted by law, the parties stipulate the agreement is enforceable as a contract**.[50]

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[50] C.R. at 320 (emphasis added).

A divorce decree which provides for its enforcement as a contract is treated the same as any other contract under Texas law. As such, all of the ordinary rules pertaining to contract enforcement apply to that type of decree.[51] This in turn means the contract/decree can only be changed using the legal rules applicable to changing other types of contracts.

According to Texas law, the only way in which a court may alter a contract's terms is by proof of unconscionability, fraud, accident, or mistake in its inception, or by enforcing a superseding agreement of the parties.[52] None of these reasons to change the contract have been alleged or proven by Pam Staley. Instead, the only circumstance alleged to have changed was regarding Pam's *mother*, which Pam believed justified her wholesale breach of the contract she recently made with Tom.

There is no Texas law—or law in any other jurisdiction for that matter—which suggests that a change in circumstances is a lawful excuse to modify or breach the terms of a contract. The parties to a contract are entitled to have the other party fulfill their obligations under a contract, and if that is inconvenient or upsetting or difficult for the obliged party to do, then so be it; they must still fulfill their obligations or pay for their breach.

Here, Pam not only flagrantly and willfully breached the terms of her contract with Tom, but she did so while retaining the valuable consideration and performance which Tom had

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[51] **Rich v. Rich**, 2003 WL 21027940 (Tex. App.– Houston [1st Dist.] 2003, no pet.).

[52] **McEntire v. McEntire**, 706 S.W.2d 347, 349-50 (Tex. App. – San Antonio 1986, writ dismissed).

already given to her in compliance with *his* contract obligations—valued at several hundred thousand dollars. What Pam has done—so far with the support of the courts—is to make a contract, accept and enjoy its many lucrative benefits, and then when it came time for her to perform she screamed "change of circumstances" and reneged on *her* obligations.

Tom thus has a cause of action against Pam for breach of contract. However, he should not have to fight the breach-of-contract action while facing arguments that Pam's breach has been somehow blessed by the courts. Instead, the judgment in this case should be reformed to expressly state that it does not have any impact on the contract rights or obligations of either party.[53] If such a correction/clarification is not made, then the judgment itself could be considered an unconstitutional impairment on the right to contract.

The court should either strike the judgment, or remand and order that the judgment be reformed to specifically state that it does not impair either parties' contract rights.

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[53] **Brady v. Hyman**, 230 S.W.2d 342 (Tex. Civ. App. – San Antonio 1950, no writ)(contractual provision for child support could not be modified by the court, although the contempt threshold could be lowered); **Ruhe v. Rowland**, 706 S.W.2d 709 (Tex. App. – Dallas 1986, no writ)(contract rights are not affected by changes to divorce decree).

ISSUE 8

Texas divorce decrees are final judgments for purposes of res judicata. The decree in this case was an agreed final judgment. Did the court's interpretation and application (or non-application) of the governing statute, Texas Family Code §156.102, improperly abrogate the res judicata effect of a final judgment as recognized by the Texas Supreme Court?

As the prince approaches the last mirror, he pauses a bit longer than usual. This is the "res judicata" mirror. It is a small, hardly-noticeable mirror at which the prince usually provides barely a glance. As he squares himself in front of it, the courtiers all assure the prince that his appearance is perfect as reflected in this mirror. However, once again, the young apprentice, who is slowly moving through the crowd toward the front of the line, wonders why the prince's attendants are not more particular, more circumspect with their flattery and advice. It is obvious that the prince is about to enter his court not fully aware of what his actual appearance is.

According to the Supreme Court, a divorce decree is a final judgment entitled to res judicata effect. This means that all matters addressed in the decree are fully and finally adjudicated as between the parties to the decree, and they may not be re-litigated in a subsequent proceeding.[54]

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[54] **Reiss v. Reiss**, 118 S.W.3d 439, 441 (Tex. 2003).

In our case, several issues were adjudicated to finality in the original Divorce Decree dated May 29, 2002. The original decree provided, *inter alia*, that:

> (a) the Staley Children would have their residence in Dallas or Collin counties until their 18th birthdays;
>
> (b) they would be educated at Carrollton Christian Academy, and
>
> (c) neither Tom nor Pam would pay each other any periodic child support.

Not only was this the trial court's order in the final judgment and decree, but these were all points of *contractual* agreement between the Staleys when they finalized their divorce.

The panel opined in its original decision that the main purpose of §156.102 is "to promote stability in the conservatorship of children by preventing the re-litigation of custodial issues within a short period of time after the custody order is entered." This is, not surprisingly, the same goal fostered by the doctrine of res judicata.

But the panel then improperly limited the statute's reach and impact by saying it only applies in those cases where one or the other parent has been granted the exclusive right to decide residence. This is clearly incorrect.

Residence stability can be obtained in at least two separate ways: (1) by the parties making an enforceable agreement that their children's residence will be and remain in a specific location, or (2) by appointing an exclusive decision-maker under §153.134(b)(1). The Staleys chose the first method. For the panel to say their choice somehow violated the statute

is plainly contrary to the statute's express wording. The motion for rehearing should be granted and this error corrected by enforcing the statute in light of the parties' agreement.

The doctrine of res judicata simply does not allow such a wholesale change to the original judgment. By taking this step, the trial court erred. By failing to correct the trial court's error, this court also erred. These errors should be corrected on rehearing.

ISSUE 9

> **In order to find a person guilty of criminal contempt, the court must provide the accused with specific procedural protections. Here, Tom Staley did not get any warning that the contempt issue would be taken up by the court on the date of that hearing, and he was therefore unable to present witnesses in his defense or arrange for adequate criminal-defense counsel. Must the contempt finding against Tom be set aside because it is constitutionally infirm?**

As the prince enters the court and takes his throne, the first order of business is a matter of an alleged violation of one of his prior orders. The person accused of violating the order is in the courtroom but he is blindfolded, gagged, and bound in his chair. The prince's chief courtier, the one who normally prosecutes such matters before the prince, makes his usual presentation despite the incapacity of the accused. Indeed, the chief courtier does not even seem to notice that the accused has been effectively rendered absent, nor does he take the time to see if the accused's lawyer *knows that the matter is now before the prince; no messenger is sent, no call is*

made. Instead, he proceeds unhindered by the circumstances. The prince seems unaware that this type of ex parte proceeding is most unusual, or if he is aware, he overlooks it.

Solely on the basis of the prince's recollection, and without hearing any explanation or response from the accused, the matter proceeds and the prince pronounces judgment. The apprentice courtier, now standing next to the rear wall of the courtroom, just shakes his head, unable to see how such proceedings could possibly be characterized as "justice."

The court convicted Tom of criminal contempt for failing to make timely child support payments and for assisting his sons in submitting statements of preference, the last allegedly in violation of the court's prior "verbal order." Since Tom had no notice that the contempt issues would be raised at the 4/28/03 hearing, Tom was wholly unprepared to address them.

In order to be the subject of a finding of contempt, an order must give the person affected fair notice of what conduct will be deemed a contempt. Ordinarily, unless expediency dictates otherwise, such an order must be in writing, at least in part so there is no question later what conduct was enjoined.[55]

There are two forms of contempt: direct contempt occurs in the court's presence; constructive contempt occurs outside the court's presence. Failure to obey a court order to pay

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[55] **Ex Parte Chambers**, 898 S.W.2d 257, 262 (Tex. 1995)(contemnor cannot be held in constructive contempt of court for actions taken prior to the time that the court's order is reduced to writing).

child support is constructive contempt.[56] Likewise, disobedience of a court's instruction not to obtain statements of preference from the Staley Children is constructive contempt because it occurred outside the court's direct presence.

The Texas Supreme Court has opined on the proper measure and type of proof necessary to uphold a criminal contempt finding:

> In a criminal contempt conviction for disobedience of a court order, the trial court must be shown proof beyond a reasonable doubt of the following: (1) a reasonably specific order; (2) a violation of the order; and (3) the willful intent to violate the order.[57]

These rules of decision must be adhered to before a court may render judgment of criminal contempt such as that imposed against Tom Staley. Here, the trial court followed none of them.

1. On the statements-of-preference issue, there was no written order that Tom was alleged to have violated, and so there was no fair warning of what conduct was prohibited by the court.

The "verbal" order was not in writing, hence there is no way to prove that it was reasonably specific. Contempt orders based on violation of void underlying orders are themselves

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[56] **Ex parte Strickland**, 724 S.W.2d 132, 133 (Tex. App. – Eastland 1987, no writ). However, it is not contempt if it cannot be purged.

[57] **Chambers**, 898 S.W.2d at 259.

void.[58] As such, Tom's contempt conviction cannot stand as a matter of law.

The first mention in the record of such an order allegedly restraining Tom from assisting his children in creating statutory statements of preference is in the court's docket entry dated 4/28/03, the date of the contempt hearing, in which the court refers to *"The **verbal** order in open court on 12/16/02 regarding the prohibition against **the children** signing statements of choice was clear, specific and unambiguous and that the Respondent on 1/20/03 had Thomas and Joseph sign such affidavits in violation of the Court's **verbal** order"* (emphasis added).[59] However, a review of the docket for 12/16/02 reveals nothing concerning any such "clear, specific and unambiguous" order directing Tom not to assist his children in filing statements of preference, nor does the 4/28/03 reference to this alleged order even coincide with the purported conduct for which Tom was held in contempt. The 4/28/03 docket entry instead describes an order pertaining to "the children" which prohibited *them* from signing such statements. It did not prohibit Tom from having them filed once they were signed—and Tom didn't file them anyway; Forest Nelson did. From the record, this Court can only conclude that the trial court issued an order to the Staley Children, not to Tom—and we have not yet come to the question of whether or not that order was even permissible.

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[58] **In re Cornyn**, 27 S.W.3d 327, 338 n.26 (Tex. App. – Houston [1st Dist.] 2000, no pet.)

[59] C.R. at 34.

Tom has thus been convicted of criminal contempt for violating a purported order that was not in writing, and even then was not directed at his conduct. Due process has certainly not been afforded under these facts, and the contempt order should be voided.

2. As to the support issue, the contempt finding was based on a void order compelling support payments, and thus may not stand.

As shown above, the order issued by Judge Coen directing Tom to make monthly support payments to Pam violated Tom's constitutional rights to contract. As such, the order is void. Contempt will not be found for violation of a void order.[60] For this and other reasons explained in this Motion, Tom's conviction for allegedly violating this order must be reversed.

3. Tom was not afforded any of the procedural safeguards required for a criminal contempt hearing, including advance notice that the hearing would be held, an opportunity to present witnesses in his defense, and opportunity to retain adequate, independent criminal counsel.

Contempt not personally observed by the judge requires notice and an opportunity to be heard on disputed facts: a man always gets to defend himself. Absent adequate notice, a contempt order is a nullity.[61]

Here, Tom was not afforded adequate advance notice that

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[60] **In re Cornyn**, *supra.*

[61] **Ex parte Gordon**, 584 S.W.2d 686, 689-90 (Tex. 1979).

the contempt issue relating to the statements of preference would be adjudicated at the hearing on 4/28/03. "A fundamental due-process requirement is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[62] Instead, the trial court apparently just decided—completely without warning to Tom—that the April 28th hearing would be "a good time" to take up that issue. Tom has thus been deprived of due process in being denied adequate notice of the hearing.

The reason a defendant accused of criminal conduct is entitled to notice of the hearing is so he can prepare and present witnesses in his defense, arrange for competent, independent, criminal-defense counsel to represent him, effectively confront witnesses against him,[63] and prepare to counter the intent issue.[64] In a word, so he can be present. Since Tom did not have *any* advance warning that the contempt issue would he heard on April 28th, he had no opportunity to do any of these things.

Right to counsel was denied.

Since he was not afforded an opportunity to hire disinterested, competent, criminal-defense counsel, Tom was put to trial represented only by his domestic-law lawyer, Brian Loughmiller. But Loughmiller was one of Tom's lawyers (along with Christopher Weil) to whom Tom had earlier sent timely child support payments, and who (like

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[62] **Armstrong v. Manzo**, 380 U.S. 545, 551-553 (1965, per curium).

[63] **Crawford v. Washington**, 541 U.S. 36, 50-52 (2004).

[64] **Groppi v. Leslie**, 404 U.S. 496, 502 (1972).

Weil) had failed to forward them to Pam. Loughmiller also had failed to ask Weil to forward the support payments Tom had provided to Weil prior to Weil's being fired as Tom's lawyer. In a properly-conducted contempt hearing, where Tom could be represented by independent counsel, Loughmiller would have been an exonerating witness testifying that Tom had not violated the court's support order but had actually made the payments as ordered. Instead, Loughmiller—for some inexplicable reason—coerced Tom into "taking the fifth" and would not let him testify about these matters. Perhaps a vivid imagination could conceive of a better definition of "inadequate counsel," but such vividness alludes Tom's present counsel.[65]

Right to present exonerating evidence was denied.

Tom—at his sons' request—prepared and presented the preference statements to his sons on 12/5/02, before the date of the alleged verbal order. Joseph's statement was signed on 12/15/02, but Weil chose not to present any statements to the court at the hearing on 12/16/02. Thereafter, Thomas signed his statement on 1/5/03. Then, new, notarized statements were signed by the boys and hand-delivered to the court on 1/20/03 by Forest Nelson, the attorney for the boys' trust. Judge Coen told Nelson to send the statements to the court-appointed psychologist, Dr. Mark Otis, for review, which Nelson did. There was no indication by the court on 1/20/03 that he felt the statements were in violation of a 12/16/02 verbal order.

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[65] **Ex parte Heister**, 572 S.W.2d 300 (Tex. 1978)(holding that whether a defendant has been afforded effective assistance of counsel is a question that turns on the facts of each case; if defendant is denied effective assistance of counsel, order of contempt cannot stand).

This proof was not presented to the court at the contempt hearing on 4/28/03, solely because Tom did not have notice that this issue would be addressed at that hearing. If the information had been presented, the trial court could have well found that Tom was NOT in contempt relating to the statements of preference.

There was no proof of intent.

If Tom had been afforded due process, he could easily have proven (a) that he had timely provided all child support payments to his lawyers who had, for some reason, failed to forward them to Pam, and (b) the innocent circumstances surrounding the creation of the allegedly-offending statements of preference and their filing with the court by Nelson. Had proof on these matters been allowed, it would have proven that Tom had no intent to disobey the court's orders, making his criminal contempt conviction improper. Thus, Tom has been deprived of due process and the contempt order must be set aside.

3. The court's order, even if it had been in writing, constituted an impermissible prior restraint on Tom's and the Staley Children's constitutional rights to freedom of speech and to petition the courts for a redress of grievances.

Tom Staley, as the parent of the minor Staley Children, is a person who is required to speak for those children in a court of law. Texas law provides that a child's desires concerning which parent will be his or her main conservator is the first-listed factor in the pre-eminent Texas Supreme Court case

dealing with the so-called best interests of the child.[66] Therefore, when the trial court attempted to prevent the Staley Children from submitting statements of preference, or alternatively attempted to prevent their father from assisting them in doing so, it was infringing upon the Staley Children's constitutional rights and was intentionally depriving itself of a controlling factor used to make a proper determination about the custodial future of those children. If this is not at least an abuse of discretion, it is anyone's guess how one would characterize it.

Judge Coen's purported verbal order not only derogated the Staley Children's constitutional rights to be heard by the court, but it derogated Tom's right and obligation to speak on their behalf. The verbal order thus constituted an impermissible prior restraint on Tom's and his children's speech and petition rights and is void. Since the verbal order is void, the contempt order based on its alleged violation is likewise void.[67]

4. **The court's order, even if it had been in writing, constituted an impermissible prior restraint on the statutory rights of the Staley Children to execute statements of preference in a custody proceeding through their parent/guardian.**

Texas law provides that the Staley Children may submit statements of preference as to which parent they want to be their managing conservator.[68] While such statements are not

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[66] **Holley v. Adams**, 544 S.W.2d 367, 371-72 (Tex. 1976).

[67] **In re Cornyn**, 27 S.W.3d at 338 n.26.

[68] Texas Family Code §153.008 (2002).

controlling of the court's decision, they are important, statutory evidence that must be taken into account when deciding custody. Otherwise, the statute would be allowing something that is irrelevant to the court's deliberations, and would thus be countenancing a nullity.[69]

The statements by the Staley Children were important factors to consider in determining conservatorship. By ordering that no such statements be submitted, the trial court abused its discretion by ensuring that important, statutory information would be excluded from the record. Why he did this, one can only imagine.

In addition, filing such statements is expressly authorized by Texas statutory law, and a court order cannot lawfully derogate that right. Thus, the underlying verbal order forbidding Tom and his children from submitting the children's statutory statements of preference to the court (if it actually existed) was void as an unconstitutional prior restraint. The contempt order for violating that void underlying order is thus itself void and must be set aside.

CONCLUSION

Though the prince looked into many mirrors on his way to the courtroom today, he nevertheless entered the proceedings completely naked. Through the combination of poor advice from his courtiers—people he trusted to give him sound counsel—and his own particular quirks and biases, the prince managed to pass judgment today that violated nearly every

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[69] Texas Government Code §311.021; **Chevron Corp. v. Redmon**, 745 S.W.2d 314, 316 (Tex. 1987)(courts do not construe statutes or portions of statutes as being meaningless or as providing for irrelevant actions).

rule of statutory construction, contract interpretation, civil procedure, and due process the kingdom had ever known. The fact that these errors were made by the prince himself only further exacerbated their negative, kingdom-wide ramifications.

The young apprentice is now disturbed enough to take action. Approaching the prince for the first time, with much trepidation and anxiety, he follows the prince back down the hall to the dressing area where the apprentice puts the ancient robe on the prince's shoulders. Together, they enter the hall of mirrors once again. The apprentice points out the flaws in the reasoning and advice the prince was earlier provided by his attendants. He asks the prince to once again look at his reflection in each of the mirrors. He tells the prince many things the prince does not want to hear, but that the prince needs to hear if he is to retain his mantle of authoritative respect. And, to the prince's credit, he does not have the boy's head removed, but instead listens intently and with an ear to correcting his mistakes so that all subjects would have the chance at a fair hearing of their disputes, and so the prince will never again humiliate himself so publicly. The end.[70]

Besides being extremely important to the entire domestic-law legal structure in Texas, many issues discussed in this Motion are also "issues capable of repetition but evading review."[71] In 99% of all domestic-law cases, the litigants are laypersons who are unaware of their basic constitutional rights as described in this Motion, and hence cannot direct their

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[70] With appropriate apologies to Hans Christian Andersen.

[71] **<u>Southern Pacific Terminal Co. v. Interstate Commerce Comm.</u>**, 219 U.S. 498, 515 (1911).

counsel to pursue them. This is not to say that Texas parents do not realize when they have been harmed and violated, it's just they do not usually articulate their concerns in the kingdom's—er, the *system's*—technical vocabulary.

To make matters worse, the lawyers/courtiers they hire to represent them (a) are usually not Constitutional-law experts so they normally are *also* mostly unaware of the constitutional issues presented, and/or (b) are part of "the system" and thus have a vested interest in the system continuing to operate business as usual; they have little incentive to overturn the apple cart even if every apple in it is filled with worms.

The trial court's actions and rulings are—in a word—repugnant. The trial court allowed Pam to violate the court's agreed judgment/decree, almost before the ink was dry on the paperwork, with utter impunity. This court then suggested that Pam's illegal conduct was salutary, curiously stating that she was somehow seeking to bring the parties' earlier agreement into compliance with an inapplicable statute and one which—even if applicable—is unconstitutional since it deprives one fit parent of the right to direct his children's upbringing without legal due process.

To add insult to injury, Tom was prosecuted for criminal contempt without being afforded ***any*** of the constitutionally-mandated, procedural safeguards that accompany any proper criminal adjudication in this country. There was no written order telling him what conduct he should avoid, and even the alleged verbal order was not coincident with the charges for which he was eventually convicted and punished. Then, he was effectively ambushed when the trial court elected to have a hearing on criminal contempt charges without giving any advance warning that the charges would be raised in the hearing in which they were ultimately adjudicated. In this

manner, Tom was deprived of his rights to confront his accusers, to hire independent criminal counsel, and to subpoena and present witnesses in his own defense. His conviction resulted in a fine, a 72-hour suspended jail sentence and one-year probation, and a hefty reimbursement of attorney's fees based solely upon:

> (a) the failure of Tom's lawyers to deliver the support checks to Pam in a timely manner, a failure those same lawyers then covered up by advising Tom not to testify about the true facts surrounding those checks; and
>
> (b) Tom's efforts to assist his children in exercising their constitutional rights of free speech and to petition the court for redress, and their statutory rights to make important statements of preference in the heat of contested custody proceedings.

To anyone who values fairness and honesty in judicial proceedings, this entire contempt proceeding literally shocks the conscience.

Finally, the controlling statutes under review in this case are unconstitutional either on their face or as applied. They derogate and destroy, without due process of law, the fundamental constitutional rights of fit parents to be involved in the parenting decisions affecting their children. And they do so under the constitutionally-infirm standard of "best interests of the child." The unfettered discretion planted in trial courts to make determinations of this nature is flatly unconstitutional.

This Court should reverse and render the judgment below, or reverse and remand this proceeding to the trial court for purposes of correcting the numerous, serious errors that appear in this record. Tom Staley prays for this and such other and further relief as is just.

Respectfully Submitted:

____

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TOM STALEY

Certificate of Service

I hereby certify that on the 23 day of June 2005, I delivered a true and correct copy of the foregoing **Motion for Rehearing** to the following by U.S. Mail, postage prepaid:

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____
James A. Pikl

APPENDIX H

IN THE DISTRICT COURT
254th JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

No. 99-11284-R

[May 29, 2002]

IN THE MATTER OF	)
THE MARRIAGE OF	)
THOMAS C. STALEY	)
AND	)
PAMELA S. STALEY	)
	)
AND IN THE INTEREST OF	)
REBEKAH CHRISTIAN STALEY,	)
THOMAS CHRISTIAN STALEY,	)
JOSEPH CHRISTIAN STALEY AND	)
MERCY CHRISTIAN STALEY,	)
MINOR CHILDREN	)
	)

FINAL DECREE OF DIVORCE

On May 6 and 10, 2002, the Court heard this case.

1. Appearances.

Petitioner, Thomas C. Staley, has made a general appearance herein and has agreed to the terms of this document to the extent permitted by law as evidenced by the hand and seal of Petitioner appearing below.

Respondent, Pamela S. Staley, also referred to as Cross-Petitioner in prior pleadings, appeared in person and through attorney of record, Edward W. Moore, and announced ready for trial.

Also appearing was Kip H. Allison, appointed Guardian and Attorney Ad Litem of the children the subject of this suit.

2. Record.

The record of testimony was duly reported by the court reporter for the 254th Judicial District Court.

3. Jurisdiction and Domicile.

The Court, after examining the record and hearing the evidence and argument of Counsel, finds that it has continuing exclusive jurisdiction of this case. All persons entitled to citation were properly cited.

4. Jury.

A jury was waived, and all questions of fact and of law were submitted to the Court.

5. Agreement of the Parties.

The Court finds that the parties have entered into a written agreement as contained in this Decree by virtue of having approved this Decree as to both form and substance. To the extent permitted by law, the parties stipulate the agreement is enforceable as a contract. The Court approves the agreement of the parties as contained in this Agreed Final Decree of Divorce.

6. Dissolution of Marriage.

It is ORDERED AND DECREED that Thomas C. Staley, Petitioner, and Pamela S. Staley, Respondent, are divorced and that the marriage between them is dissolved.

7. Children.

The Court finds that Petitioner and Respondent are the parents of the following children the subject of this suit:

Name: Rebekah Christian Staley
Sex: Female
Birth place: Dallas, Texas
Birth date: December 30, 1985
Home state: Texas

Name: Thomas Christian Staley
Sex: Male
Birth place: Dallas, Texas
Birth date: September 2, 1987
Home state: Texas

Name: Joseph Christian Staley
Sex: Male
Birth place: Dallas, Texas
Birth date: May 8, 1989
Home state: Texas

Name: Mercy Christian Staley
Sex: Female
Birth place: Dallas, Texas
Birth date: September 27, 1991
Home state: Texas

8. Conservatorship and Support.

The Court, having considered the circumstances of the parents and of the children finds that the following orders are in the best interest of the children.

IT IS ORDERED that Thomas C. Staley and Pamela S. Staley are appointed parent joint managing conservators of the following children, Rebekah Christian Staley, Thomas Christian Staley, Joseph Christian Staley, and Mercy Christian Staley.

IT IS ORDERED that, at all times, Thomas C. Staley and Pamela S. Staley shall have the following rights and duties:

1. The right to receive information from the other parent concerning the health, education, and welfare of the children;

2. The duty to inform the other parent in a timely manner of significant information concerning the health, education, and welfare of the children;

3. The right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the children;

4. The right of access to medical, dental, psychological, and educational records of the children;

5. The right to consult with all physicians, dentists, or psychologists of the children;

6. The right to consult with school officials concerning the children's welfare and educational status, including school activities;

7. The right to attend school activities;

8. The right to be designated on the children's records as a person to be notified in case of an emergency;

9. The right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children;

10. The right to manage the estate of the children to the extent the estate has been created by the parent or the parent's family;

11. The right to represent the children in legal actions and to make other decisions of substantial legal significance concerning the children;

12. The right to consent to marriage and to enlistment in the armed forces of the United States;

13. The right to make decisions concerning the children's education except as limited elsewhere in this decree;

14. The right to the services and earnings of the children; and

15. Except when a guardian of the children's estate has been appointed for the children, the right to act as an agent of the children in relation to the children's estate if the children's action is required by a state, the United States, or a foreign government.

IT IS ORDERED that, during his or her respective periods of possession, Thomas C. Staley and Pamela S. Staley shall have the following rights and duties:

1. The duty of care, control, protection, and reasonable discipline of the children;

2. The duty to support the children, including providing the children with clothing, food, shelter, and medical and dental care;

3. The right to direct the moral and religious training of the children;

4. The right to consent for the children to medical and dental care not involving invasive procedures; and

5. The right to consent for the children to medical, dental and surgical treatment involving invasive procedures.

IT IS ORDERED that the primary residence of all four children is established at two locations: (1) with their mother

at either 6639 Hillbriar, Dallas, Dallas county, Texas or other home with their mother located in area bounded by Beltline Road (North Dallas) on the South, Central Expressway (Hwy. 75) on the East, Marsh Lane (as it would continue Northward) on the West, and the Collin county line on the North, or anywhere in Dallas county, and (2) with their father at either the Collin County Farm, Collin county, Texas or other home with their father located in area bounded by Beltline Road (North Dallas) on the South, Central Expressway (Hwy. 75) on the East, Marsh Lane (as it would continue Northward) on the West, and the Collin county line on the North, or anywhere in Dallas county.

POSSESSION ORDER.

The court FINDS that the following provisions of the Possession Order are in the best interest of the children subject of this suit. IT IS ORDERED AND DECREED that Thomas C. Staley, as Joint Managing Conservator, and Pamela S. Staley, as Joint Managing Conservator, shall comply with all terms and conditions of this Possession Order. IT IS ORDERED AND DECREED that this Possession Order is effective immediately and applies to all periods of possession occurring on and after the executing of this Possession Order. IT IS, THEREFORE, ORDERED AND DECREED:

(a) Definitions.

1. In this Possession Order "school" means Carrollton Christian Academy, Carrollton, Texas, unless mutually agreed upon otherwise by the parties.

2. In this Possession Order "children" used without any further limiting language includes Rebekah Christian

Staley, Thomas Christian Staley, Joseph Christian Staley, and Mercy Christian Staley, whether one or more.

(b) Mutual Agreement or Specified Terms for Possession.

IT IS FURTHER ORDERED AND DECREED that the parties shall have possession of the children at any and all times mutually agreed to in advance by the parties, and in the absence of mutual agreement, it is ORDERED AND DECREED that the parties shall have possession of the children under the specified terms set out in this Possession Order.

(c) Thomas C. Staley's Possession Periods.

1. School Term Possession of the Staley Boys by Thomas C. Staley.

Thomas C. Staley shall have a superior right of possession of the children, Thomas Christian Staley and Joseph Christian Staley, during the regular school term, as follows:

A. Weekends. On weekends, beginning at the time school is dismissed on the first, third and fifth Friday of each month and ending the next day school resumes. Thomas Christian Staley shall also be with Petitioner on every second weekend of each month except in the month of May.

B. Weekends Extended by a Non-school Day. Except as otherwise explicitly provided in this Possession Order, if a weekend period of possession by Thomas C. Staley begins on a Friday where school is not in

session during the regular school term, or if the period ends on or is immediately followed by a Monday where school is not in session, that weekend period of possession shall begin at the time school dismisses on the Thursday immediately preceding the Friday where school is not in session and/or end at the time school resumes after that Monday where school is not in session.

C. Mondays, Tuesdays and Thursdays. On Tuesday of each week, beginning at the time school is dismissed and ending when Pamela S. Staley returns from work, 6:30 p.m., or as soon as practicable after sporting events or school activities, whichever is later, or, at the sole choice and discretion of each child, the next day school resumes. Monday may be substituted for a Tuesday or Thursday with twenty (20) hours prior notice.

D. Wednesdays. On Wednesday of each week, beginning at the time school is dismissed and ending the next day school resumes.

2. School Term Possession of Rebekah Christian Staley by Thomas C. Staley.

Dr. Mark Otis shall be appointed as counselor to facilitate a positive relationship between Rebekah Christian Staley and Thomas C. Staley with the goal to promote and develop a stronger, healthier relationship between daughter and father. This counseling will begin immediately and end at a time to be determined by Dr. Mark Otis. Thomas C. Staley shall have a superior right of possession of the child, Rebekah Christian Staley, during the school term as

determined by Dr. Mark Otis. Any determination or agreement shall be in writing and signed off by Dr. Mark Otis.

3. School Term Possession of Mercy Christian Staley by Thomas C. Staley.

   Thomas C. Staley shall have a superior right of possession of the child, Mercy Christian Staley, during the regular school term, as follows:

A. Weekends. On weekends, beginning at the time school is dismissed on the first, third and fifth Friday of each month and ending the next day school resumes.

B. Weekends Extended by a Non-school Day. Except as otherwise explicitly provided in this Possession Order, if a weekend period of possession by Thomas C. Staley begins on a Friday where school is not in session during the regular school term, or if the period ends on or is immediately followed by a Monday where school is not in session, that weekend period of possession shall begin at the time school dismisses on the Thursday immediately preceding the Friday where school is not in session and/or end at the time school resumes after that Monday where school is not in session.

C. Wednesdays. On Wednesday of each week, beginning at the time school is dismissed and ending the next day school resumes

4. Summer Possession of the Staley Children by Thomas C. Staley.

   Thomas C. Staley shall have a superior right of possession of the child, Rebekah Christian Staley, during the summer 2002 vacation as determined by Dr. Mark Otis. Any determination or agreement shall be in writing and signed off by Dr. Mark Otis.

   Thomas C. Staley shall have a superior right of possession of the children, Thomas Christian Staley, Joseph Christian Staley and Mercy Christian Staley, during the summer vacation, ranging from approximately May 24th thru August 18th as follows:

A. Beginning at 8:00 a.m. on June 8th and ending at 8:00 a.m. on June 24th, and

B. Beginning at 8:00 a.m. on July 3rd and ending at 8:00 a.m. on August 1st.

   Thomas C. Staley shall have a superior right of possession of the children, Thomas Christian Staley, Joseph Christian Staley and Mercy Christian Staley, during the summer 2003 vacation and all following summer vacations as follows:

A. Beginning at the time school is let out for that years' summer vacation and continuing for one-half (½) of the vacation days allowed for the summer before school starts for approximately 45 days. If the vacation days do not divide equally, then Thomas C. Staley shall get the extra day.

5. Holidays, Birthdays, Father's Days, and Spring Break Vacation Possession by Thomas C. Staley.

A. Christmas Holidays in Odd Numbered Years. In odd numbered years, beginning on the last school day before the Christmas school vacation and ending at 6:00 p.m. on December 29.

B. Christmas Holidays in Even Numbered Years. In even numbered years, beginning at 6:00 p.m. on December 29, and ending the next day school resumes.

C. Thanksgiving in Odd Numbered Years. In odd numbered years, beginning at the time when school is dismissed for the Thanksgiving holiday and ending the next day school resumes.

D. Child's Birthday. If Thomas C. Staley is not otherwise entitled under this Possession Order to present possession of the child on the child's birthday, Thomas C. Staley shall have possession of the child and the child's siblings beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that Thomas C. Staley picks up the children and returns the children to that same place.

E. Father's Day. Each year, beginning at 6:00 p.m. on the Friday preceding Father's Day and ending at 12:00 Noon on next immediately following Monday, provided that if he is not otherwise entitled under this Possession Order to present possession of the children, he shall pick up the children from 6639 Hillbriar or other location in accordance with this Possession Order, and return the children to the same place.

F. Spring Break Vacation in Even Numbered Years. In even numbered years, beginning at the time school is dismissed for the school's spring break vacation and ending the next day school resumes.

(d) Pamela S. Staley's Possession Periods.

1. School Term Possession of the Staley Boys by Pamela S. Staley.

   Pamela S. Staley shall have a superior right of possession of the children, Thomas Christian Staley and Joseph Christian Staley, during the regular school term, as follows:

A. Weekends. On weekends, beginning at the time school is dismissed on the fourth Friday of each month and ending the next day school resumes for Thomas Christian Staley. Thomas Christian Staley shall also be with Respondent on the second weekend of each month of May. On weekends, beginning at the time school is dismissed on the second and fourth Friday of each month and ending the next day school resumes for Joseph Christian Staley.

B. Weekends Extended by a Non-school Day. Except as otherwise explicitly provided in this Possession Order, if a weekend period of possession by Pamela S. Staley begins on a Friday where school is not in session during the regular school term, or if the period ends on or is immediately followed by a Monday where school is not in session, that weekend period of possession shall begin at the time school dismisses on the Thursday immediately preceding the Friday where school is not in session and/or end at the time school

resumes after that Monday where school is not in session.

C. Mondays, Tuesdays, Wednesdays and Thursdays. On Monday, Tuesday, Wednesday and Thursday of each week, at all times other than when Thomas C. Staley has possession of the children as spelled out in Paragraph (c) 1, C & D above.

2. School Term Possession of the Staley Girls by Pamela S. Staley.

Pamela S. Staley shall have a superior right of possession of the children, Rebekah Christian Staley at all times except when Rebekah Christian Staley chooses to be with her father, and Mercy Christian Staley, during the regular school term, as follows:

A. Weekends. On weekends, beginning at the time school is dismissed on the second and fourth Friday of each month and ending the next day school resumes.

B. Weekend Extended by a Non-school Day. Except as otherwise explicitly provided in this Possession Order, if a weekend period of possession by Pamela S. Staley begins on a Friday where school is not in session during the regular school term, or if the period ends on or is immediately followed by a Monday where school is not in session, that weekend period of possession shall begin at the time school dismisses on the Thursday immediately preceding the Friday where school is not in session and/or end at the time school resumes after that Monday where school is not in session.

C. Mondays, Tuesdays, Wednesdays and Thursdays. On Monday, Tuesday, Wednesday and Thursday of each week, at all times other than when Thomas C. Staley has possession of the children as spelled out in Paragraph (c) 2, and (c) 3, C above.

3. Summer Possession of the Staley Children by Pamela S. Staley.

Pamela S. Staley shall have a superior right of possession of the child, Rebekah Christian Staley, at all times during the summer 2002 vacation, except when Thomas C. Staley shall have a superior right of possession of Rebekah Christian Staley as spelled out in Paragraph (c)4 above.

Pamela S. Staley shall have a superior, right of possession of the children, Thomas Christian Staley, Joseph Christian Staley and Mercy Christian Staley, during the summer 2002 vacation, ranging from approximately May 24th thru August 18th as follows:

A. Beginning at the time school is let out for the summer vacation and ending at 8:00 a.m. on June 8th, and

B. Beginning at 8:00 a.m. on June 24th and ending at 8:00 a.m. on July 3rd, and

C. Beginning at 8:00 a.m. on August 1st and ending at when school resumes following the summer vacation.

Pamela S. Staley shall have a superior right of possession of the child, Rebekah Christian Staley, at all times during the summer 2003 vacations and all following summer vacation, except when Thomas C. Staley shall have a superior right of possession of Rebekah Christian Staley as spelled out in Paragraph (c) 4 above.

Pamela S. Staley shall have a superior right of possession of the children, Thomas Christian Staley, Joseph Christian Staley and Mercy Christian Staley, during the summer 2003 vacation and all following summer vacations as follows:

A. Beginning at 8:00 a.m. the day following Thomas C. Staley's summer possession as spelled out in Paragraph (c)4 above and ending when school resumes following the summer vacation.

4. Holidays, Birthdays, Mother's Day, and Spring Break Vacation Possession by Pamela S. Staley.

A. Christmas Holidays in Even Numbered Years. In even numbered years, beginning on the last school day before the Christmas school vacation and ending at 6:00 p.m. on December 29.

B. Christmas Holidays in Odd Numbered Years. In odd numbered years, beginning at 6:00 p.m. on December 29, and ending the next day school resumes.

C. Thanksgiving in Even Numbered Years. In even numbered years, beginning at the time when school is dismissed for the Thanksgiving holiday and ending the next day school resumes.

D. Child's Birthday. If Pamela S. Staley is not otherwise entitled under this Possession Order to present possession of the child on the child's birthday, Pamela S. Staley shall have possession of the child and the child's siblings beginning at 6:00 p.m. and ending at 8:00 p.m. on that day, provided that Pamela S. Staley picks up the children and returns the children to that same place.

E. Mother's Day. Each year, beginning at 6:00 p.m. on the Friday preceding Mother's Day and ending at 12:00 Noon on next immediately following Monday, provided that if she is not otherwise entitled under this Possession Order to present possession of the children, she shall pick up the children from Collin county Farm, Collin county, Texas, or other location in accordance with this Agreement, and return the children to the same place.

F. Spring Break Vacation in Odd Numbered Years. In odd numbered years, beginning at the time school is dismissed for the school's spring break vacation and ending the next day school resumes.

(e) General Terms and Conditions of Surrender and Return of Children.

Except as otherwise explicitly provided in this Possession Order, the terms and conditions of possession of the children that apply regardless of the distances between the residence of a parent and the children are as follows for Summer Possession and the Christmas Holidays.

1. Surrender and Return of Children by Pamela S. Staley. Pamela S. Staley is ORDERED to surrender

and return the children to Thomas C. Staley at the beginning of each period of Thomas C. Staley's possession and at the end of each period of her possession at 6639 Hillbriar, Dallas, Dallas county, Texas.

2. Surrender and Return of Children by Thomas C. Staley. Thomas C. Staley is ORDERED to surrender and return the children to Pamela S. Staley at the beginning of each period of Pamela S. Staley's possession and at the end of each period of his possession at Collin County Farm, Collin county, Texas.

(f) Other Related Matters and Clarifications of the Possession Order.

1. Children's School. The children shall attend Carrollton Christian Academy through the twelfth grade, unless the parties, Thomas C. Staley and Pamela S. Staley, mutually agree otherwise.

2. Mother's Access to Children at Sports and Extracurricular Activities. Pamela S. Staley shall have a superior right of decision-making and possession of Rebekah Christian Staley concerning all school related sports and school related extracurricular activities.

3. Telephone Access by Father. Exclusive and private telephone service using the already existing 972-233-2727 number at 6639 Hillbriar home, with answering machine, shall be provided each child in each child's bedroom at said 6639 Hillbriar home, specifically to communicate with Thomas C. Staley. If 6639 Hillbriar

home is replaced with another home in accordance with this Agreement, equal or better telephone service shall be established immediately with the cost of same payable by Thomas C. Staley.

4. Telephone Access by Mother. If Pamela S. Staley desires to install a telephone line at the Collin County Farm for exclusive and private telephone communication with the children, then exclusive and private telephone service at the Collin County Farm, on the line and at the number installed by Pamela S. Staley with answering machine, shall be provided each child in each child's bedroom at said Collin County Farm, specifically for the children to communicate with Pamela S. Staley and all at Pamela S. Staley's sole cost and expense. If the Collin County Farm is replaced with another home in accordance with this Agreement, equal or better telephone service shall be established immediately with the cost of same payable by Pamela S. Staley.

5. Medical. As reasonably as possible, all medical or medical related treatments of the children shall be approved by both parties. Both parties shall stay in close contact and communication with each other concerning such medical matters.

6. Designation of Competent Adult. Each parent may designate any competent adult to pickup and return the children as applicable. It is ORDERED that a conservator or a designated competent adult be present when the children are picked up or returned.

(g) Duration.

The periods of possession ordered above apply to the children subject of this suit while the children are under the age of eighteen (18) years and not otherwise emancipated.

CHILD SUPPORT.

For each child who is a subject of this suit, IT IS ORDERED that both Petitioner and Respondent are equally obligated to support each child and Petitioner is additionally obligated to pay, as additional child support, all medical and educational expenses (as defined below) of each individual child, however, upon the first month following the date of the earliest occurrence of one of the following events for each individual child:

(a) that individual child reaches the age of 18 years, provided that, if that child is fully enrolled in an accredited primary or secondary school in a program leading toward a high school diploma, the financial support shall continue until the end of the school year in which the child graduates;

(b) that individual child marries;

(c) that individual child dies;

(d) that individual child's disabilities are otherwise removed for general purposes;

(e) that individual child is otherwise emancipated; or

(f) further order of the Court.

then, for that individual child the obligations of Petitioner and Respondent to support that child and the obligation of Petitioner to pay additional child support in the form of all medical and educational expenses (as defined below) ends for that child. Any payments received for the benefit of the children from any sources shall be a credit against this obligation. Respondent shall take no efforts or encourage any other person or entity to interfere with Petitioner's efforts to seek reimbursement from other sources and the obligation of petitioner to assume responsibility to pay all such medical, dental and educational expenses is predicated upon Petitioner's access to other sources, as well as Petitioner's primary source of income derived from such sources. Impairment of access to such sources, or loss of salary and/or income from such sources shall be cause for modification of such additional child support obligations to a more equitable division in line with each parties respective assets, financial resources and income.

IT IS FURTHER ORDERED that the provisions for child support in this Decree shall be an obligation of the estate of the parties and shall not terminate on the death of the parties. Any payments received for the benefit of the children from any sources shall be a credit against this obligation.

Each party is ORDERED to notify the other parent as soon as practicable, and within eight (8) hours, of any medical condition of the children requiring surgical intervention and/or hospitalization.

HEALTH CARE.

IT IS ORDERED that Petitioner shall pay, as additional child support, the health insurance for the children as follows:

It is the intent and purpose of this Decree that Petitioner shall, at all times, provide and pay for health insurance for the children. IT IS THEREFORE ORDERED that as long as the provisions for child support are applicable, Petitioner shall keep and maintain at all times in full force and effect health insurance.

"Health insurance" means minimum insurance coverage that provides catastrophic inpatient hospital care and may be provided through a health maintenance organization or other private or public organization.

IT IS FURTHER ORDERED that Petitioner shall furnish to Respondent a true and correct copy of any renewals or changes (including conversations) of the insurance of the renewal or change. Respondent is ORDERED to submit to Petitioner any and all forms, receipts, bills, and statements reflecting the medical or health care expenses Respondent incurs on behalf of the children within ten (10) days of receiving them.

IT IS ORDERED that any insurance payments received by Petitioner from the health insurance carrier as reimbursement for health care expenses incurred by or on behalf of the children shall belong to the party who incurred and paid those expenses.

IT IS FURTHER ORDERED that Petitioner is designated a constructive trustee to receive any insurance checks or payments for expenses incurred and paid by Respondent, and Petitioner shall endorse and forward the checks or payments, along with any explanation of benefits, to Respondent within five (5) working days of receiving them.

IT IS FURTHER ORDERED that Petitioner shall pay all health care expenses not paid by insurance that are incurred by or on behalf of the parties' children, including medical, prescription drug, dental, and orthodontic charges.

IT IS FURTHER ORDERED that, within ten (10) working days after Petitioner receives the original forms, receipts, bills, or statements, in readable format, Petitioner shall pay the uninsured portion of the medical or health care expenses either by paying the health care provider directly or by reimbursing Respondent for any payment made for such expenses.

This provision shall not be interpreted to include expenses for psychological testing and treatment, travel to and from the health care provider, or nonprescription medication.

IT IS ORDERED that for reasonable health care services a rebuttable presumption will arise that the charges for such services were reasonable upon presentation of the bill to a party and that disallowance of the bill by a health insurer shall not excuse the obligation of Petitioner to make payment or reimbursement as otherwise provided herein.

IT IS FURTHER ORDERED that the support of the children as prescribed in this Agreement shall be exclusively discharged in the manner ordered.

Each party is ORDERED as long as the children are minors to keep the other party fully and promptly informed of his or her current postal location, actual physical address, home telephone number, name of employer, place of employment and work telephone number. Each party who intends a change of residence, employment, and/or telephone number is ORDERED to give written notice of the intended

date of change of the new address and/or telephone number to the other party 60 days in advance of the change. If the other party did not know and could not have known of the change before the 60 day period, such notice shall be given to the other party within five days after the date the party knew or should have known of the change.

EDUCATIONAL EXPENSES.

IT IS ORDERED that Petitioner shall pay, as additional child support, the educational expenses for the children. "Educational expenses" are limited to those expenses incurred in the purchase of books and supplies used in the children's course work, the payment of yearly tuition, the purchase of required school uniforms worn daily by the children, and school sponsored extracurricular activities.

Findings Regarding Family Violence.

It has been represented to the Court that there has been no pattern of child neglect or family violence by any party to this case within two years preceding the filing of this case or during the pendency of this case. The Court finds this is so.

WARNINGS TO PARTIES.

FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO CHILDREN MAY RESULT IN FUTURE LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF LAWYER'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO SUPPORT THE CHILDREN DOES NOT JUSTIFY DENYING THAT PARTY COURT ORDERED POSSESSION OF OR ACCESS TO THE CHILDREN. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO THE CHILDREN DOES NOT JUSTIFY FAILURE TO SUPPORT THE CHILDREN REQUIRED BY A COURT ORDER.

EACH PERSON WHO IS A PARTY TO THIS ORDER OR DECREE IS ORDERED TO NOTIFY THE CLERK OF THIS COURT WITHIN 10 DAYS AFTER THE DATE ANY CHANGE IN THE PARTY'S CURRENT TELEPHONE NUMBER, NAME OF EMPLOYER, EMPLOYMENT, OR WORK TELEPHONE NUMBER. THE DUTY TO FURNISH THIS INFORMATION TO THE CLERK OF THE COURT CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER OR DECREE, IS ENTITLED TO POSSESSION OF OR ACCESS TO THE CHILDREN. FAILURE TO OBEY THE ORDER OF THIS COURT TO PROVIDE THE CLERK WITH THE CURRENT POSTAL LOCATION OF A PARTY MAY RESULT IN THE ISSUANCE OF A CAPIAS FOR THE ARREST OF THE PARTY IF THAT PARTY CANNOT BE PERSONALLY SERVED WITH NOTICE OF A HEARING AT AN ADDRESS OF RECORD.

UNLESS APPROVED BY THE COURT IN WRITING, AGREEMENTS BETWEEN THE PARTIES REGARDING SUPPORT OF THE CHILDREN WHICH ARE CONTRARY TO, OR IN MODIFICATION OF, THE COURT'S ORDERS HEREIN SHALL NOT BE RECOGNIZED BY THE COURT AND SHALL NEVER BE A DEFENSE TO A MOTION FOR CONTEMPT

ALLEGING FAILURE TO SUPPORT THE CHILDREN AS HEREIN ORDERED.

9. Division of Marital Estate.

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party and the children of the marriage.

IT IS ORDERED, ADJUDGED AND DECREED that the estate of the parties is divided as follows:

A. Property to Petitioner.

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is divested of all right, title, interest, and claim in and to such property:

(1) All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to sole control of Petitioner, except as qualified below.

(2) All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner, except as qualified below.

(3) Any and all sums of cash in the possession of or subject to the sole control of Petitioner, including money on account in banks, savings institutions, or other financial institutions, which accounts stand in Petitioner's sole name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's sole control.

(4) Any and all policies of life insurance insuring the life of Petitioner.

(5) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any benefit program existing by reason of Petitioner's past, present, or future employment.

(6) All rights and claims in and to those certain notes receivable due and owing from Cromwell Holding Company.

(7) One-half (½) of the family photos, mementos and keepsakes currently in possession of Respondent and one-half (½) of the family photos, mementos and keepsakes currently in possession of Petitioner.

(8) Select household furniture, furnishings, fixtures, electronics, computers, antiques, artwork, and collections under the care, custody and control of Respondent which were acquired during marriage, including but not limited to (1) bedroom suite with claw feet; (2) personal effects; (3) gifts from Petitioner's family; (4) family heirlooms from Petitioner's family; (5) C.S. Lewis novels; (6) bread machine; (7) juicer; (8) and other various items of personal property to be retrieved from the residence at 6639 Hillbriar Drive and off-site storage facility(ies). Retrieval and further identification of items shall be carried out as follows:

Petitioner shall identify the select items by appearing at residence and off-site storage

facility(ies) located at ______________________
and at a time pre-agreed to by the parties but not to take place later than August 1, 2002. Petitioner shall be accompanied by Billy Preston. Counsel representative for Pam Staley may be present and may videotape items in issue and items being taken. Petitioner may take listed items and any others agreed on at the time by the parties. Any disputed items shall be listed for further negotiation by the parties and a mediator from Dispute Mediation Services.

(9) Any and all guns in possession of Petitioner.

(10) Any and all separate property of Petitioner including, but not limited to, one (1) large oak dining table, one (1) twin size oak bed and all jewelry of Petitioner under the care, custody and control of Respondent.

(11) Any rights of interest in property put in the trusts formed during the marriage of the parties. The trusts do not form part of the community estate created with and during the marriage of Thomas C. Staley and Pamela S. Staley. The Certificate Holders of Cromwell Holding Company, including Christian Shaw Staley, have no rights, powers, privileges or interest in or control over Cromwell Holding Company or the management of Cromwell Holding Company, other than those created by the actions of the creators, settlors and trustees of said entities. Per the terms of each respective trust's agreement, the RELEASING PARTIES[(1)], which include the children from the marriage of Pamela S. Staley and Thomas C.

Staley, have no ownership or possesory interest in the Company Holdings.

(1) "RELEASING PARTIES" are defined as Pamela S. Staley and her respective representatives, lawyers, assignees, heirs, successors, assigns, and all others in privity with same or claiming by, through, or on behalf of her or who may claim under her by way of a derivative claim, as next friend, or otherwise.

B. Property to Respondent.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is divested of all right, title, interest, and claim in and to such property:

(1) All household furniture, furnishings, fixtures, goods, appliances and equipment in the possession of or subject to the sole control of Respondent, except as qualified below.

(2) All clothing, jewelry, and personal effects in the possession of or subject to the sole control of Respondent, except as qualified below.

(3) Any and all sums of cash in the possession of or subject to the sole control of Respondent, including money on account in banks, savings institutions, or other financial institutions, which accounts stand in Respondent's sole name or from which Respondent has the sole right to withdraw funds or which are subject to Respondent's sole control.

(4) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any benefit program existing by reason of the Respondent's past, present, or future employment.

(5) 1991 GMC Pickup Truck, VIN No. 2GTEK19K7M1532687, together with all prepaid insurance, keys, and title documents.

(6) The following real property, including any escrow funds, prepaid insurance, utility deposits, keys, house plans, warranties, service contracts, and title and closing documents:

> Situated in Dallas County, Texas, and being Lot 28 in Block 8/8189 of Preston Meadow Estates NO. 3, an addition to the City of Dallas, Dallas county, Texas, according to the map recorded in Volume 70058, Page 1647, of the Map Records of Dallas county, Texas, and more commonly known as 6639 Hillbriar, Dallas, Texas.

(7) One-half (½) of the family photos, mementos and keepsakes currently in possession of Respondent and one-half (½) of the family photos, mementos and keepsakes currently in possession of Petitioner.

(8) All the household furniture, furnishings, fixtures, electronics, computers, antiques, artwork, and collections under the care, custody and control of Respondent which were acquired during marriage except for those items awarded above to Petitioner.

(9) Any and all separate property of Respondent.

(10) Four mother cows and offspring from each since 1996 with ear tag #'s 21, 22, 27, 37, 56, if they still exist, which she will hold in trust for the children.

(11) Two antique fans in Respondent's possession.

C. Stipulation Regarding Horses.

The parties stipulate and agree that Heir Out the Socks is for the enjoyment of Christian and the other children and that Christian may keep Heir Out the Socks wherever she chooses, however, if she is not riding Heir Out the Socks on a regular basis, then she shall bring Heir Out the Socks back to the Collin County Farm for the other children to ride. The parties stipulate and agree that Applejack is for the enjoyment of the children of the parties. Petitioner agrees that Applejack is to stay on the Collin County Farm or other location designated by Petitioner. Petitioner agrees that Heir Out the Socks may stay on the Collin County Farm if Christian so desires. Petitioner agrees that he will assume responsibility for and cover all maintenance expenses for said horses staying at the Collin County Farm or any future farm managed by he Petitioner. Respondent agrees that if said horse is not staying at the Collin County Farm or other farm managed by Petitioner, that Respondent will assume responsibility for and cover all maintenance expense for said horse.

D. Division of Debts.

IT IS ORDERED that Petitioner shall pay as part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Respondent and

Respondent's property harmless from any failure to so discharge these debts and obligations:

(1) Any and all debts, liabilities, and obligations arising out of, running with, or secured by property awarded to Petitioner, unless express provision is made herein to the contrary. ALL DEBTS OF THE COMMUNITY.

(2) Any and all debts, charges, liabilities, and other obligations incurred solely by Petitioner, prior to the date of divorce, unless express provision is made in this Decree to the contrary.

(3) Any and all lawyer's fees incurred by Petitioner as a result of legal representation in this case.

IT IS ORDERED that Respondent shall pay as part of the division of the estate the parties, the following debts and obligations and shall indemnify and hold Petitioner and Petitioner's property harmless from any failure to so discharge these debts and obligations:

(1) NO DEBT OF THE COMMUNITY IS TO BE AN OBLIGATION OF RESPONDENT. THE 6639 HILLBRIAR HOME IS TO BE TRANSFERRED FREE AND CLEAR OF ALL DEBTS AND OBLIGATIONS. All ad valorem taxes for the year 2002 accrued on the 6639 Hillbriar home shall be at the cole cost and expense of Respondent.

2) Any and all debts, charges, liabilities, and other obligations incurred solely by Respondent, prior to the date of divorce, unless express provision is made in this Decree to the contrary.

(3) Any and all lawyer's fees incurred by Respondent as a result of legal representation in this case.

IT IS ORDERED and each party represents and warrants to the other that he or she has not incurred any debt, and obligation, or other liability, other than those described in this agreement, on which the other party is or may be liable. IT IS ORDERED and each party agrees that if any claim, action or proceeding is hereafter initiated seeking to hold the other party liable for any debt, obligation, liability, act, or omission of the party, that party will indemnify and hold harmless the other party from all damages resulting therefrom.

IT IS ORDERED that damages, as used herein, will include any loss, costs, expense, penalty, and other damage, including without limitation, lawyer's fees and other costs and expenses reasonably incurred in investigating or in attempting to avoid same or opposing the imposition thereof or in enforcing this indemnity.

TAXES.

IT IS ORDERED that each party file their own individual income tax return for the entire years ending December 31, 2001 and December 31, 2002 as the parties represent they have lived separately and apart during that time and there has been no transfer of earned community income during that time.

IT IS ORDERED that each party shall hold the other party's property harmless from the federal income tax liability attributable to that party's income from January 1, 2001, through the date of divorce.

IT IS ORDERED that each party shall be solely entitled to use as a credit against his or her own tax liability all prepayments and withholdings made by him or her during tax years ending December 31, 2001 and December 31, 2002, and all deductions, exemptions, and adjustments attributable to his or her income and expenses during tax years ending December 31, 2001 and December 31, 2002.

IT IS ORDERED each party shall pay for the preparation of his or her own tax returns for 2001 and 2002.

If a refund is made for overpayment of taxes for any year during the parties' marriage through 2000, each party shall be entitled to one-half of the refund, and the party receiving the refund check is designated a constructive trustee for the benefit of the other party, to the extent of one-half of the total amount of the refund, and shall pay to the other party one-half of the total amount of the refund check within thirty days of receipt of the refund check. Any refunds made for overpayment of taxes for 2001 through the year of divorce belongs to the party who made the overpayment.

CLARIFYING ORDERS.

Without affecting the finality of this Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this Decree. In this connection, each party is ORDERED and DECREED to execute and deliver to the other party reasonably requested documents requested and shall do or cause to be done other reasonable acts and things as may be necessary or desirable to effect the provisions and purposes of this Decree. If either party fails on demand to comply with this provision, that party shall pay to the other all legal fees, costs and other expenses reasonably incurred as a result of that failure.

The Court Decrees and Approves the Compromise Settlement Agreement entered into by and between Pam Staley et al, Christian Staley, Sandra Crosnoe, Tim Pettinger, Lynn Johnston, Paul Perry, and the Charis Interest, Ecarg Interests, Cromwell Holding Company, Ironside Interest, Gideon Interests. Same Attached as Exhibit B.

IT IS ORDERED that all costs of court, incurred herein, are to be borne by the party by whom such costs were incurred.

IT IS ORDERED that all relief requested by either party in this action not specifically granted herein is hereby denied

Judgment for Attorney/Guardian Ad Litem. Attached as Exhibit A to this Decree is the Order of this Court granting judgment to Kip H. Allison for fees as the attorney/guardian ad litem incurred for support, welfare and safety of the children.

EXECUTED this 29 day of May, 2002.

/s/____________________________
JUDGE PRESIDING

AGREED TO AND ACCEPTED:

BY:_________________________________
Pamela S. Staley, Respondent

APPROVED AS TO FORM ONLY:

BY:_______________________________
Thomas C. Staley, Petitioner

APPROVED AS TO FORM ONLY:

MOORE & ANDERSON, L.L.P.
2651 N. Harwood, Suite 210
Dallas, Texas 75201
Telephone (214) 871-9444
Facsimile (214) 871-3133

By: /s/__________________________
Edward W. Moore
State Bar No. 14329050
Attorney for Respondent, Pamela S. Staley

Allison Johnson Williamson, L.L.P.
5000 Legacy Dr., Suite 160
Plano, Texas 75204-3111
Telephone: (972) 608-4300
Facsimile: (972) 608-4301

By: /s/__________________________
Mr. Kip H. Allison
State Bar No. 00789117
Guardian and Attorney Ad Litem for Children

Law Offices of Steven J. Heath
Stemmons Towers, West Tower
2730 Stemmons Frwy., Suite 1010
Dallas, Texas 75207
Telephone: (214) 879-1436
Facsimile: (214) 879-1472

By: /s/______________________________
Steve Heath
State Bar No. 09352020
Attorney for Petitioner, Thomas C. Staley

EXHIBIT A

ATTORNEY/GUARDIAN AD LITEM FEES JUDGMENT

The Court finds that attorney/guardian ad litem fees have been incurred in the course of this lawsuit and incorporates this judgment within and as a part of the Final Decree of Divorce duly signed in this matter of which this judgment is attached and hereby incorporates this Judgment as a part of and enforceable as a part of the Final Decree of Divorce.

By and through the evidence presented:

THE COURT FINDS that **KIP H. ALLISON** was appointed as the attorney/guardian ad litem for CHRISTIAN, REBECCA, THOMAS, JOSEPH, and MERCY STALEY for purposes of support, welfare and safety.

THE COURT FURTHER FINDS that **KIP H. ALLISON** has executed his duties as an attorney/guardian ad litem for the subject children as contemplated by the court at the time of his appointment and further finds that there is no longer a need for such an appointment and is hereby released from his appointment.

THE COURT FURTHER FINDS that **KIP H. ALLISON** has submitted attorney time and cost to the court and to the parties and the Court finds that such attorney time, rate and cost are reasonable and necessary and were incurred for the representation of the children's support, safety and welfare during the course of the litigation.

IT IS ORDERED that **KIP H. ALLISON** is granted a judgment in total amount of $25,000.00 against the entity

known as the CHARIS INTEREST, and TOM STALEY and PAM STALEY individually jointly and severally.

IT IS FURTHER ORDERED that said judgment to bear interest at the rate of six (6.0%) per annum for which let execution issue.

IT IS FURTHER ORDERED that the payment of the above referenced judgment shall be as follows: $25,000.00 against CHARIS INTEREST and **IT IS FURTHER ORDERED** that LYNN JOHNSON, TRUSTEE for the entity known as CHARIS INTEREST shall cause the entity to pay the amount of $25,000.00 in the form of a cashiers check to **KIP H. ALLISON** at 5000 Legacy Dr., Ste. 160, Plano TX 75024 no latter than June 28, 2002.

The Court reserves the right to enter additional Orders in this matter for purposes of clarification and/or enforcement of this Judgment.

EXHIBIT B

THIS SETTLEMENT AGREEMENT CONTAINS RELEASE AND INDEMNIFICATION PROVISIONS

COMPROMISE SETTLEMENT AGREEMENT

This Compromise Settlement Agreement, Release, Settlement, and Indemnity Agreement the ("Agreement") is entered into by and among Pamela S. Staley and her respective representatives, lawyers, assignees, heirs, successors, assigns, and all others in privity with same or claiming by, through, or on behalf of her or who may claim under her by way of a derivative claim, as next friend, or otherwise (collectively the "RELEASING PARTIES"), Christian Staley, and Sandra Crosnoe, as Trustee for Charis Interests; Tim Pettinger as Trustee for Ecarg Interests; Lynn Johnston, as Trustee for Cromwell Holding Company, and Paul Perry, as Trustee for Gideon Interests, and their past and present agents, affiliates, parents, subsidiaries, servants, successors, assigns, officers, trustees, beneficiaries, certificate holders, settlors, exchangers, managers, protectors, employees, lawyers, representatives and all other persons, firms, corporations, persons and other entities who may be deemed to act, to have acted, or to act in the future, on behalf of Sandra Crosnoe, as Trustee for Charis Interests; Tim Pettinger as Trustee for Ecarg Interests; Lynn Johnston, as Trustee for Cromwell Holding Company; and Paul Perry, as Trustee for Gideon Interests (collectively the "RELEASED PARTIES") and is effective as of the last date of execution set forth below. Charis Interests, Ecarg Interests, Cromwell Holding Company, Ironside Interests, and Gideon Interests, agents, affiliates, parents, subsidiaries, servants, successors, assigns, officers, trustees, beneficiaries, certificate holders, settlors, exchangers, managers, protectors, employees,

lawyers, representatives and all other persons, firms, corporations, persons and other entities who may be deemed to act, to have acted, or to act in the future shall collectively be referred to as the “trusts” in this Agreement.

WHEREAS, The following case (Lawsuit), in which the RELEASING PARTIES and RELEASED PARTIES are named, is currently pending: Cause No. DF 99-11284-R in the 254th Judicial District Court of Dallas County, Texas. The claims in the lawsuit regard the establishment and activities of the trusts in which the RELEASED PARTIES have served.

RELEASED PARTIES have denied and continue to deny the allegations set forth by the Pamela S. Staley in the Lawsuit.

RELEASING PARTIES agree to, stipulate to, and confirm the existence of the following facts:

1. Pamela S. Staley had actual knowledge of the formation of each of the trusts, at or about the time each trust was formed.

2. The RELEASING PARTIES and the children from the marriage of Pamela S. Staley and Thomas C. Staley have no ownership or possessory interest in the corpus/Company Holdings of any of the trusts to the best of Pamela S. Staley’s knowledge.

3. The children from the marriage of Thomas C. Staley and Pamela S. Staley only hold Certificate Units in Cromwell Holding Company. The children from the marriage of Thomas C. Staley and Pamela S. Staley currently hold no Certificate Units in any of the other trusts to the best of their knowledge.

4. The trusts do not form part of the community estate created with and during the marriage of Thomas C. Staley and Pamela S. Staley. All of the trusts provide for the ultimate distribution of the Company Holdings, and not the generation of profits from the dissipation of Company Holdings.

5. Christian Shaw Staley consents to or ratifies all acts or omissions committed by or on behalf of the trusts in connection with the LAWSUIT, and any actions taken to resolve the claims made by Pamela Staley. Rebekah, Thomas, Joseph, and Mercy Staley consent to this document and this act of payment to Pam Staley.

6. Pamela S. Staley, at or about the time the 1994 divorce proceedings were initiated either knew or had reason to know about the activities of each of the trusts.

7. The Certificate Holders of Cromwell Holding Company, including Christian Shaw Staley, have no rights, powers, privileges or interest in or control over Cromwell Holding Company or the management of Cromwell Holding Company, other than those created by the actions of the creators, settlors and trustees of said entities. Per the terms of each respective trust's agreement, the RELEASING PARTIES, which include the children from the marriage of Pamela S. Staley and Thomas C. Staley, have no ownership or possesory interest in the Company Holdings.

8. The notes attached to the motion for summary judgment filed in this action by the RELEASED PARTIES were prepared and written by Pamela S. Staley at or about the time of the 1994 divorce proceedings being initiated.

The RELEASING PARTIES and RELEASED PARTIES desire to fully and finally settle and resolve all claims, suits,

disputes, questions, and differences existing between them relating to the Lawsuit and any and all claims resulting or arising from the acts or omissions of the RELEASED PARTIES. Pamela S. Staley as a RELEASING PARTY and the RELEASED PARTIES further desire to fully and finally settle and resolve all claims, suits, disputes, questions and differences which may exist in the future between her and the RELEASED PARTIES in any way arising out of the acts or omissions of the RELEASED PARTIES.

It is the intention of the parties to this Agreement that this Agreement shall apply to all pure trusts (trusts) formed during the marriage of Thomas C. and Pamela S. Staley, in which Pamela S. Staley may or could assert an interest in or to, whether such trusts were made a party to the Lawsuit or not.

The RELEASING PARTIES acknowledge that they are relinquishing all existing and potential rights, if any, arising out of the RELEASED PARTIES or any other trust formed during the marriage of Thomas C. and Pamela S. Staley, in which they may assert an interest in or to, for all past and present claims, suits, disputes, questions and differences of any type whatsoever in any way directly or indirectly, arising out of, connected with, or related to the Lawsuit, the RELEASED PARTIES, and in any trust formed during the marriage of Thomas C. and Pamela S. Staley. Pamela S. Staley further acknowledges that she is relinquishing all existing and potential rights, if any, arising out of the RELEASED PARTIES trust or any other trust formed during the marriage of Thomas C. and Pamela S. Staley, in which she may assert an interest in or to, for all future claims, suits, disputes, questions and differences of any type whatsoever in any way directly or indirectly, arising out of, connected with, or related to the Lawsuit, the RELEASED PARTIES, or any

trust formed during the marriage of Thomas C. and Pamela S. Staley.

The RELEASING PARTIES on behalf of themselves and on behalf of their respective representatives, lawyers, and agents do hereby agree, represent, warrant, and covenant as follows:

COMPROMISE OF DISPUTED CLAIMS. This Agreement is a compromise of disputed and known and unknown past, present or future claims arising out of formation and activities of trusts formed during the marriage of Thomas C. and Pamela S. Staley. The Parties enter into this Agreement solely to avoid the cost, expense and disruption of present and future litigation pertaining to or arising out of the Lawsuit and any and all other claims resulting or arising from acts and omissions of the RELEASED PARTIES. This Agreement and any payment of consideration hereunder to Pamela S. Staley is a good faith effort to compromise the claims for personal injury damages that have been alleged by Pamela S. Staley. This Agreement is not to be construed as an admission of any Certificate Holder status, liability, error, omission, wrongdoing, misconduct, or breach of any contractual, common law, or statutory duty on the part of any RELEASING PARTY or RELEASED PARTY.

PAYMENT. The RELEASED PARTIES will pay to RELEASING PARTIES within twelve months of this Agreement's execution by all parties the sum of $700,000.00, by issuing the following checks to the following payees for the following time frames:

1. Within ten days of execution of this Agreement by all parties to this Agreement, $100,000.00 payable to Pamela S.

Staley, and Moore & Anderson, L.L.P., said payment to be delivered to the offices of Moore & Anderson, L.L.P., 2651 N. Harwood, Suite 210, Dallas, Texas 75201; and

2. Within either twelve months of execution of a Joint Motion to Dismiss with Prejudice and Agreed Order of Dismissal by all parties to this agreement, by and through their respective counsel, or within ten (10) days of one of the trusts receiving proceeds from closing on the sale of a parcel of land held by one of the trusts released in this Agreement, whichever occurs first, $600,000.00 payable to Pamela S. Staley and Moore & Anderson, L.L.P., said payment to be delivered to the offices of Moore & Anderson, L.L.P., 2651 N. Harwood, Suite 210, Dallas, Texas 75201.

This payment of $600,000.00 shall be secured by a deed of trust upon property in Carrollton, Dallas County, Texas, and a promissory note in the principal amount of $600,000.00. The note shall be at no interest for the six month period following execution of this Agreement. After that six month period, the note shall accrue simple interest at the prime rate for Chase Bank.

This sum shall be in complete and full satisfaction of each and every alleged obligation, if any, the RELEASING PARTIES or any other named party in the Lawsuit contends or could have contended that the RELEASED PARTIES has or had pursuant to the applicable trust documents. No additional sums shall be paid to any other current or potential party to the Lawsuit.

Each party shall bear all legal fees and costs arising from the actions of its own counsel in connection with the Lawsuit, this Agreement and the matters and documents referred to

herein, the filing in the Lawsuit of a Joint Motion to Dismiss With Prejudice, and all other related matters.

CONDITIONS. This Agreement shall not be required to be paid, and this Agreement shall be of no force or effect, unless and until all of the following events and conditions occur: (a) All parties to this Agreement have executed this Agreement; (b) A Joint Motion to Dismiss With Prejudice and an Agreed Order of Dismissal is signed by the counsel of record for the relevant RELEASED PARTIES and RELEASING PARTIES in the Lawsuit; and (c) the representation from all counsel of record for RELEASING PARTIES and RELEASED PARTIES confirming the settlement represented by this Agreement as a good faith settlement.

Upon the delivery of the RELEASED PARTIES' initial payment of $100,000.00 as described in the PAYMENT section above, the parties, by and through their respective counsel, shall execute, deliver and file in the Lawsuit a Joint Motion to Dismiss with Prejudice and Agreed Order of Dismissal in the same form as the one attached hereto as Exhibit "A", which is expressly approved as to the form and substance by each of the parties to the Lawsuit.

WITHDRAWAL OF CLAIMS. The RELEASING PARTIES hereby acknowledge that any claim previously asserted against the RELEASED PARTIES related to the applicable trust no longer exists, and the RELEASING PARTIES waive any and all rights to reassert or assert such claims at any time or for any reason relating to any litigation, administrative proceeding, or other proceeding whether legal, equitable, constitutional, lawful, or administrative.

CONTRIBUTION AND SUBROGATION The RELEASING PARTIES agree that execution of this Agreement bars all contribution, indemnification, and subrogation claims by third parties and non-settling parties under any applicable theory, as against the RELEASED PARTIES.

RELEASE OF CLAIMS.

A. EXCEPT FOR THE OBLIGATIONS CREATED BY OR ARISING OUT OF THIS AGREEMENT, IN CONSIDERATION OF THE PAYMENT BY THE SUMS SET FORTH IN PAYMENT SECTION AND OTHER GOOD AND VALUABLE CONSIDERATION THE RECEIPT AND SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED AND CONFESSED, RELEASING PARTIES HEREBY IRREVOCABLY REMISE, RELEASE, ACQUIT, FORGIVE AND FOREVER DISCHARGE RELEASED PARTIES SEPARATELY AND SEVERALLY, FROM ANY AND ALL CLAIMS OR CAUSES OF ACTION (RELEASED CLAIMS) OF ANY KIND WHATSOEVER, AT COMMON LAW, STATUTORY, EQUITY, OR OTHERWISE, WHICH THE RELEASING PARTIES, OR ANY ONE OF THEM, HAS OR MIGHT HAVE, KNOWN OR UNKNOWN, DIRECTLY OR INDIRECTLY, ATTRIBUTABLE TO THE FACTS AND CIRCUMSTANCES AT ISSUE IN THE LAWSUIT AS FURTHER DESCRIBED IN THE PLEADING FILED OF RECORD BY OR ON BEHALF OF THE RELEASING PARTIES IN THE LAWSUIT WHICH ARE INCORPORATED IN THEIR ENTIRETY BY THIS REFERENCE, AND OR OTHERWISE DESCRIBED HEREIN.

THIS RELEASE FURTHER APPLIES TO AND ENCOMPASSES RELEASED CLAIMS WHETHER BROUGHT BY ANY CURRENT PARTY IN THE LAWSUIT, OR ANY OTHER PERSON OR ENTITY OF ANY NATURE WHATSOEVER, INCLUDING WITHOUT LIMITATION, REPRESENTATIVES OF CERTIFICATE HOLDERS UNDER THE TRUSTS FORMED DURING THE MARRIAGE OF THOMAS C. AND PAMELA S. STALEY OR ANY PRIVATE CORPORATION OR INDIVIDUAL PERSON, ASSOCIATION OR ENTITY OF ANY TYPE OR NATURE WHATSOEVER NOT CURRENTLY A PARTY TO THE LAWSUIT. THIS RELEASE FURTHER APPLIES TO AND ENCOMPASSES RELEASED CLAIMS BROUGHT FOR RECOVERY OF ANY RELIEF OF ANY TYPE WHATSOEVER ARISING OUT OF OR FOR ANY IMPAIRMENT OR DIMINUTION OR OTHER INTERFERENCE WITH ANY OTHER RIGHT OR AMENITY OF ANY KIND WHATSOEVER PROTECTED BY LAW, DIRECTLY OR INDIRECTLY ARISING OUT OF, RELATING TO, OR CONNECTED WITH EITHER (A) THE CONDUCT OR HANDLING OF THE TRUSTS FORMED DURING THE MARRIAGE OF THOMAS C. AND PAMELA S. STALEY, THE RELEASING PARTIES CLAIMS, OR THE ALLEGATIONS OR ISSUES IN THE LAWSUIT, WHETHER PAST OR PRESENT, ACTUAL OR ALLEGED, KNOWN OR UNKNOWN, OR NOT NOW KNOWN OR ANTICIPATED, BUT WHICH MAY LATER DEVELOP OR BE DISCOVERED INCLUDING ALL OF THE EFFECTS THEREOF AND INCLUDING, WITHOUT LIMITATION, PERSONAL INJURY, BODILY INJURY, PROPERTY DAMAGE, ENVIRONMENTAL DAMAGE, ECONOMIC LOSS, LOSS OF USE, EXEMPLARY DAMAGES OR THE LIKE.

IT IS THE EXPRESS INTENT OF THE PARTIES THAT THE CONSIDERATION PAID PURSUANT TO THIS AGREEMENT SHALL OPERATE TO RELEASE AND FOREVER DISCHARGE THE RELEASED PARTIES FROM ANY AND ALL PAST, PRESENT OR FUTURE OBLIGATIONS ALLEGEDLY OWED, WHETHER ACTUAL OR ALLEGED, KNOWN OR UNKNOWN, ACCRUED OR UNACCRUED, TO RELEASING PARTIES, OTHER THAN THOSE EXCEPTED IN THIS AGREEMENT.

THE RELEASING PARTIES FURTHER AGREE TO ASSIGN TO THE RELEASED PARTIES ALL CLAIMS, RIGHTS, PRIVILEGES, POWERS, CAUSES OF ACTION, OR CHOSES IN ACTION ANY RELEASING PARTY HAS RECEIVED FROM ANOTHER PERSON OR ENTITY.

THE RELEASING PARTIES REPRESENT AND WARRANT THAT THEY ARE OF MAJORITY AGE AND ARE COMPETENT AND HAVE THE AUTHORITY TO ENTER THIS AGREEMENT. ACCORDINGLY NO NEED EXISTS FOR THE APPOINTMENT OF A GUARDIAN AD LITEM.

MUTUAL RELEASE.

THE INTENT OF THE PARTIES HERETO IS THAT EACH PERSON OR ENTITY EXECUTING THIS SETTLEMENT AGREEMENT SHALL, BY REASON OF SUCH EXECUTION, BE ENTIRELY FREE OF ANY AND ALL ACTUAL OR POTENTIAL CLAIMS, SUITS, DEMANDS, CAUSES OF ACTION, CHARGES OR GRIEVANCES OF ANY KIND OR CHARACTER, REGARDLESS OF THE NATURE OR EXTENT OF THE SAME, ARISING OUT OF THE LAWSUIT.

RELEASING PARTIES HEREBY FULLY AND FINALLY **RELEASE, ACQUIT, AND FOREVER DISCHARGE** RELEASED PARTIES, AND RELEASING PARTIES FURTHER COVENANT NOT TO ASSERT IN ANY MANNER AGAINST ANY OF SUCH PERSONS OR ENTITIES RELEASED HEREBY, ANY AND ALL ACTUAL OR POTENTIAL CLAIMS HELD BY RELEASING PARTIES, AGAINST RELEASED PARTIES, AND/OR ANY SUITS, DEMANDS, CAUSES OF ACTION, CHARGES OR GRIEVANCES OF ANY KIND OR CHARACTER WHATSOEVER, HERETOFORE OR HEREAFTER ACCRUING FOR OR BECAUSE OF ANY MATTER DONE, OMITTED OR SUFFERED TO BE DONE BY ANY SUCH PARTY HERETO PRIOR TO AN INCLUDING THE DATE HEREOF, AND IN ANY MANNER (WHETHER DIRECTLY OR INDIRECTLY) ARISING FROM OR RELATED TO THE LAWSUIT.

RELEASED PARTIES HEREBY FULLY AND FINALLY **RELEASE, ACQUIT, AND FOREVER DISCHARGE** RELEASING PARTIES, AND RELEASED PARTIES FURTHER COVENANT NOT TO ASSERT IN ANY MANNER AGAINST ANY OF SUCH PERSONS OR ENTITIES RELEASED HEREBY, ANY AND ALL ACTUAL OR POTENTIAL CLAIMS HELD BY RELEASED PARTIES, AGAINST RELEASING PARTIES, AND/OR ANY SUITS, DEMANDS, CAUSES OF ACTION, CHARGES OR GRIEVANCES OF ANY KIND OR CHARACTER WHATSOEVER, HERETOFORE OR HEREAFTER ACCRUING FOR OR BECAUSE OF ANY MATTER DONE, OMITTED OR SUFFERED TO BE DONE BY ANY SUCH PARTY HERETO PRIOR TO AN INCLUDING THE DATE HEREOF, AND IN ANY MANNER (WHETHER DIRECTLY OR INDIRECTLY) ARISING FROM OR RELATED TO THE LAWSUIT.

Christian Staley hereby fully and finally Releases, Acquits, and Forever Discharges all past, present, and future Trustees of Ecarg Interests, Charis Interests, Cromwell Holding Company, and Gideon Interests, and their heirs estates, and further covenants not to assert in any manner against any of such persons released hereby, and any and all actual or potential claims held by Christian Staley, against the Trustees, and/or any suits, demands, causes of action, charges or grievances of any kind or character whatsoever, heretofore or hereafter occurring for or because of any matter done, omitted or suffered to be done by any such party hereto prior to and including the date hereof, and in any manner (whether directly or indirectly) arising from or related to the lawsuit.

THE RELEASING PARTIES HEREBY FURTHER AGREE TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE RELEASED PARTIES SEPARATELY AND SEVERALLY, AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, DEBTS, AND LIABILITIES, SPECIFICALLY INCLUDING, BUT NOT LIMITED TO, ANY CLAIMS OR LIABILITIES FOR DAMAGES, ATTORNEY'S FEES AND COSTS AND COURT COSTS, ASSERTED AGAINST THE RELEASED PARTIES, OR ANY OF THEM, AT ANY TIME IN THE FUTURE, BY ANY OTHER PERSON OR ENTITY CLAIMING BY, THROUGH OR UNDER THE RELEASING PARTIES AND WHICH IS RELATED TO OR ARISES FROM THE ACTS OR OMISSIONS ALLEGED IN THE LAWSUIT AGAINST RELEASED PARTIES, AS FURTHER DESCRIBED IN THE PLEADINGS FILED OF RECORD BY THE RELEASING PARTIES IN THE LAWSUIT WHICH ARE INCORPORATED HEREIN BY THIS REFERENCE, AND THIS AGREEMENT, THIS PARAGRAPH SHALL SPECIFICALLY INCLUDE, BUT NOT BE LIMITED TO, INDEMNITY FOR ANY CLAIMS BY LIENHOLDERS OF

THE RELEASING PARTIES, IF ANY. FURTHERMORE, THE OBLIGATION OF THE RELEASING PARTIES TO THE RELEASED PARTIES UNDER THIS PROVISION SHALL INCLUDE THE OBLIGATION TO DEFEND, INDEMNIFY AND HOLD HARMLESS THE RELEASED PARTIES.

DISCHARGE DEBTS. The RELEASING PARTIES hereby warrant and represent to the RELEASED PARTIES that all claims which could be lawfully asserted against the Settlement Proceeds either have been previously, or will immediately in the future, be fully and completely satisfied out of the Settlement Proceeds and further confirm, stipulate and agree that this Agreement is entered into by the RELEASED PARTIES in reliance upon this representation. This specifically includes, but is not limited to, any and all liens and claims by legal counsel, lenders, experts, doctors or any other person or entity asserting or that could legally or equitably assert a lien or claim.

NO PRECEDENT. This Agreement will be without precedential value and is not intended to nor shall be construed as an interpretation of any trust documents, and shall not be used as evidence, or in any other manner, in any court or dispute resolution proceeding to create, prove, or interpret the obligations of any of the parties to this agreement under any trust documents, whether to a party to this Agreement or to any non-party to this Agreement.

GOVERNING LAW. This Agreement is made and entered into in the Texas state and shall in all respects be enforced and governed by and under Texas law. Moreover, this Agreement shall not be interpreted according to the rules of construction applicable to trust documents. This Agreement shall not be construed in favor of or against any party hereto,

but shall be construed as if all parties prepared this Agreement. This Agreement shall inure to the benefit of, and be binding upon, each and every one of the parties hereto, and the assigns, and other successors in interest of each party hereto. If any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions of this Agreement shall remain in full force and effect and shall in no way be affected, impaired, or invalidated. The parties, agree that venue for any action related to the negotiation, execution or enforcement of this Agreement shall lie in Dallas county, Texas state.

VOLUNTARY AND KNOWING AGREEMENT. Each of the parties to this Agreement state that this Agreement is executed voluntarily and with full knowledge of its significance and legal and lawful effect.

ADVICE OF COUNSEL. EACH OF THE PARTIES HERETO WARRANTS AND REPRESENTS THAT IT/SHE/HE HAS FULLY AND CAREFULLY READ AND UNDERSTOOD THIS AGREEMENT, KNOWS THE CONTENTS THEREOF, AND HAS RECEIVED THE ADVICE OF INDEPENDENT LEGAL COUNSEL OF ITS/HIS/HER OWN CHOOSING IN CONNECTION WITH THE CLAIMS AND DISPUTES RELEASED HEREIN AND THE EXECUTION OF THIS AGREEMENT. EACH OF THE PARTIES HERETO ACKNOWLEDGES THAT NO OTHER PARTY OR AGENT OR LAWYER OF ANY OTHER PARTY HAS MADE A PROMISE, REPRESENTATION, OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, NOT CONTAINED HEREIN CONCERNING THIS AGREEMENT. EACH PARTY ACKNOWLEDGES THAT IT/SHE/HE HAS NOT EXECUTED THIS INSTRUMENT IN RELIANCE UPON

A PROMISE, REPRESENTATION OR WARRANTY, IF ANY, NOT CONTAINED HEREIN.

ENTIRE AGREEMENT. All parties hereto agree that this writing embodies the entire Agreement between the parties, and that no representations, promises, or inducements of any kind have been made by any party or any officer, employee, agent, or lawyer of any party, other than those that appear in writing in this document, and that each covenant and condition mentioned in this Agreement is a material consideration for each party to enter into this Agreement.

COUNTERPARTS. This Agreement may be executed in counterparts, and said counterparts shall constitute one and the same document.

NO ASSIGNMENT. All parties hereto represent, agree and warrant to each other that each has not heretofore sold, assigned, or otherwise transferred in any manner to any person or entity any rights, duty, obligation, other interest, or any matter which is the subject matter of this Agreement, either in whole or in part, and each agrees to indemnify, defend and hold harmless each other from and against all claims, demands, liabilities, obligations, actions, causes of action, suits, controversies, costs, expenses, legal fees, damages, and judgment of every nature, character, and description whatsoever which are based on or arise out of or are in any way related to any such sale, assignment or transfer.

NO THIRD PARTY BENEFICIARIES. This Agreement confers no rights and imposes no duty on any person or entity not acknowledging this Agreement.

CHALLENGE TO AGREEMENT. In the event any proceeding of any nature whatsoever is commenced or pursued by a third party to enforce, invalidate, interpret or prevent validation or enforcement of all or part of this Agreement, the parties do mutually agree to cooperate fully in the opposition to such proceedings. All reasonable expenses incurred therein by any party shall be borne by that party.

EXECUTION OF OTHER DOCUMENTS. From time to time at the request of the RELEASED PARTIES, and without further consideration, at such party's expense and within a reasonable period of time after request hereunder is made, the RELEASING PARTIES hereby agree to execute and deliver any and all further documents and instruments, and shall do all acts, as the RELEASED PARTIES may reasonably request.

ENFORCEMENT OF THE AGREEMENT. In the event that any party brings any action or proceeding against the other for the recovery of any sum due hereunder, or because of the breach of covenant, condition, or provisions hereof, or for any other relief, one against the other, declaratory or otherwise, including appeals therefrom, and whether being an action based upon tort or contract, then the prevailing party in any such action or proceeding shall be paid by the other party reasonable legal fees and all costs of such action or proceeding, provided further that such right to reasonable legal fees and costs shall be enforceable whether or not such action or proceeding is prosecuted to final judgment.

COSTS AND LEGAL FEES. The Parties agree that each Party shall bear its own costs and lawyers' fees relating to the Lawsuit.

TITLES AND CAPTIONS. The section titles and captions contained in this Agreement are inserted only as a matter of convenience and for reference and shall in no way be construed to define, limit, or extend the scope of this Agreement or the intent of any of its provisions.

COUNSEL'S AUTHORITY. It is further understood and agreed that each of the parties to this Agreement mutually and simultaneously authorizes and directs its respective lawyers to execute and deliver for entry such instruments as may be necessary to effectuate the terms of this Agreement.

SEVERABILITY. If any provision or provisions of this Agreement are for any reason declared invalid, all other provisions shall remain valid.

CONTRACT. The parties to this Agreement stipulate that this Agreement is a contract and is enforceable as a contract.

/s/____________________
Pamela S. Staley

/s/____________________
Edward W. Moore,
Counsel for Pamela S. Staley

____
By: Lynn Johnston
As: Trustee for Cromwell Holding Company

/s/____________________

M. Forest Nelson as Counsel and Attorney-in-fact for purposes of this Lawsuit only of Sandra Crosnoe as Trustee for Charis Interests, Tim Pettinger as Trustee for Ecarg Interests, and Paul Perry as Trustee for Gideon Interests.

/s/_____________________

Christian Staley

/s/_____________________

By: Kip Allison
As: Guardian Ad Litem and Attorney Ad Litem

CONTRACT. The parties to this Agreement stipulate that this Agreement is a contract and is enforceable as a contract.

____
Pamela S. Staley

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Edward W. Moore,
Counsel for Pamela S. Staley

/s/________________

By: Lynn Johnston
As: Trustee for Cromwell Holding Company

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M. Forest Nelson as Counsel and Attorney-in-fact for purposes of this Lawsuit only of Sandra Crosnoe as Trustee for Charis Interests, Tim Pettinger as Trustee for Ecarg Interests, and Paul Perry as Trustee for Gideon Interests.

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Christian Staley

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By: Kip Allison
As: Guardian Ad Litem and Attorney Ad Litem