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**Sent:** Friday, March 8, 2024 8:16 PM  
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**Subject:** Second Court Newsletter: Save the Date, and New Opinion Summaries

March 8, 2024

Dear Friends:

We're edging ever closer to an event our criminal law practitioners will not want to miss: On **Thursday, April 11, 2024**, the Criminal Justice Section of the State Bar of Texas, in partnership with the Dallas Bar Association, the University of North Texas at Dallas College of Law, Southern Methodist University Dedman School of Law, and the State Bar of Texas Appellate Section, will conduct a **Criminal Law Program from 8 a.m. until 4 p.m. at the Arts District Mansion (Home of the Dallas Bar Association)**, 2101 Ross Avenue, Dallas, Texas. Starting with a **Continental Breakfast**, the morning will be filled out with **2.5 hours of arguments before the Texas Court of Criminal Appeals and Lunch**, and then a **3 hour CLE program** that afternoon followed by a **reception** beginning at 4 p.m. The three hours of **CLE** consist of the following:

- **Court of Criminal Appeals Update: CCA Judges Bert Richardson and Jesse McClure**
- **Firearms and Weed: Judge Audrey Moorehead (Judge, Dallas County Criminal Court #3) and Patty Tress (Denton)**
- **AI: Nelson Ebaugh (Houston)**

More details later, but save the date for now!

***Recent opinions issued by the Court in civil cases cover the following issues***

- Juvenile(Legal and Factual Sufficiency, Probable Cause)
- Mediation (Ambiguity, Voidness)
- Parent Child Relationship (Motion for Enforcement, 157.002 Requirements/Contempt)
- Parental Right Termination (Continuance, Legal and Factual Sufficiency)
- Texas Citizen's Participation Act (Abortion/Declaratory Judgment)
- Texas Citizen's Participation Act (Defamation, IIED, Malicious Prosecution, Negligence, Conspiracy)

**Recent opinions issued by the Court in civil cases cover the following issues (footnotes omitted in all summaries unless otherwise stated. All names in suits involving minors are aliases unless otherwise noted):**

***Juvenile(Legal and Factual Sufficiency, Probable Cause):*** *J.S.*, No. 02-23-00465-C--"Sixteen-year-old J.S. (James)... appeals from the juvenile court's 'Order of Transfer to a Criminal District Court and Waiver of Jurisdiction.' See Tex. Fam. Code Ann. § 54.02. Relying on evidentiary contradictions and ambiguities, in one issue James challenges the legal and factual evidentiary sufficiency of the trial court's finding that probable cause existed to believe that he committed the offenses of murder and deadly conduct and, thus, contends that the trial court abused its discretion by waiving its jurisdiction. The record reflects no abuse of discretion, so we affirm the juvenile court's order."

**Mediation (Ambiguity, Voidness):** *T.B.*, No. 02-24-00014-CV—“In this original proceeding, Relator T.B.... (Father) seeks mandamus relief from the trial court’s Order to Mediate. Father asserts that the trial court abused its discretion by ordering him (1) to appear for mediation in a matter where he had not been served with process, (2) to pay for the mediation, and (3) to appear at mediation with counsel he had not retained on that matter. We deny Father’s petition in part and conditionally grant it in part....The Order to Mediate that the trial court signed on January 3, 2024, featured the styles of both cases with the style of cause number 23-10429-16 crossed out. However, the substance of the order states that Mother and Father ‘are to mediate cases 22-4175-16 and 23-10429-16 on or before January 22, 2024.’ We leave it to the trial court to resolve this ambiguity....The trial court’s Order to Mediate is void in cause number 22-4175-16. To the extent that Father requests mandamus relief from the trial court’s order in cause number 23-10429-16, we deny any such relief because of the ambiguity in the record. We do, however, conditionally grant a writ of mandamus, and we direct the trial court to vacate its Order to Mediate in cause number 22-4175-16 and to notify this court in writing, within twenty days of this opinion, that it has taken action consistent with our opinion. See Tex. R. App. P. 52.8(c). Mandamus will issue only if the trial court fails to comply. The temporary stay that this court issued on January 16, 2024, is ordered lifted upon the trial court’s compliance with this court’s order in this opinion.”

**Parent Child Relationship (Motion for Enforcement, 157.002 Requirements/Contempt):** *A.W.*, No. 02-24-00018-CV—“The trial court held relator Father A.W. in contempt for six instances of not exchanging his son Andy... with real-party-in-interest Mother M.B. on the date and at the time and place specified in its March 2017 order. It ordered Father committed to the county jail for 100 days for each violation, ordered the commitments to run concurrently, but suspended the commitments and placed Father on non-reporting community supervision for 48 months. Father filed this petition for writ of mandamus challenging the contempt order.... We requested a response from Mother, but she declined to file one. In Father’s dispositive first issue, he contends that Mother’s motion for enforcement by contempt did not comply with Section 157.002 of the Texas Family Code, which required Mother to specify ‘the date, place, and, if applicable, the time of each occasion’ that Father failed to comply with the court-ordered terms for Andy’s exchange. See Tex. Fam. Code Ann. § 157.002(c). We agree.”

**Parental Right Termination (Continuance, Legal and Factual Sufficiency):** *P.M. and A.M.*, No. 02-23-00365-CV—“The trial court terminated Appellant Father’s parental rights to Adam and Brad based on grounds under Section 161.001(b)(1)(D), (E), and (O) and the children’s best interests under Section 161.001(b)(2) of the Texas Family Code.1 See Tex. Fam. Code Ann. § 161.001(b)(1)(D), (E), (O), (2). In his first of five issues that Father raised on appeal, Father argues that the trial court abused its discretion by denying his motion to continue the trial date and to extend the dismissal deadline. Then, in his second through fourth issues, Father contends that the evidence was legally and factually insufficient to support the trial court’s findings that he knowingly placed or allowed the children to remain in conditions or surroundings that endangered their physical or emotional well-being, see id. § 161.001(b)(1)(D); engaged in conduct or knowingly placed the children with persons who engaged in conduct that endangered their physical or emotional well-being, see id. § 161.001(b)(1)(E); and failed to comply with the provisions of a court order that specifically established the actions necessary for him to obtain the children’s return; see id. § 161.001(b)(1)(O). Finally, in his fifth issue, Father argues that the evidence was legally and factually insufficient to support the trial court’s finding that termination of his parental rights was in the children’s best interests. See id. § 161.001(b)(2).

As to his first issue, because Father’s motion to continue the trial date was not supported by an affidavit, as required by Rule 251 of the Texas Rules of Civil Procedure, the trial court did not abuse its discretion by denying it. And once the trial court denied Father’s motion for continuance, his motion to extend the dismissal deadline became moot—his case was going to final trial regardless of any deadline extension. We thus overrule Father’s first issue. Regarding Father’s third and fifth issues, we hold that the evidence is both legally and factually sufficient to support grounds under Subsection (E) and the best interests finding. Father had neither

stable housing nor income. And despite Father’s assertions to the contrary, a reasonable factfinder could have concluded that Father had a substance abuse problem. We thus overrule Father’s third issue—attacking the Subsection (E) finding—and his fifth issue challenging the best interests finding.

Because resolution of Father’s second and fourth issues will have no impact on his appeal’s disposition, we do not reach them. See Tex. R. App. P. 47.1, .4; *In re D.S.*, 602 S.W.3d 504, 511 (Tex. 2020).

We affirm the trial court’s termination judgment.”

***Texas Citizen’s Participation Act (Abortion/Declaratory Judgment):*** *Weldon v. Lilith Fund*, No. 02-22-00413-CV—“Before the United States Supreme Court overruled *Roe v. Wade* in the summer of 2022, abortion-assistance group The Lilith Fund for Reproductive Equity made it known that in October 2021 it had deliberately flouted a new Texas law prohibiting abortion after cardiac activity is detected—the law known as SB 8, or the Heartbeat Act—by helping at least one pregnant woman obtain an abortion. To gather information about Lilith Fund’s admitted SB 8 violation, Appellant Sadie Weldon petitioned for a pre-suit deposition of Appellee Lilith Fund’s deputy director under Rule 202 of the Texas Rules of Civil Procedure.<sup>1</sup> See Tex. R. Civ. P. 202.

While Weldon’s Rule 202 petition was pending, Lilith Fund separately sued Weldon seeking declaratory judgments that SB 8 is unconstitutional and seeking to temporarily enjoin Weldon from pursuing any judicial proceedings against it in the interim and seeking an anti-suit injunction against the Rule 202 proceeding. Weldon appeals the trial court’s denial of her motion to dismiss Lilith Fund’s lawsuit under the Texas Citizens Participation Act. See Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–.011; id. § 51.014(a)(12) (allowing appeal from interlocutory order that denies a TCPA motion). Because we conclude that the TCPA does not apply to Lilith Fund’s action, we will affirm. <sup>1</sup>To the extent that Lilith Fund practically invited a lawsuit, we’re unsure why Weldon opted to proceed with a Rule 202 petition rather than simply suing, learning during discovery who else might have been involved, and then joining those people as additional defendants. As Lilith Fund pointed out in the trial court, there was not ‘any debate’ that it had ‘violate[d] the technical terms of SB 8’ ‘at least on one occasion.’ ....Although Van Stean did not involve an earlier-filed Rule 202 petition, as this case does, we do not consider that procedural difference significant enough to warrant a different outcome.<sup>12</sup> TRL put up a website and Weldon filed a Rule 202 petition, but the consequent declaratory-judgment actions filed by the Van Stean parties and Lilith Fund, respectively, were not based on or in response to TRL’s or Weldon’s protected conduct within the TCPA’s meaning.<sup>13</sup> <sup>13</sup>The parties should not take our holding as suggesting that the TCPA would never apply to declaratory-judgment claims, only that in a situation like this, where Lilith Fund’s requested relief does not seek to prohibit Weldon from engaging in constitutionally protected activity, the declaratory-judgment claim is of a type that is properly protected from dismissal. ”

***Texas Citizen’s Participation Act (Defamation, IIED, Malicious Prosecution, Negligence, Conspiracy):*** *McShirley v. Lucas*, No. 02-23-00229-CV—“In this accelerated interlocutory appeal, Appellants Evan McShirley and D’Ann Dagen (the McShirleys)... challenge the trial court’s denial of their motion to dismiss pursuant to the Texas Citizens Participation Act... (TCPA), in which they sought to dismiss the claims filed against them by Appellee Leilani Lucas: defamation,... intentional infliction of emotional distress (IIED), malicious prosecution, negligence, gross negligence, and conspiracy. Applying the TCPA’s standards, we affirm the trial court’s order as it concerns Lucas’s defamation, malicious-prosecution, and conspiracy claims; reverse and render judgment dismissing Lucas’s IIED, negligence, and gross negligence claims; and remand this matter to the trial court for further proceedings consistent with this opinion....We conclude (1) that the TCPA applies to Lucas’s claims and (2) that Lucas presented clear and specific evidence of each element of her defamation, malicious-prosecution, and conspiracy claims but failed to do so with respect to her IIED, negligence, and gross negligence claims. We affirm the trial court’s order denying the McShirleys’ TCPA motion to dismiss as it pertains to Lucas’s defamation, malicious-prosecution, and conspiracy claims. We reverse the trial court’s order as to Lucas’s IIED, negligence, and gross negligence claims and render judgment dismissing those claims only. We

remand this matter for further proceedings consistent with this opinion and Section 27.009(a). Tex. Civ. Prac. & Rem. Code Ann. § 27.009(a).”

All for now. Y'all stay safe and well. Have a great weekend!

Yours,

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