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PRACTICE FOCUS: FAMILY LAW

Be Mindful of These Top 5 Dangers in Family Law

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A FAMILY LAW TRIAL PRACTICE IS FILLED WITH interesting issues. But because family law is such a diverse practice, it is also filled with legal pitfalls. Among the most common waiver/preservation issues are the failure to timely object to testimony or evidence, and the failure to state a specific, legal objection at trial. Other waiver issues are always lurking, though not always readily apparent. Here are some of the most common.

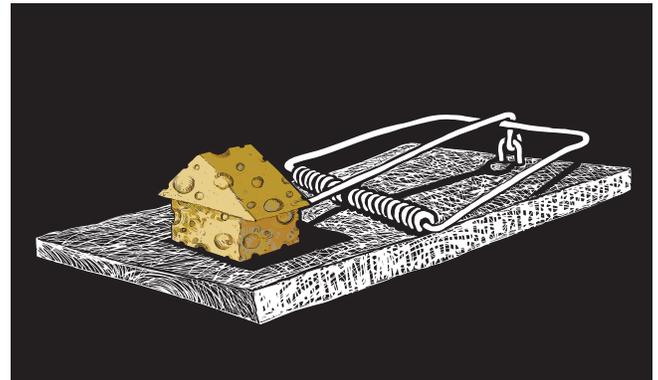
1 Failure to file a timely motion to transfer venue. A trial court that signed a divorce decree or a suit affecting the parent-child relationship final order is referred to as the court of continuing, exclusive jurisdiction as it retains jurisdiction to address future issues regarding the child until majority. But if the child's county of residence (in Texas) has changed for more than six months, then a motion to transfer may be made—with an affidavit—asking for a transfer to a new jurisdiction. The transfer is mandatory if the facts are not contradicted. Respondents may also file a transfer motion with their answer. These motions and affidavits must be filed with the initial pleadings, or the transfer is waived and the parties potentially face litigation in a county where none of them live.

2 Failure to properly brief at the trial court level. Texas Courts of Appeal generally cannot address legal arguments that are made for the first time on appeal. Despite this, you frequently see an opinion that states, but waives, an appellate litigant's argument simply because the argument was never made to the trial court. Obviously, it is best to raise any legal concerns immediately, but Motions

for Reconsideration and Motions for New Trial are a very good place to brief any legal issue that was not well developed before or at trial. They are also a good place to call attention to any perceived errors in the judgment. Ideally, the briefing in the court of appeals will match the briefing in the trial court precisely.

3 Failure to prove separate property by clear and convincing evidence. The Texas Constitution mandates that separate property (property owned before marriage, inherited, gifted, etc.) is not divisible. As a result, any ruling by the trial court providing for the division of separate property is reversible error. But separate property must be proved by clear and convincing evidence. This usually means introducing documents to support the claim.

4 Failure to follow the deadlines for findings of fact and conclusions of law. Among the biggest traps awaiting trial attorneys are the procedure to request traditional findings of fact and conclusions of law (which must be made within 20 days of the judgment), reminders for past-due findings of fact and conclusions of law (within 30 days after the initial request if findings were not filed in a timely fashion, but not before 20 days after the initial request), and for additional findings of fact and conclusions of law (within 10 days after the trial court files findings.) Failure



to properly request findings or additional findings will result in fact findings deemed in support of the judgment.

5 Failure to make an offer of proof on excluded evidence. When a trial court erroneously excludes evidence, many times a trial lawyer will abandon the effort and "move on." To properly preserve error when evidence is wrongly excluded, evidence should formally be included in the record. If the evidence is not in the record, the appeals court finds that error was waived because it is impossible to tell that the evidence would have changed the judgment. To preserve error, the offer of proof (testimony and/or exhibits) should be included in the reporter's record as excluded evidence. ■



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