

SUMMER 2006 VOL. 12 NO. 1

TPIJ

Texas Paralegal Journal



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PRESIDENT'S *Message*

Ellen Lockwood, CLAS, RP

As the Division approaches its 25th Anniversary on October 23, 2006, there will be celebrations and articles that will focus on where the Division has been and where it is going. The past 25 years have been remarkable for the leadership, innovation, and advancement of the paralegal profession. It is important to remember we would not be celebrating this milestone if not for the contributions of the following people:

Those involved in the formation of the Division, including attorneys, judges, State Bar personnel, and paralegals. If not for their vision and hard work, we would not have been the first paralegal division of a state bar. We owe them our deepest gratitude.

Charter members, those paralegals across the state who recognized the historic significance and importance of joining the first paralegal division of a state bar, and their attorneys who hope-fully supported their membership.

Chairs/Presidents of the Division who have stepped up to be the representative and spokesperson. These ladies and gentleman volunteered to be the Division's principal leader and while many of us do much for the Division, it is only these brave few who were willing to take on the extra responsibilities of the office of president. Several of them continue to serve the Division as Ambassadors.

Officers, directors who take on the additional responsibilities of parliamentarian, secretary, or treasurer. The board truly could not function without these officers.

PD District Directors who serve their

members in their districts, who attend lengthy board meetings, who strive to make the best decisions for the Division, trying to balance the needs of members in small towns and those in large cities. They spend quite a bit of time preparing for board meetings, offering CLE in their districts, working with their sub-committee chairs, and dealing with various Division issues. There have been numerous board members and their leadership formed the policy and procedures of the Division.

Committee Chairs, the leaders of the committees, where the true work of the Division is done. The committee chairs work with committee members from all over the state, pulling them together into a coordinated effort to accomplish the Division's goals, then reporting back to the board their committee's accomplishments.

Sub-Chairs/Committee Members, and Other Volunteers, the army of the Division. These volunteers do the work of the Division. Without them the Division would cease to function. After all, the directors don't process membership applications, or bear the responsibility for publications, public relations, elections, annual meeting, professional development, ethics, TAPS, and various ad-hoc committees. The Division could continue at least for a while without the board of directors, but without the committees and the volunteers are the Division's various events, the Division could not function.

The Coordinator, Norma Hackler, who for sixteen of the Division's 25 years has been its continuity and its organizer. As the Division's only paid employee, she does her job *plus* all of the things we volunteers don't have time to do. She deals

with everyone's personality quirks, the State Bar, vendors, hotels, and restaurants.

Although she had no previous involvement with the legal field, she has adopted our profession and the Division as her own. No one is a more devoted to our organization.



The State Bar of Texas, which, in its wisdom, created the Paralegal Division, and has provided our organization with legitimacy, support, and leadership.

All of the others who support the Division, whether directly or indirectly, including sustaining members, vendors, families, friends, attorneys, employers, and anyone else I have neglected to mention.

And of course, YOU, the members!

There would be no Division without the great members who a part of this very first state bar paralegal organization. Your leaders are important but the members are the heart of the Division. Without you, we cease to exist.

The Division's success for the last 25 years is the result of many people's efforts. As we look toward the future, please take a moment to thank someone who has helped make this organization what it is today, and pat yourselves on the back, as well. If you have not yet gotten involved in the Division, I hope you will considering doing so, and helping make the Division's next 25 years even better.

Thank you for the opportunity to serve you as your president. It has been an honor and a privilege.

TPIJ

Texas Paralegal Journal

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PARALEGAL DIVISION

ANNOUNCES

TAPS 2006 SCHOLARSHIP

For the upcoming 2006 TAPS seminar (Texas Advanced Paralegal Seminar, a three day CLE seminar), the Paralegal Division of the State Bar of Texas will award up to two (2) scholarships for the registration fee to attend the TAPS 2006 seminar. Below please find the guidelines and application for applying for this scholarship.

1. The Recipient must apply for or be a member of the Paralegal Division of the State Bar of Texas.
2. To apply for a TAPS scholarship, the applicant is required to give a written essay regarding the paralegal profession. The essay should be two (2) pages and double-spaced.
3. To apply for a TAPS scholarship, the applicant is required to provide two (2) personal references, which describe the applicant's involvement in the paralegal profession.
4. Financial need shall be a contributing factor, but not a requirement. However, if two or more applicants are tied in meeting the criteria for the scholarship, financial need shall be the determining factor.

Other

1. No money will be sent directly to the recipient.
2. The scholarship for TAPS shall cover the cost of registration only.
3. The scholarship selection committee for reviewing scholarship applications for TAPS shall be composed of the Chair of the TAPS Planning Committee, one Planning Committee Sub-Committee Chair, and the Board Advisor to the TAPS Planning Committee.

The Paralegal Division of the State Bar of Texas will award scholarships for TAPS 2006 which will cover the cost of registration in accordance with the TAPS scholarship guidelines.

TAPS 2006 SCHOLARSHIP APPLICATION

IMPORTANT: ALL APPLICATIONS FOR A SCHOLARSHIP FOR TAPS 2006 MUST BE RECEIVED BY Monday, July 31, 2006. DATE OF TAPS 2006: September 20-22, 2006, Addison, TX

Name _____ PD Membership No. _____
Home Address _____
Home Telephone _____ E-mail Address _____
Work Address _____
Work Telephone _____ Fax Number _____
Employer _____

Are you a member of a local paralegal organization that offers a scholarship award? _____
Give a detailed description of your reason for seeking a scholarship to TAPS 2006: _____

Give a detailed description, if any, for your reasons for financial need: _____

Attach your two (2) personal references and your written essay to this application. Applications should be mailed to: Ellen Lockwood, RP, CLAS, President of the Paralegal Division and Chair of the TAPS Planning Committee, Clear Channel Communications, 200 East Basse Road, San Antonio, TX 78209. *Scholarship recipients will be notified by letter by August 15, 2006.*

Applicant's Signature

Attach any additional explanations

Continuing Legal Education

ONLINE CLE

The Paralegal Division offers online CLE via the PD website. To participate in online CLE, please go to www.txpd.org and select CLE/Events.

CLE REQUIREMENT

Active and Associate members are required to obtain six (6) hours of CLE (2 of which can be self-study) by May 31 of the membership year. CLE completed during any membership year in excess of the minimum six (6) hour requirement for such period may be applied to the following membership year's requirement. The carryover provision applies to one (1) year only.

CLE CALENDAR

A statewide CLE calendar can be found on the PD website at www.txpd.org under Upcoming Events/CLE. You can find a variety of CLE programs offered around the State. Please check the PD website often because the calendar is updated weekly.

Membership Information

CHANGES TO MEMBER INFORMATION

Paralegal Division members can now change their credentials, addresses, email addresses, preferred mailing address and/or phone numbers via the State Bar of Texas website. Go to www.texasbar.com; click on MyBarPage (top of home page). If you have never visited this page, you will need to set up a pin/password. Your password to set up your **NEW Pin/password** is the last four digits of your social security number (**if the State Bar does NOT have your social security number on file, you will not be able to use this area nor will you have access to MyBarPage**); once you set up the new pin/password, you will be able to enter this section of the website to update your member records. If you have any problem accessing this page, please contact the Membership Department at 1/800-204-2222, ext. 1383.

MEMBERSHIP CERTIFICATE (Active Members Only)

Need to replace your membership certificate? Please complete the order form found on www.txpd.org and follow instructions. The cost to replace an Active Membership Certificate is \$15.00.

MEMBERSHIP CARD

Need to replace your membership card? Please send \$5.00 made payable to the Paralegal Division along with a letter requesting a new membership card to the Membership Department, State Bar of Texas, P. O. Box 12487, Austin, TX 78711.

Were you ever issued a membership card? If no, please contact the Membership Department of the State Bar of Texas at 1/800/204.2222, ext. 2114 or email at jmartinez@texasbar.com

DELL COMPUTER DISCOUNT

The number assigned to the Paralegal Division by Dell Computer Corp is: SS2453215. This is the number you should use to receive the 10% discount for purchase of computers. However, Dell **does not** have the 10% discount special continuously. Dell sends a notice when the discount is offered to our members at which time it is forwarded to the PD members via the PD E-group. You may try to use this number anytime, but there are no guarantees that you may receive the discount at the time of access. Notices will continue to be forwarded to the PD E-Group when the discount is offered by Dell Computer Corporation.

PD Website Information

MEMBER DIRECTORY ONLINE

A membership directory is set up on the PD website under the Members Only area. By default, your membership information is listed in the online membership directory. If you would like to suppress showing your listing to other members, go to the Members Only "Edit My Profile" function to display your listing and then uncheck the "publication" box. If you haven't already done so, you might want to include info about adding

member specialties through the same interface. If you need changes made to the online membership directory, you must make those changes using the procedures set out in the above *CHANGES TO MEMBER INFORMATION* procedures.

MEMBERS ONLY AREA

The Members Only area of the PD website is for current members of PD only. If you are a member of the Paralegal Division and cannot access this area, please send an email to pd@txpd.org with your particular problem. Access is automatically given to members of the Paralegal Division. Access to the members-only area is available within two weeks from the date of the acceptance notice mailed to the individual by the Paralegal Division Coordinator.

PD E-GROUP

How do I sign up for the PD E-Group?

Going to trial in a "foreign" jurisdiction and want some tips from those who have gone before? Need a form but do not know where to turn? Then you need to sign up for the PD E-group! This is a members-only group and a benefit of being a member of the Paralegal Assistants Division (PD).

To sign up, go to www.txpd.org, click on Members-Only and choose E-Group. There will be directions on how to sign up. **You will be required to respond to an email confirmation.** Once you have completed the signed up, you will begin receiving emails from the members of PD.

For those who prefer not to be interrupted with email notifications, select "digest" for the PD email exchange. Emails are collected and distributed one time a day in one email.

How Do I change my PD E-group email address?

Instructions:

The PD E-Group created by the member is Password-protected, only the member has access to change a member's PD E-Group email. Go to www.txpd.org, click on Members-Only, click on PD E-Group, enter your password, unsubscribe the current email address, and create a new email address where you want to receive your PD E-Group messages.

EDITOR'S *Note*

by Rhonda J. Brashears

Greetings, Division Members! We find ourselves right in the middle of summer again with almost half of 2006 gone. Where does the time go? In this edition, you will find several helpful tidbits, including a brief look at the newly released Paralegal Division Salary Survey. Members, you can find the full survey on the website at txpd.org under the Members-Only section. Our Opinions to the Editor Column for the quarter received a great deal of response on a topic that is obviously very important to several people. I really appreciate the professionalism with which the membership is responding to the posted questions.

As you can imagine, the biggest task in putting together this magazine each quarter is finding articles that the readers will find interesting and helpful. If you have an article or have seen a paper which would make a good article, please contact me at TJP@txpd.org. I ALWAYS need good articles.

I hope that you have a wonderful and safe summer.

The Paralegal Division announces the results of the Spring 2006 Director Elections for even numbered districts. The new directors will serve on the Paralegal Division Board of Directors for two consecutive years (2006–2008).

2006 Director Election Results
District 2 - Stephanie A. Hawkes, RP

District 4 - Billy Hart
District 5 - Kristy Ritchie
District 6 - Deirdre Trotter, CLAS
District 8 - Robert W. Soliz
District 10 - Ginger D. Williams, CLAS
District 12 - Debbie Guerra
District 14 - Mona Hart Chandler, CP
District 16 - Clara L. Buckland, CP

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PARALEGAL DIVISION

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Parliamentarian: Deborah Skolaski, CP
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Secretary: Mona Hart Chandler, CP

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DEADLINE FOR SUBMISSION OF ARTICLES FOR THE FALL ISSUE IS AUGUST 31, 2006.

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A Child's Preference v. The Best Interests Standard

J. Lindsey Short, Jr.

It is a well-settled fact that in family law jurisprudence a child's preferences should be a factor to be considered in custody decisions. The issue becomes the determination as to the weight of the consideration. Correspondingly, a child in Texas has the right to express a preference as to the issue of conservatorship. One such preference is the preference as to who will be appointed the managing conservator. Texas Family Code §153.008, Child's Choice of Managing Conservator states:

If the child is 10 years of age or older, the child may, by writing with the court, choose the managing conservator, subject to the approval of the court.

The statute has been amended several times in recent years reducing the age at which a child has the right to state a preference for his managing conservator from 14 to 12 to 10 years old. This reduction of the age of the child has proven to be a subject of much controversy and discussion by the Texas judiciary.

On its face, the statute allows a child over the age of 10 to choose with whom that child wants to live. A court will certainly consider a child's preference in choosing the managing conservator, but as the statute states, the choice is "subject to the approval of the court" (emphasis added). "Approval of the court" has the effect of saying that a court will consider a child's preference when determining the "best interest of the child." The court will receive a child's choice as a part of the evidence which the judge will weigh in determining the appointment of the managing conservator.

Texas courts have held that a child's preference of managing conservator is only one of the many factors that the court will consider in determining the "best interest" of a child. The "best interest of a child" test is clearly stated in the Texas Family Code §153.002 as follows:

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.

The statute itself offers little help in defining what precisely determines the best interest of a child. Texas case law routinely deals with this issue, and yet, courts have not formulated an exact definition of the best interest standard.

The public policy behind §§153.008 and 153.002 appears to be the legislature's attempt to offer guidance but not to bind the court in the determination of its decision as to the



appointment of a managing conservator, but rather to provide some guidance in determining what is in the best interest of a child. It is extremely important to highlight the fact that a child's preference is only one factor to be considered by the court, albeit an important one. Although seen as a significant right which a child possesses, a child's written preference for managing conservator will not be considered in a vacuum. It bears repeating that upon careful analysis of Texas cases that a child's preference is only one factor to be considered in deciding what is in the best interest of a child when a court is determining a managing conservator in a custody case. Whether a child's preference is the leading factor is debatable. What is apparent is that judges will generally consider all of the evidence which is available. This would include the circumstances surrounding how a written preference was obtained from the child to determine a managing conservator for the child.

It would seem that the power of a child's preference converges with the totality of the best interest test, but does the former outweigh the latter, or is the former merely a part of the latter? As practitioners, where we are either advising our clients or preparing a case for mediation or trial, the issues that seem most pertinent are 1) how old and also how mature is the child; 2) what weight should a child's preference be given; 3) what is the evidentiary use of such preferences; and 4) what are the circumstances which surround the choice.

Best Interests Standard

No Clear Definition of "Best Interest" Standard

Section 153.008 of the Texas Family Code which allows a child 10 years of age or older to state a preference for Managing Conservator must be read in conjunction with §153.002 of the Family Code which provides that the "best interest of the child shall always be the primary consideration

of the court." The best interest test, as stated in the statute, does not define further nor list any factors or elements for us or the court to determine what is meant by the best interest of child. Best interest has never been clearly nor definitively defined in Texas. The lack of a statutory definition of the best interest test has given Texas courts plenty of leeway in determining what they will use to determine what is in the best interest of a child in a particular custody case. The factors which seem extremely important in one case may seem to be of lesser importance in another.

What all this boils down to is the fact that the best interest standard vests a high level of discretion in judges. The Court in *Hogge v. Kimbrow*, 631 S.W.2d 603 (Tex. App. — Beaumont 1982, no writ), considered the definition of the best interest standard. The trial court had refused the mother's tendered instructions of factors to be considered in determining the best interests of the child. The Appellate Court, citing TEX. R. CIV. P. 277, found that the trial court's decision was not error, stating that the trial court has considerable discretion in the submission of definitions and instructions. The Court did not believe that the "best interest the child" was an example of a legal term that has an irregular meaning which is unknown to the layperson. In other words, the best interest standard should be seen as having a plain meaning, even though that plain meaning is a broad one with no precise parameters.

At the time of the preparation of this presentation, Texas case law has not developed a precise definition or list of factors that is either more complete or more instructive than the phrase itself. The closest that a Texas Court has come in the custody/ possession arena to a list is the explanation of factors set forth in the parental rights termination case of *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). The factors to be considered by the Court for the "best interest of a child" test which the Texas Supreme Court in *Holley* derived include: desires of the child; emotional

and physical needs of the child; any emotional or physical danger to the child now and in the future; parenting ability of the person seeking custody; programs available to assist in promoting the best interest; plans for the child; stability of each home; and any acts or omissions of the parent. It is important or significant to note that the "desires" of the child is the first item listed in *Holley's* factors for the best interest test.

Holley was a case in which one parent was seeking to terminate the parental rights of the other parent. At various times it has been stated that the factors derived in *Holley* are not appropriate to apply in conservatorship cases. The authors of the Texas Pattern Jury Charges, vol. V (1998) wrote in the comment section to 215.2: "[T]he Committee believes it is inappropriate to apply that list in conservatorship cases." In addition, *Holley* has not been specifically cited by any appellate court in a nontermination case. Notwithstanding the fact that commentators may say that *Holley* may not be applicable to a case other than a parental rights termination suit, it can often be seen as a roadmap to the testimony and evidence produced at trial in an effort at providing guidance in a realm void of specific terminology. *Holley* is the nearest thing Texas courts have in deriving a list of factors for the "best interest of a child" test. Texas courts do not follow any one list of factors or elements to determine a child's best interest, but rather seem to base their individual determinations upon factors which are important or significant to the particular judge as well as upon the facts of the particular case.

"Best Interest" Standard Applied

The Court of Appeals in *Cole v. Cole*, 880 S.W.2d 477 (Tex. App.—Fort Worth 1994, no writ), was very clear when it applied the "best interest of the child" standard as its primary consideration in determining the question of managing conservatorship of a child. In *Cole*, the Court, looking at the totality of the evidence, did not rule



according to the child's preference. This is an extremely important case to bring to the attention of a trial court if your client is facing a choice made by the child for the other parent. This case points out that a trial court can, will, and should exercise a wide latitude of discretion when determining the best interest of a child.

The case was a divorce suit involving the parental choices of the fifteen-year old son who had been living with his father since the parents' separation. The child testified that he wanted to remain living with his father, and the mother also testified that her son preferred to live with his father. The Court's decision was apparently influenced by testimony from the mother that when the father was out of town she discovered the boy having thirty to forty friends over for a party. Additional testimony from the mother revealed that at another time the mother went to the father's house where her son was staying and found two naked strippers asleep in his bed. The trial judge had also interviewed the son in his office — off the record. There is no record of the conversation.

The appellate court later concluded:

The primary consideration of the court shall always be the best interest of the child...the trial court is given wide latitude in determining the best interest of a minor child for purposes of making a custody award and its judgment will not be disturbed on appeal unless it is shown from the record as a whole that the court abused its discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982)

Cole, at 478. Once again, a Texas court applied the "best interest of a child" standard without any description of the elements the court used in determining that the appointment of the mother as managing conservator would be in the "best interest of the child." What we are left

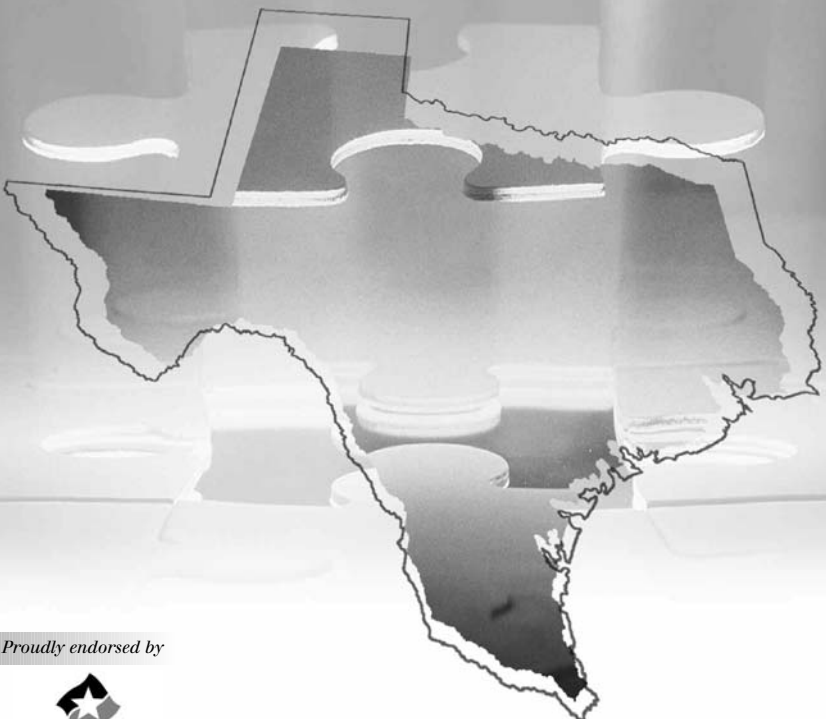
with is an indistinct rule giving trial courts wide latitude in reaching their decision of what is in the best interest of the child. Frankly, an indistinct rule is, in the author's opinion, preferable as it allows a decision to be fact driven but still have parameters for the court.

The Court in *Cole* held that the trial court had the discretion to decide that the


son's preference would not be in his best interest. The case is a classic situation in which the evidence was both legally and factually sufficient to support the court's decision to make the mother managing conservator. *Cole* at 480.

Ordinarily, Appellate Courts will not disturb a trial court's decision of managing conservator absent an abuse of discretion.

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Upon appellate review, the district court is given wide latitude in determining the best interest of the child and will be reversed in such cases only when it has abused its discretion. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). "The test for abuse of discretion is whether the trial judge acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable" *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The Court in *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985), stated that it would not reverse for abuse of discretion merely because they disagree with a decision of the district court. Again, assuming that there is no error with regard to this admission or exclusion of evidence, facts drive the case and a preference or choice by a child is, although an important fact, only one such fact.

Weight of Best Interest Standard

Trial courts' decisions are held in high regard by the appellate courts with respect to the determination of custody issues. The *Cole*, *Gillespie*, *Worford*, and *Downer* line of cases simply illustrates the power trial courts have in reaching managing conservator decisions.

As the author has stated previously, Texas courts are given wide latitude in determining the best interest of a child. The standard as stated in the statute is itself general and indeterminate, so it is very difficult to identify what interests, facts, or circumstances are the "best". In considering the best interest of children, and further, in trying to formulate a list of factors, the court may consider a myriad of factors including, but not limited to: physical ability and fitness of each parent; mental ability and fitness of each parent; child's age; child's physical and mental health; child's special needs; child's preference; religion; who has been the primary caretaker; adultery and its impact on children; separation of siblings; locale of parents - stability of one home and/ or the

relocation of a parent; spousal abuse; child abuse; child's refusal to be with one parent; parent's work schedule; ability of the custodial parent to support the child; the willingness of one parent to foster the child's relationship with the other parent; prior criminal conduct of a parent.

The best interest standard clearly inserts judges into family decision-making and therefore may at times allow judges to impose their own personal values on others. This may be a risk society has to accept when two parents cannot decide on custody issues. It therefore goes without saying that the practitioner as part of the representation of a client become familiar with the trial judge and factors, biases, and values of each trial judge so that a reasoned decision may be made as to whether or not to pay a jury fee in a particular case.

What weight does the child's preference carry in relation to other best interest factors? One can make the argument that the Texas Family Code places greater weight on a child's wishes simply because there is a separate statute addressing the elements of preference and of best interest. Conversely the fact that a separate statute exists allowing for a child's preference in 6153.008 may merely be the legislature's attempt to allow additional evidence to be considered by the judge. If this is true, this preference may not be any different from that voiced by a child under the age of 10. However, a particular judge may carry a personal belief that a choice should be afforded greater or lesser weight. Similarly, the age of the child who has made a choice may impact the significance to a particular judge. Predictability must then be compromised to allow for the facts which may exist in a particular case.

A Child's Preference

History of the Child Preference Statute

Prior to the Texas Family Code's first enactment in 1973, there was no specific statute which addressed the child's written preference on the issue of managing con-

servatorship. The pre-family Code case of *Brooks v. Brooks*, 480 S.W.2d 463, 465 (Tex. Civ. App. — Eastland 1972, no writ), held that the child's preference was only one of the factors to be considered in determining the "best interest of a child". Even today, case law seems to follow this line of reasoning, although there is now a separate statute which deals with a child's preference.

The "new" Texas Family Code in 1973 at 614.07(a) provided:

The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. If the child is 14 years of age or older, he may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.

With this statute, the state specifically acknowledged the importance of the child's participation and viewpoint in the issue of the choosing of a managing conservator. The 1973 statute highlighted the issue of whether this change could be seen as changing the weight given to children's preferences in managing conservatorship cases. Some would argue that it did, but at least in the context of a modification action, the argument can be made that it did not.

By the enactment of this statute it is clear that the legislature intended to grant children who are age 14 and older some greater control or at least input over the determination of conservatorship than for children who are under 14. The first case to address this change in the law was *In the Interest of Galliher*, 546 S.W.2d 665 (Tex. Civ. App. — Beaumont 1977, no writ), which was a non-jury modification of conservatorship trial. *Galliher* involved a fourteen-year-old child's written preference as to a managing conservator which had been filed with the Court. The father

Focus on...

argued that the statute changed prior law, as described in *Brooks*, supra, which considered a child's preference as one among many factors that the court could consider. The Court's opinion stated that the new law did change prior law regarding preference because it brought into the statutory law the concept of choice by a child over the age of 14 years. However, the Court in *Galliher* held that the child's preference is "subject always to the discharge of the court's primary obligation of determining what is in the best interest of the child... In no event is such a designation absolute or controlling." *Galliher* at 667. See also, *Addressing the Child's Preferences on Conservatorship and Visitation*, Janice L. Green & Lora J. Livingston, 1998 Adv. Fam. L. Again, this is a critical case to cite when dealing with an adversely filed preference.

Effect of Child Preference Statute, §153.008

While there can be little debate that the court usually gives a child's preference serious consideration, it is important reiterate that the court is not bound by the choice and further, that the court is not required to grant the request. Arguably, the Texas legislature by enacting a separate statute for a child's preference as to managing conservator wanted to insure that a child's preference would always be considered as a factor when the court is determining a child's best interest. Without further guidance from the Family Code, we are left with a child preference statute which must be read in conjunction with the indistinct best interest statute.

The Comment to 6153.008 of the TEX. FAM. CODE ANN. (2000) states

In 1999, §153.008 was amended to reduce the age for a child to express a preference in managing conservators from age 12 to age 10. Opponents of this amendment assert that a child of 10 years of age will be subject to undue parental pressure in choosing a managing

conservator – as contrasted with a 12-year-old. A steady progression of reducing the age of expressing a preference from 14 to 12 and now 10 has occurred over the past several years, albeit in an inconsistent fashion. However, the judge interviewing a child in chambers is mandated at 10

The statute was amended to provide for a preference to be available from age 12 to age 10 during the 1999 Legislative Session. If the lawsuit was filed prior to September 1, 1999, then the age at which a child may choose would remain 12.

Part of the rationale used to support a lowering of these ages is based primarily on other areas of litigation in which children are held accountable for their actions at younger and younger ages. The current feeling among a majority of judges appears

to be a disapproval of the legislature's act of reducing the age that a child may file a written preference from 12 to 10 years old. By the date of presentation of this article, it would not surprise this author if the age were again amended to reflect the age of 12. In any event, securing an affidavit from a child under the age of 12 and the facts and circumstances surrounding the execution of the choice will probably be closely scrutinized. A parent filing such a preference may be seen as not having a child's best interest at heart. In effect, the motivation of a parent as opposed to a legitimate choice by a child may be the focus.

In her article, Janice Green lists a number of motivational factors in her article that can be seen as unfairly influencing a child's preference. The list includes: fear of retaliation or punishment if the child does not choose one parent; bribes; with which parent will a favorite pet reside;



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caretaker role of the child with a parent; choice and strictness of rules of discipline by a parent; neighborhood; lifestyle and social status associated with one parent; anger and/ or revenge; perceived love and attention; and seeking some sort of control over the uncontrollable. As a result, we may simply be enacting a battle of psychological experts to opine regarding not only the maturity and cognitive development of the child but the psychological evaluation of the parent who procured the choice.

The circumstances under which statements of preference are secured almost always provide fertile grounds for attack. See *The Child as a Witness*, Jan Marie Delipsey, Ph.D. & Hon. Paula Larsen, 2000 Adv. Fam. L. There are those who would argue that when executing a written designation of preference pursuant to §153.008, filing it with the court is a "decision of substantial legal significance concerning the child" so the power to obtain it from the child is exclusively that of the managing conservator. *Dealing with Choice of Managing Conservator in a Custody Case*, Earle S. Lilly & John E. Van Ness, 1995 Adv. Fam. L. Therefore, if there has been no managing or temporary managing conservator, who then has that right?

Weight given to a Statement of a Child's Preference

In attempting to determine the extent to which a 10 year old can control who is appointed managing conservator, the initial question to be answered is what is meant by the phrase "subject to the approval of the court"? The term "the court" in §153.008 has been defined as only the judge, not the jury. This analysis is then critical when making the determination as to whether or not there will be a bench trial. In deciding whether to approve the choice, the judge should consider all of the evidence and make a determination based on the best interest of the child. In weighing a child's preference, the Court should also consider the age and maturity of the child and the potential for

influence which may have been exerted by one or the other of the parents of the child. But will she? This being the case, in a bench trial it would appear that in the ultimate determination of conservatorship, the choice filed pursuant to §153.008 should merely be additional evidence to be considered by the judge, and as such perhaps no different than a preference voiced by a child under the age of 10. It is questionable that this is what the legislature intended. See Lilly and Ness.

Jury Trial

In a jury trial, the written choice itself is probably not admissible. The §153.008 fails to specifically address the admissibility of a written preference filed with the Court as evidence in a contested trial. In *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App. — Corpus Christi, 1967, writ dismissed), the Court examined the fact that there was a statutory requirement regarding the filing of the preference and compared that to the fact that there was a lack of a statutory provision which required that the writing be received into evidence. The child's written statement of preference for custody was admitted into evidence in a jury trial over the objection of the opposing parent. The Court concluded that the legislature contemplated that the writing would be received into evidence and considered by the fact-finder, the fact-finder being "the court" as stated in §153.008, since it would be senseless to file such a writing if it were not to be considered. However, and quite significantly, the Court noted that it is error to admit a child's statement of preference into evidence at a jury trial. See Delipsey and Larsen. Simply put, it is hearsay.

Now, in custody contests and cases where there has been allegation of child abuse, there are specific rules which may allow a court to admit the statements of a child which would otherwise be hearsay. These rules and exceptions to the hearsay rule include the res gestae statement, relating to the excited utterance; state of mind,

not offered for the truth of the matter but offered to show state of mind; medical diagnosis or treatment; business records; expert testimony, the opinion being based on hearsay; social studies, which can be considered by the court; and electronic testimony.

It is also important to remember and consider the fact that there is nothing in these statutory provisions which prevent a party from calling a child to the witness stand during trial if the child otherwise qualifies as a witness and is competent to testify under the other rules and therefore understands the taking of an oath. But, most attorneys are reluctant to call a child as a witness in civil cases involving custody, and judges usually strongly discourage the practice, as it is upsetting to the child and requires the child to openly pick and choose between parents as the parents watch the child testify. Thus, while this option may be technically available, pragmatically speaking it must be a very carefully considered option which may have a very negative and far-reaching effect. The Amarillo Court of Appeals *In the Matter of the Marriage of D.M.B. and R.L.B. and In the Interest of R.L.B., a Child*, 798 S.W.2d 399 (Tex. App. — Amarillo 1990, no writ), considered maturity, not competence, of a child witness and found the child to be too young to express a preference for a custodial parent.

An attorney considering calling a child as a witness may seriously consider the issue before doing so because the jury and perhaps the judge may well penalize that party for exercising bad judgment. A very careful analysis should be made with input by the client and perhaps a mental health provider of this option. It could be suggested that the trauma of having a child testify can be lessened somewhat by a pre-recorded videotaped question-and-answer format. Section 104.003 of the Texas Family Code allows for such testimony in certain circumstances. Sometimes an interview of the child in chambers can be useful in determining a child's true feelings



concerning custody matters and may give the court insight into parental relationships and whether pressures have been exerted on the children. Useful information sometimes becomes available in chamber interviews with the judge that may aid the court in rendering a decision. 33 TEX. PRAC., HANDBOOK OF TEXAS FAMILY LAW 615.7 (2000 ed.). However, when a jury has been empanelled, the option is lost.

We know that a jury verdict on the issues of the appointment of managing conservatorship and the determination of the primary residence are binding on the court. TEX. FAM. CODE ANN 6105.002. However, the court can render an order that contravenes the verdict of a jury but only as it relates to specific terms of possession, access, child support, and the rights and duties of managing, joint managing, and possessory conservators. In other words, these issues, even if submitted to the jury are advisory only and so most courts are reluctant to even submit them. Therefore, simply stated, while a jury verdict on the selection of a managing conservator is binding on the court, the

allocation of parental rights and duties is not. TEX. PRAC. GUIDE, FAMILY LAW Ch. 11.I.B (2000).

Interview of Child in Chambers

There are other options available to the court and the parties if the written choice is not obtained or if obtained and there are circumstances surrounding the choice that need or should be examined. In many cases, particularly with a young (10 years old) or immature child, the child might not even understand what she has signed or the impact of signing such a choice. Therefore, when the issue of managing conservatorship is contested, on the application of a party, the court must interview a child 10 years of age or older and may interview a child under 10 years of age to determine the child's wishes as to conservatorship. TEX. FAM. CODE ANN. 6153.009 (2000). Interviewing a child does not diminish the discretion of the court. TEX. FAM. CODE ANN 6153.009(b) (2000). In other words, a child over the age of 10 will be interviewed in chambers at one party's request, whether or not a child has filed a written preference. The Comment to

§153.009 reads, "Mandatory interviewing of a child in chambers, on request from a party, is an important step in giving a child a voice in a lawsuit in which the child is 'the real party in interest'." Notwithstanding the fact that the comment makes such a statement, there are those, particularly in the mental health field, who will argue that the courts are not qualified to analyze a child's statement or be able to discern whether or not the child has been unduly influenced except in the grossest or most obvious of circumstances.

The court has the discretion and may permit the attorney for a party or the attorney ad litem for the child to be present at the interview. TEX. FAM. CODE ANN § 153.009(c) (2000). However, the judge has full discretion as to whether or not to allow third parties to be present when the child is interviewed (except for a court reporter in the case of a child age 10 or older). See *Kimerly v. Blackstock*, 538 S.W.2d 503, 504 (Tex. Civ. App.—Waco 1976, no writ). On the motion of a party or on the court's own motion, the court shall have a record of the interview made when



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the child is ten years of age or older. A record of the interview is part of the record in the case. TEX. FAM. CODE ANN. 6153.009(d) (2000).

Modification of Conservatorship

Despite the outcome of a case to decide a managing conservator, when a suit is a modification of conservatorship the filing of a choice by a child over 12 will often be the determining factor in the ultimate outcome of the case, dependent again on the best interest standard. Until recently, when confronted with a modification proceeding in which sole managing conservatorship is to be modified, and in which a child has filed a designation of preference, one would find an unresolved inconsistency in the Texas Family Code. Section 156.001 provided the test for the modification of a sole managing conservatorship and in reading the section it is important to note that "best interest of the child" is not a factor. However, the legislature has amended section 156.101 dealing with temporary orders, effective September 1, 1995, to include a test for best interest of the child. See Lilly and Ness.

The burden of proof in a suit for modification of custody is easier when trying to modify a sole managing conservatorship to another sole managing conservatorship, as compared to the burden of proof set out in §156.104 of the Texas Family Code when modifying a sole managing conservatorship to a joint managing conservatorship. When modifying a joint managing conservatorship into a sole managing conservatorship, §156.203 controls and does not mention any decisive factors involving the child's preference. However, a 6153.008 preference could still provide evidence of substantial and material change. See Green & Livingston.

Related Issues

Joint custody

The Texas Family Code at §153.131(b) states

It is rebuttably presumed that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.

If the parents agree in writing to be managing conservators, the court must deliver an order appointing both parents as joint managing conservators if the agreement meets the statutory requirements set out in 153.133(a) of the Texas Family Code which includes a best interest test. If no written agreement is filed by the parents as to joint managing conservators, the court itself may order the parents to be joint managing conservators, only if the appointment would be in the best interest of the child according to §153.133(b) of the Texas Family Code.

There is a good argument that Tex. Fam. Code Ann. §153.008 is inapplicable in joint managing conservatorship cases since the real issue in joint managing conservatorship cases is the court's allocation of the rights and duties as set forth in the Family Code. Section 153.008 specifically refers to managing conservatorship, and does not address visitation or possession schedules between the parents. It has been held that a child's preferences concerning visitation are not controlling. *Walker v. Showalter*, 503 S.W.2d 624 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ). It can be argued that 6153.008 and 6153.009 of the Texas Family Code do not apply where both parents are named joint managing conservators since the real issue in joint management cases is the distribution of rights, duties, powers and privileges set forth in §153.132. See Green and Livingston.

Split Custody

The policy in Texas is in favor of keeping siblings together, and splitting custody of siblings is presumed not to be in the best interest of a child. The party requesting split custody must show clear and compelling reasons why it is the child's best interest. *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. App.—Houston [1st

dist.] 1988, no writ). A good argument can be made that the right of the child to choose is affected and perhaps limited by the rights of the other siblings, if there are any, who may want to live with the other parent, or who may not be old enough to choose, and vice versa. If after hearing the evidence, the judge approves the choice made by one child over the age of 10, and appoints the designated parent as sole managing conservator, the issue of potentially splitting of custody would arise.

Conservatorship of two or more children of a marriage should not be awarded to different parties absent clear and compelling reasons. See also *Zuniga v. Zuniga*, 664 S.W.2d 810 (Tex. App.—Corpus Christi 1984, no writ). But in the 1992 Appellate Court case of *MacDonald v. MacDonald*, 821 S.W.2d 458 (Tex. Civ. App.—Houston [14th dist.] 1992, no writ) the court held that the Family Code does not require a party to show clear and compelling reasons to split custody of siblings and that split custody is merely one factor to be considered in determining the best interest of the children.

Conclusion

Child custody is a bundle of rights that include the right to physical possession of the child; to decide where the child will live and with whom the child will associate; to collect the child's earnings; the control the child's religious and secular education; to make medical decisions; and to grant and withhold permission to travel, worship, work, and marry. Along with the rights of custody come responsibilities: the duties to feed, clothe, house, educate, protect, and supervise the child. The allocation of custody rights becomes a matter for the courts in separation and divorce cases where the parents cannot agree. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: the Search for a Just and Workable Standard*, 33 FAM. L.Q. 815 (1999).



The public has a stake in the welfare of children. Judges acting on behalf of the public must place children's interests ahead of either parent's claims of rights and allocate custody to the party best fitted to meet the child's particular needs. In other words, judges act in the best interests of the child. *Id.*

It is important that a child have a say in what happens in his life. Allowing a child a preference in choosing a managing conservator provides that child a right to be heard. Texas law gives this right to a child over the age of 10. But Texas courts will not elevate the interests of one family member, the child, above those of other family members, potentially to the detriment of the collective interests of the family unit. When determining the managing

conservator a court will look at many factors, all in an effort to decide what is in the best interest of a child. The best interest of child is only to some extent dependent on a child's preference. Although a child's preference is an important right granted by the legislature, by no means is it seen as the most important right, especially in the context of the rest of the family. It is also material to note that in weighing a child's preference the Court must consider the age and maturity of the child. The statute sets the age for a child to make a written preference at 10, but by no means is this absolute – a judge must always consider a child's maturity and the context in which a written preference was obtained.

"This article is for information only. Check with your lawyer for legal advice."

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How to Get Help Paying Nursing Home Costs

H. Clyde Farrell

Because of the high cost of nursing home care—an average of about \$3,500 per month in Texas at this writing—most people who go into nursing homes for extended times will sooner or later need help from the Medicaid program to pay the nursing home. In all, about 72% of Texas nursing home residents are qualified for Medicaid, and 94% of Texas nursing homes are certified to participate in the Medicaid program.

For the reasons discussed below, people who can afford long term care (or who can purchase long term care insurance) are usually best advised to avoid becoming eligible for Medicaid. It is also true that most people who need some degree of long term care do *not* need *nursing home* care. Therefore, this discussion is most helpful to those persons who need *nursing home* care and *cannot afford it*. Unfortunately, because of the high cost of such care, many are in that position.

What are the financial requirements for eligibility for Medicaid nursing home care?

The basic requirements are for low income (at this writing, less than \$1,809 per month for an individual or \$3,618 for a couple who are both on Medicaid) and very limited assets (called “resources” in Medicaidese) (not more than \$2,000

worth of “countable” assets for an unmarried person at this writing, but see below for married couples). Those dollar figures are subject to frequent changes, and the income limits are not absolute, as explained below.

Determining eligibility is further complicated by the fact that certain income and assets are exempt from the limits. For example, at present, exempt resources (assets) for an unmarried person include (among others) a homestead to which the applicant intends to return, any amount of term life insurance, an automobile of any value, a burial contract or policy to the extent it is worth less than \$1,500 (or an unlimited amount if it is nonrefundable), and some other exemptions.

A married couple with one spouse *not* living in a nursing home or other medical institution and not on Medicaid likewise may own one car of unlimited value; household goods of unlimited value; burial plots of unlimited value for certain “immediate family” members; and the other exemptions that apply to an unmarried person. If both spouses live in a nursing home on Medicaid, the same exemptions as for unmarried people apply, and the couple can have no more than \$3,000 in total countable resources. If both spouses live in a nursing home (or separate nursing homes) but only one is on Medicaid, the one not on Medicaid can

have unlimited income and resources—including even resources transferred (without penalty) from the spouse on Medicaid.

One way of accelerating eligibility for Medicaid is to transfer funds into exempt assets (such as improvements to the homestead) and pay debts secured by exempt assets (for example, the mortgage debt on the homestead).

Can a person become eligible for Medicaid by giving away their property?

If a person transfers property for less than market value for the purpose of becoming eligible for Medicaid, they are “penalized” by being ineligible for Medicaid for one day for every \$117.08 difference between the market value of the property and the amount they received for it. This amount changes from time to time, as it is the amount HHS estimates it costs, on the average, for private-pay nursing home care in Texas.

For gifts made on or after February 8, 2006, the ineligibility period begins when you are in a Medicaid-certified nursing home and *would* meet all the other requirements for Medicaid eligibility *but for* the transfer. The maximum penalty period, however, is 60 months from the date of the transfer, no matter how much property is transferred, provided that no Medicaid application is filed for at least 60



months. For gifts made before February 8, 2006, the ineligibility period began on the first day of the calendar month in which the gift was made.

For example, if property worth \$10,000 is given away all at once, the person who gives it away is ineligible for Medicaid for an 85-day period. If the gift was made on or after February 8, 2006, that period does not begin to run until the giver is in a nursing home *and* has no more than the Medicaid limit of assets and income (and possibly meets other Medicaid requirements, depending on how the rules are written in the next few months). If the gift was made before February 8, 2006, the ineligibility period as already begun— on the first day of the calendar month during which the transfer was made.

If property worth \$10,000 is sold for \$3,000, the seller is ineligible for 59 days (there is a gift of \$7,000). However, because of the 60-month maximum penalty period, a gift of \$300,00 worth of property to one or more individuals will result in a penalty of only 60 months, provided no application is filed during that time. (The maximum penalty period, provided no application is filed within the period, is 36 months for transfers made before February 8, 2006, and the “start date” of the penalty period was the first day of the month of the gift.)

Are there any reasons not to give away property to become eligible for Medicaid?

The decision as to whether and how to give away property to become eligible for Medicaid is almost always complex. It requires the advice of a professional who understands both the complicated state and federal rules, and the values of the client. Not only is the law complex and constantly changing, but the following considerations, among others, may argue against such a transfer:

- Such a transfer may be against the deeply held values of the person involved.
- If the resources involved are sufficient

to pay for the nursing home stay, transferring them may deprive the client of the opportunity to stay in one of the better homes, some of which are not certified for Medicaid.

- Qualifying for Medicaid almost always rules out staying in an Assisted Living Facility, which is generally more desirable if one can meet your care needs (because with the Texas Legislature’s recent cuts in Medicaid funding, it is almost impossible to get into an Assisted Living Facility on Medicaid).

Another disadvantage of Medicaid is that when the beneficiary goes to a hospital from the nursing home, they may not be able to return to the same nursing home, in the event that it fills up while they are in the hospital; and they are likely not to be able to return to the same room.

- The beneficiaries of the transfer may use up the property, undergo a divorce, have it seized by creditors or die leaving it to other people, so the person making the gift does not have enough money available to pay for nursing home care during the “penalty period” of up to 60 months. (This risk can be minimized by having an attorney create a trust that will provide substantial legal protection, or implementing other protective strategies.)
- If the transfer is of property (such as real estate or stock) worth substantially more than when it was purchased, it may result in a capital gains tax liability that might have been avoided by holding the property until death. (This can usually be avoided by reserving certain “interests” in a deed or trust instrument.)

If the person giving away the property does not meet the “medical necessity” requirement (discussed below), the gift will not result in eligibility anyway (except possibly for certain limited home care programs).

Family members may disagree as to who

should receive the property; and those who feel most passionately that they should get it may be the least capable of managing it wisely.

- **The law may change at any time** to extend the penalty period, invalidate trusts used, or otherwise make the planning ineffective— perhaps even retroactively to transfers made in the past.

You may give away your property for any reason, as long as the transfer is not motivated to any degree by intent to qualify for Medicaid, and there should be no adverse effects on your Medicaid eligibility. For example, you can make tax planning gifts or gifts to avoid probate, as long as you are not doing (even in part) to qualify for Medicaid. Likewise, you can make certain gifts that do not create a transfer period even if they *are* intended to qualify you for Medicaid (such as gifts to your spouse). However, if you presently have a need for long term care or have reason to anticipate such a need in the near future, you may have difficulty proving the transfer was *not* to some degree motivated by intent to qualify for Medicaid.

What can I do if I have too much income for Medicaid eligibility and too little income to pay for nursing home care?

At this writing, persons with more than \$1,809 but less than about \$3,500 in monthly income have too much income to qualify for Medicaid but too little to pay for the average cost of nursing home care. If they otherwise qualify for Medicaid, they are in what has become known as the “Utah Gap” (named after certain box canyons in Utah from which there is no way out). That is because Texas is one of ten states that have an “income cap” on eligibility but fail to provide for a “medically needy” program for elders. However, there is always a way out.

Sometimes, sources of “income” can be sold and converted to “assets” that can then be transferred or “spent down” until



the owner has low enough assets to be eligible. In other cases, pension income may be transferred to the spouse at home by means of a “qualified domestic relations order.” In any case, countable income can be reduced by transferring it into a “Miller Trust” (also called a “Qualified Income Trust”). Such planning requires up-to-date knowledge of the law and careful drafting of the necessary legal instruments.

If my spouse needs to go to a nursing home, do I have to use up all my assets before he/she will be eligible for Medicaid?

About one in twenty Medicaid recipients in nursing homes have a spouse who is not in a nursing home. At one time, this “community spouse” had to become impoverished in order for the other spouse to be eligible for Medicaid. Fortunately, a federal law provides some relief for the “community spouse.”

Basically, the “community spouse” is entitled to keep a “protected resource amount.” The starting point is to subtract from all the couple’s property (community and separate) certain exempt property including homestead, household goods, personal goods, one car, and burial funds (as defined and limited in the regulations). The property is valued as of the first day of the first month one spouse is in a nursing home. The “protected resource amount” is one-half of the remaining amount, provided it cannot (at this writing) be less than \$19,908 nor more than \$99,540. These figures change with inflation every year.

In addition, the community spouse is allowed to keep a limited amount of countable income, known as a “spousal needs allowance.” In the year 2006, the maximum amount is \$2,488.50 per month. If the combined countable incomes of both spouses (after certain deductions) exceed the “spousal needs allowance,” the excess amount (to the extent it consists of income of the spouse in the nursing home) must be paid to the Medicaid program (as “applied income”). There is also a “needs allowance” for certain dependents.

If the combined incomes of the spouses are not sufficient to provide the community spouse the full “spousal needs allowance,” the couple has a right to obtain an increase in the protected resource amount sufficient to produce enough income to provide the spousal needs allowance. For example, if the spouses’ combined noninvestment incomes (after certain deductions) total \$1,700, the spouse at home (with, let’s say, an income of \$1,200) can keep enough assets to produce an additional \$788.50 per month, at the rate of interest being paid locally on one-year certificates of deposit. In this example, if CD’s are paying 4.0% interest, the spouse at home can keep \$236,550 without giving up any of the couple’s income.

Until September 1, 2004, Texas law allowed an increased “Protected Resource Amount” even if the net combined incomes of both spouses exceeded the spousal needs allowance (now \$2,488.50)—as long as the income of the spouse at home was significantly less. That is still possible in cases in which the institutionalized spouse had a total stay of 30 days or more in a nursing home and/or hospital commencing *before* September 1, 2004. When it can be done, this is always the best way to qualify, because keeping assets protects the spouse at home from the loss of income that often occurs when the institutionalized spouse passes away.

Are there non-financial requirements for receiving Medicaid?

In addition to financial requirements, most Medicaid programs require that the applicant show a “medical necessity” for nursing home care. That is, the applicant must have a medical disorder or disease requiring attention by registered or licensed vocational nurses on a regular basis. Inability to attend to “activities of daily living,” such as bathing, grooming and eating, is not sufficient in itself. Ironically, even to receive home care under the “Community Based Alternatives

Program” of Medicaid, you have to prove you need nursing home care under this standard. However, it is possible to qualify for home care under the “Community Care” programs without proof of “medical necessity.” For Community Care, it is sufficient to show you need a certain level of help with “activities of daily living.” Unfortunately, the Community Care programs do not allow for the “spousal impoverishment” protections. The “Community Based Alternatives Program,” however, does allow for those protections.

If I apply for Medicaid, will the government take everything I have?

The Medicaid program never takes property away from anyone—at least, not during their lifetime. It just refuses to provide help until you meet the program’s requirements, which means (unless there is a spouse at home) your savings have run out.

Under the new “estate recovery” program, however, Medicaid will sometimes be able to force sale of a Medicaid recipient’s residence after their lifetime. This program applies only to people who have received Medicaid benefits at or after age 55 *and* first qualified for Medicaid in an application filed on or after March 1, 2005. People who filed a Medicaid application before that date are exempt from estate recovery, provided the application led to certification of eligibility. There are some important exemptions and waiver provisions, most of which are covered in a summary at <http://www.hhsc.state.tx.us/m Medicaid/EstateRecovery/ER-FAQ.html>.

How can a lawyer help with Medicaid planning?

A lawyer who is knowledgeable about planning for long-term care can help in the following ways:

- By helping you decide whether or not becoming eligible for Medicaid is consistent with getting the best care you can afford



- If Medicaid eligibility is appropriate, by showing you ways of qualifying sooner rather than later
- By helping you avoid small mistakes that cost big money (because each month's delay may cost as much as \$3,500 in nursing home expenses)
- By helping you understand complex rules and formulas you need to know, and keeping you from wasting time with information you don't need
- By helping you the peace of mind of

knowing you are considering all your own needs and those of your loved ones and that you are utilizing all the resources available

For more information on Medicaid and other Elder Law topics, go to www.elder-lawanswers.com. To view the web site of the Law Office of H. Clyde Farrell, enter "512" in the box at the top left of the first page under "Search by Area Code." Then click on "Law Office of H. Clyde Farrell."

H. Clyde Farrell is Certified as an Elder Law Attorney by the National Elder Law Foundation and is a Certified Financial Planner.

Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases. This article is for educational purposes only. Readers are responsible for obtaining such advice from their own legal counsel.

MEDICAID

Medicaid & SSI Dollar Amounts Effective as of January 1, 2006:

	2005	2006
Medicaid Single Income/Mo.	\$1,737	\$1,809
Medicaid Couple Income/Mo.	\$3,474	\$3,618
SSI Single Income/Mo.	\$579	\$603
SSI Couple Income/Mo.	\$869	\$904
Protected Resource Amt. Min.	\$19,020	\$19,908
Protected Resource Amt. Max.*	\$95,100	\$99,540
Spousal Monthly Allowance	\$2,377.50	\$2,488.50
Gift Penalized	\$117.08/day**	\$117.08/day**

*The Community Spouse can sometimes keep more by applying for an increase. For example, if countable income of both spouses together is \$1,500 per month, and the 1-yr. CD rate is 3.5%, they can keep \$300,857.

**For applications filed before 9/1/05, the divisor is \$2,908/month; thereafter it is \$117.08/day. For transfers discovered on or after 9/1/05 in applications filed previously, the divisor is \$117.08/day.

Medicare & Social Security Dollar Amounts Effective January 1, 2006:

	2005	2006
Part A Premium/Mo. ¹	\$375	\$393
Part B Premium/Mo.	\$78.20	\$88.50
Skilled Nursing Facility Copayment	\$114.00	\$119.00
Hospital Stay Deductible	\$912	\$952
Hospital Copayment, Days 61-90	\$228	\$238
Hospital Copayment, Days 91-150	\$456	\$476
Part B (Medical) Annual Deductible	\$110	\$124
QMB max income single (gross incl. \$20 exempt amt)	\$818	\$837*
QMB max income couple (gross incl. \$20 exempt amt)	\$1,090	\$1,120*
SLMB max income single (gross incl. \$20 exempt amt)	\$977	\$1,000*
SLMB max couple (gross incl. \$20 exempt amt)	\$1,303	\$1,340*
"Substantial Gainful Employment" (Non-Blind)	\$830	\$860
Max Earnings Taxed for SS2	\$90,000	\$94,200
Max Earnings/Yr, Under 65	\$12,000	\$12,480
Max Earnings in Yr of Full Retirement Age**	\$31,800	\$33,240
Max Earnings after Yr of Full Retirement Age**	No Max!	No Max!
SS COLA	2.70%	4.1%

*Effective 4/1/2006

**Full Retirement = 65 and 6 months if born in 1940 or 65 and 8 months if born in 1941. Full retirement age will gradually increase to age 67 for those born in 1960 and later.

¹ Social Security beneficiaries usually have sufficient Medicare covered quarters that they pay no Part A premium.

² Explanation of the maximum earnings test: www.ssa.gov/OACT/COLA/RTEA.html.

What Does THAT Mean? BREAKING THE CODE

By Janabeth Fleming Taylor, R.N., R.N.C.

Everyday we are faced with a "code" of some sort, no matter what area of law we work in. It may be a special abbreviation used to denote an expert's credentials, or shorthand for an engineering term. Or even a specialized term we can not find defined in a traditional dictionary. It may be a shortened spelling of a word, an abbreviation. Or, it may be an acronym.

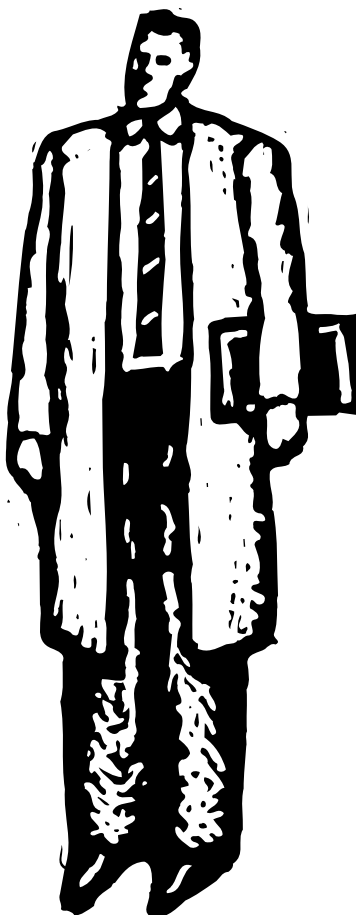
An acronym is a kind of abbreviation. The word comes from Greek, meaning heads of names. Acronyms are usually made from the capitalized initials of the words it represents, for example FBI is an acronym for the Federal Bureau of Investigation. Occasionally, for special reasons, the second letter of a word is used, as in XML (eXtensible Markup Language). Sometimes more than one letter is included for a word, to avoid ambiguity or because they form an existing abbreviation, as in SACEUR (Supreme Allied Commander, Europe).

Contrary to what some sources say, acronyms do not have to be pronounceable words (for example FBI is spelled out when spoken, whereas NASA is not). Some sources use the word initialism to refer to the spelled acronyms.

The medical and billing records of the client are filled with specialized abbreviations and acronyms that may provide crucial information related to the client's claim. Even data reports referencing chemicals, specialized tests, and laboratory results come in "code".

What is one to do when faced with the challenge of the "code"? There are various resources available on the internet with more arriving daily. I have made an attempt to summarize some of the various resources available.

If you are not able to "crack" the "code", it is advised you ask the entity providing the data where the "code" is found with a key



or list of approved codes to enable you to clearly translate the document.

Be aware that some abbreviations are regional, with differing abbreviations actually meaning the same thing. For example in medicine TKO and KVO mean the same thing, to run an IV at a rate that is just fast enough to overcome vascular resistance and keep the vein open (TKO = to keep open, KVO = keep vein open). Below are various sites available to assist in "breaking the code".

Part One - Medical Abbreviations - Acronyms - General

International Medical Abbreviations:

http://www.wyeth.co.uk/resources/med_main.htm

General Medical Abbreviations Look up:

<http://www.wyeth.co.uk/education/eduhome.htm>

Use the medical dictionary to look up the meaning of common medical terms, abbreviations, and medical names. This dictionary includes terms from diseases, symptoms, treatments, diagnostic tests, and many other medical terms.

<http://www.wrongdiagnosis.com/lists/dictaz.htm>

Medical Malpractice

Terminology/Dictionary

<http://www.wrongdiagnosis.com/malpractice/dictionary.htm>

List of Medical Acronyms and Abbreviations

<http://www.wrongdiagnosis.com/lists/acronyms.htm>

Pathology Abbreviation Look up:

Pathologists use lots of abbreviations and acronyms. An acronym is an abbreviation of a phrase, where each letter of the acronym is added consecutively from the first letter of each of the words of the phrase. An abbreviation is a shortened form of a text-string, and all acronyms are types of abbreviations. The following is a list of over 12,000 abbreviations used in medicine:

<http://www.euspirit.org/en/upload/984528174.37955/abbtwo.htm>

JACHO/ Institute for Safe Medication Practices - Listing of dangerous and prohibited abbreviations

By the end of 2004, JACHO expected full compliance in all handwritten, print, and electronic media documents related to these dangerous abbreviations. Further details are available on the JACHO Web site: http://www.joint-commission.org/NewsRoom/NewsReleases/nr_012506.htm

In addition, the Institute for Safe

Medication Practices (ISMP) has published a list of dangerous abbreviations relating to medication use that it recommends should be explicitly prohibited. It is available on the ISMP Web site: <http://www.ismp.org/Tools/errorproneabbreviations.pdf>

Acronym Glossary - Medical & Professional Degrees & Credentials

http://www.sandiegobizmart.com/tools/t3_acronym_glossary.htm

Nursing Credentials/Acronyms

A

AAS: Associates' Degree Applied Science
ACNP: Acute Care Nurse Practitioner
ACLS: Advanced Cardiac Life Support
ACRN: AIDS Certified Registered Nurse
ANP: Adult Nurse Practitioner
AOCN: Advanced Oncology Certified Nurse
APN: Advanced Practice Nurse

ARNP: Advanced Registered Nurse Practitioner
ASN: Associates' Degree in Nursing

B

BC: Board Certified
BCLS; BLS: Basic Cardiac Life Support

C

C: C - connotes certification in a specialty area by the American Nurses' Credentialing Center in one of several generalist and specialist practice areas.
C-SPI: Certified Specialist in Poison Information
CANP: Certified Adult Nurse Practitioner
CAPA: Certified Ambulatory Perianesthesia Nurse
CARN: Certified Addictions Registered Nurse
CARN-AP: Certified Addictions Registered Nurse—Advanced Practice
CCCN: Certified Continence Care Nurse
CCM: Certified Case Manager
CCNS: Certified Clinical Nurse Specialist
CCRN: Certified Critical Care Registered Nurse
CDDN: Certified Developmental Disabilities Nurse

CDE: Certified Diabetes Educator
CDMS: Certified Disability Management Specialist
CDN: Certified Dialysis Nurse
CDONA/LTC: Certified Director of Nursing Administration in Long-Term Care
CEN: Certified Emergency Nurse
CFRN: Certified Flight Registered Nurse
CGA: Certified Gastroenterology Associate
CGN: Certified Gastroenterology Nurse
CGRN: Certified Gastroenterology Registered Nurse
CGT: Certified Gastroenterology Technician
CHN: Certified Hemodialysis Nurse
CHPN: Certified Hospice and Palliative Nurse
CHRN: Certified Hyperbaric Registered Nurse
CHT: Certified Hemodialysis Technician
CIC: Certified in Infection Control
CLNC: Certified Legal Nurse Consultant
CM: Certified Midwife
CMCN: Certified Managed Care Nurse
CMDSC: Certified MDS Coordinator
CNA: Certified Nursing Assistant
CNA: Certified in Nursing Administration
CNA-A: Certified Nursing Assistant—Advanced
CNAA: Certified in Nursing Administration, Advanced
CNLCP: Certified Nurse Life Care Planner
CNM: Certified Nurse-Midwife
CNN: Certified Nephrology Nurse
CNNP: Certified Neonatal Nurse Practitioner
CNOR: Certified Nurse, Operating Room
CNRN: Certified Neuroscience Registered Nurse
CNS: Clinical Nurse Specialist
CNSN: Certified Nutrition Support Nurse
COCN: Certified Ostomy Care Nurse
COHN: Certified Occupational Health Nurse
COHN-S: Certified Occupational Health Nurse—Specialist
COHN-S/CM: Certified Occupational Health Nurse—Specialist/Case Manager
COHN/CM: Certified Occupational Health Nurse/Case Manager
CORLN: Certified Otorhinolaryngology and Head/Neck Nurse

CPAN: Certified Postanesthesia Nurse
CPDN: Certified Peritoneal Dialysis Nurse
CPHQ: Certified Professional in Health Care Quality
CPN: Certified Pediatric Nurse
CPNA: Certified Pediatric Nurse Associate
CPNL: Certified Practical Nurse—Long-Term Care
CPNP: Certified Pediatric Nurse Practitioner
CPON: Certified Pediatric Oncology Nurse
CPSN: Certified Plastic Surgical Nurse
CRN: Certified Radiologic Nurse
CRNA: Certified Registered Nurse Anesthetist
CRNFA: Certified Registered Nurse, First Assistant
CRNI: Certified Registered Nurse Infusion
CRNL: Certified Registered Nurse—Long-Term Care
CRNO: Certified Registered Nurse in Ophthalmology
CRNP: Certified Registered Nurse Practitioner
CRRN: Certified Rehabilitation Registered Nurse
CRRN-A: Certified Rehabilitation Registered Nurse—Advanced
CTN: Certified Transcultural Nurse
CUA: Certified Urologic Associate
CUCNS: Certified Urologic Clinical Nurse Specialist
CUNP: Certified Urologic Nurse Practitioner
CURN: Certified Urologic Registered Nurse
CVN: Certified Vascular Nurse
CWCN: Certified Wound Care Nurse
CWOCN: Certified Wound, Ostomy, and Continence Nurse

D

DNC: Dermatology Nurse Certified
DNS: Doctorate, Nursing Science

E

ENPC: Emergency Nursing Pediatric Course
ET: Enterostomal Therapist (Now Wound, Ostomy, Continence Nurse)

F

FAAN: Fellow, American Academy of Nursing

FAAPM: Fellow, American Academy of Pain Management
 FCCM: Fellow, American College of Critical Care Medicine
 FNC: Family Nurse Clinician
 FNP: Family Nurse Practitioner
 FPNP: Family Planning Nurse Practitioner
 FRCNA: Fellow, Royal College of Nursing, Australia

G
 GNP: Gerontological Nurse Practitioner
 GPN: General Pediatric Nurse

H
 HHA: Home Health Aide

I
 IBCLC: International Board Certified Lactation Consultant

L
 L.Ac.: Licensed Acupuncturist
 LCCE: Lamaze Certified Childbirth Educator
 LNC: Legal Nurse Consultant
 LNCC: Legal Nurse Consultant Certified
 LPN: Licensed Practical Nurse
 LSN: Licensed School Nurse (In Minnesota)
 LVN: Licensed Vocational Nurse

M
 MICN: Mobile Intensive Care Nurse
 MN: Masters' Degree in Nursing
 MSN: Masters' Degree in Nursing

N
 NCSN: National Certified School Nurse
 NICN: Neonatal Intensive Care Nursing
 NNP: Neonatal Nurse Practitioner
 NP: Nurse Practitioner
 NP-C: Nurse Practitioner, Certified
 NPP: Psychiatric Nurse Practitioner

O
 OCN: Oncology Certified Nurse
 OGNP: Obstetric/Gynecology Nurse Practitioner
 ONC: Orthopaedic Nurse Certified

P
 PHN: Public Health Nurse
 PMHNP: Psychiatric Mental Health Nurse

Practitioner
 PNP: Pediatric Nurse Practitioner

R
 RN: Registered Nurse
 RN,C: Registered Nurse, Certified
 RN,CS: Registered Nurse, Certified (Clinical) Specialist

T
 TNCC: Trauma Nursing Course Certified
 TNS: Trauma Nurse Specialist

W
 WHNP: Women's Health Care Nurse Practitioner
 WOCN: Wound, Ostomy, Continence Nurse

Dictionary of Initials, Acronyms, and Abbreviations Used by Counselors and Social Workers

<http://www.counselingseattle.com/initials.htm>

Abbreviations - International Federation of Medical Students Association

<http://www.ifmsa.org/about/abbreviations.php>

Stanford School of Medicine - Department of Medicine Resource Guide - Abbreviation Resource

<http://ostinato.stanford.edu/acronyms/alpha.asp?F>

Abbreviations used in documentation for those with diabetes

<http://www.diabetesmonitor.com/ro3.htm>

Medical and Pharmaceutical Spell Checker - Check the spelling of words online, also includes a link to look up medical abbreviations

<http://spellex.com/speller.htm>

Abbreviations commonly used in writing prescriptions:

a.c.: before meals (Latin: ante cibum)
 b.i.d.: twice daily (Latin: bis in die)
 b.i.n.: twice nightly (Latin: bis in noctus)
 c: with (Latin: cum)
 cap: capsule (Latin: capsula)
 d: day (Latin: dies)
 daw: Dispense as written, no substitutions
 gtt: drop (Latin: gutta)
 h.s.: bedtime (Latin: hora somni)
 noct: at night

O.D.: Right eye (Latin: oculus dexter)
 O.S.: Left eye (Latin: oculus sinister)

O.U.: Each eye (Latin: oculus uterque)
 p.c.: After meals (Latin: post cibum)
 pil: Pill (Latin: pilula)
 p.o.: By mouth (Latin: per os)
 p.r.n.: As needed (Latin: pro re nata)
 q.d.: Every day (Latin: quaque die)
 q.h.: Every hour (Latin: quaque hora)
 q.2h.: Every two hours (Latin: quaque secunda hora)
 q.3h.: Every three hours (Latin: quaque tertia hora)
 q.4h.: Every four hours (Latin: quaque quarta hora)
 q.q.h.: Every four hours (Latin: quaque quarta hora)
 q.6h.: Every six hours (Latin: quaque sex hora)
 q.8h.: Every eight hours (Latin: quaque octa hora)
 q.i.d.: Four times per day (Latin: quater in die)
 q.s.: As much as is required (Latin: quantum sufficit)
 s.: Without (Latin: sine)
 s.o.s.: If necessary (Latin: semis)
 ss: Half (Latin: sine)
 t.d.s: To be taken three times daily (Latin: ter die sumendum)
 t.i.d.: Three times a day (Latin: ter in die)
 t.i.n.: Three times a night (Latin: ter in nocte)
 ut. dict.: As directed (Latin: ut dictum)

Acronyms Frequently Used in Special/Gifted Education

This list is not comprehensive; it is intended as a quick reference.

<http://ericec.org/fact/acronyms.html>

Dictionary for Parents of Children with Disabilities - Download from this site:

<http://www.usd.edu/cd/publications/dictionary.cfm>

Acronyms in the Helping Professions

Here is a helpful list of some of the more common abbreviations and acronyms. The designations are broken down into several categories for your convenience. Many professionals will list both a license and a national certification. For example, a professional counselor may place both LPC (for

Licensed Professional Counselor) and NCC (for Nationally Certified Counselor) after his/her name and degree.
<http://www.encouragementplus.com/acronyms.html>

Physical Therapy Acronyms and Abbreviations

<http://physicaltherapy.about.com/od/abbreviationsandterms/a/PTabbreviations.htm>

Various Departments of Disabilities, Aging and Independent Living - these agencies use a number of acronyms and abbreviations to describe its services and programs. The following list from the Department of Disabilities-Vermont includes some of the more common:

<http://www.dad.state.vt.us/DWebsite/facts/acronyms.html>

And this listing is from the U.S. Department of Health and Human Services

<http://aspe.hhs.gov/daltcp/acronym.shtml>
 Acronyms in Aging - AARP - This guide, published in 2005, identifies acronyms commonly used in the field of aging and provides brief descriptions of the entities to which they refer. The downloadable guide is found here:
<http://www.aarp.org/research/reference/agingtrends/aresearch-import-881.html>

Part Two: Medical Diagnosis/Code-Acronym Look Up **ICD-9 codes (Think of it as "Diagnosis" Code)**

<http://www.cdc.gov/nchs/icd9.htm>
 The International Classification of Diseases (ICD) is the classification used to code and classify mortality data from death certificates.
 The International Classification of Diseases, Clinical Modification (ICD-9-CM) is used to code and classify morbidity data from the inpatient and outpatient records, physician offices, and most National Center for Health Statistics (NCHS) surveys.

CPT Codes -Current Procedural Terminology (Think of it as "Procedure Code" upon which reimbursement is determined)

https://catalog.ama-assn.org/Catalog/cpt/cpt_search.jsp?check

Xwho=done

CPT Codes describe medical or psychiatric procedures performed by physicians and other health providers. The codes were developed by the Health Care Financing Administration (HCFA) to assist in the assignment of reimbursement amounts to providers by Medicare carriers. A growing number of managed care and other insurance companies, however, base their reimbursements on the values established by HCFA.

Since the early 1970s, HCFA has asked the American Medical Association (AMA) to work with physicians of every specialty to determine appropriate definitions for the codes and to try to determine accurate reimbursement amounts for each code. Two committees within AMA work on these issues: the CPT Committee, which updates the definitions of the codes, and the RUC (Relative Value Update Committee), which recommends reimbursement values to HCFA based on data collected by medical societies on the going rate of services described in the codes.

Medicare Unique Physician Identification Numbers (UPIN) - UPIN is a six-position alphanumeric identifier that is assigned to all Medicare physicians, medical groups and non-physician practitioners

UPIN are assigned as follows:

Physicians (Medical Doctors) begin with A - M

Limited License Practitioners, e.g., Chiropractors, Dentist, etc, begin with T - V

Non-Physician Practitioners, e.g., Anesthesia Assistants, Physician Assistants, Clinical Nurse Practitioners, etc, are assigned P - S

Group Entities, e.g., Ambulance, Independent Physiological Lab, etc, are assigned W - Y

See below for the applicable Credential Codes:

AA: Anesthesia Assistant

AMB: Ambulance Service Supplier

ASC: Ambulatory Surgical Center

AU: Audiologist

CH: Chiropractor

CNA: Certified Nurse Anesthetist

CNM: Certified Nurse Midwife

CNS: Certified Clinical Nurse Specialist

CP: Clinical Psychologist

CSW: Clinical Social Worker

DDM: Doctor of Dental Medicine

DDS: Doctor of Dental Surgery

DO: Doctor of Osteopathy

DPM: Podiatrist

FNP: Family Nurse Practitioner

GRP: Group

IDF: Independent Diagnostic Facility

IPL: Independent Physiological Lab

LAB: Laboratory

MD: Medical Doctor

MSC: Mammography Screening Center

NP: Nurse Practitioner

OD: Doctor of Optometry

OT: Occupational Therapist

PA: Physician Assistant

PHS: Public Health Service

PSY: Psychologist

PT: Physical Therapist

PXS: Portable XRay Supplier

RNA: Certified Registered Nurse

Code Modifiers for Alternative Medicine

- ABC codes and terminology are maintained and developed annually as consumers, individual practitioners, practitioner associations and other health industry organizations submit code requests that reflect current practices in alternative medicine, nursing and integrative healthcare. This is an attempt to fill in the "gaps" left from other coding, and is done to support research and compile data by practitioner type. These include treatment by massage therapists, acupuncturists, etc. These may not be seen in traditional billing records, but may be referenced in charting or other records obtained from non-traditional medical sources: http://www.alternativelink.com/ali/abc_codes/code_mode.asp

Part Three: General References

General Acronym Look Up

This is a neat tool for when you need to know what a special Acronym means. What is great about this electric dictionary is it returns a list of appropriate

matches, BUT lets you further sort by categories such as : Most common (default), information technology, military/government, science/medicine, organizations, slang/chat, etc.

<http://www.acronymfinder.com/>

Abbreviationz (from a-z on the net) -

Search or browse more than 305,000 abbreviations or acronyms. You can create and maintain your own list of terms.

<http://www.stands4.com/>

Acronyma- Database of more than

460,000 acronyms and abbreviations.

Results can be displayed alphabetically or according to "importance". Also can search in several languages

<http://www.acronyma.com/>

The WorldWideWeb Acronym and

Abbreviation Server - This site has

acronyms and their expansions.

<http://silmaril.ie/cgi-bin/uncgi/acronyms>

Investigative Resources - Investigative

Resources International has maintained

this database since 1995 as a service to the investigative and legal communities.

They are continually updating and

improving the site with selected links to searchable databases and research sites.

Open and Public record sources from the US as well as foreign countries are included.

<http://www.factfind.com/public.htm>

General Reference "Bookshelf" Great

source of references to all kinds of information - abbreviations, definitions, standards, codes, travel, media..you name it ..it's here!

<http://www.ecoplan.org/general/referenceshelf.htm>

Governmental/Military Acronyms

The Federal Government tends to use abbreviations and special terms a great deal in their documentation. This is a listing of some from the Department of Defense and Veteran's Affairs

<http://www.pbm.va.gov/PBM/acronyms.pdf>

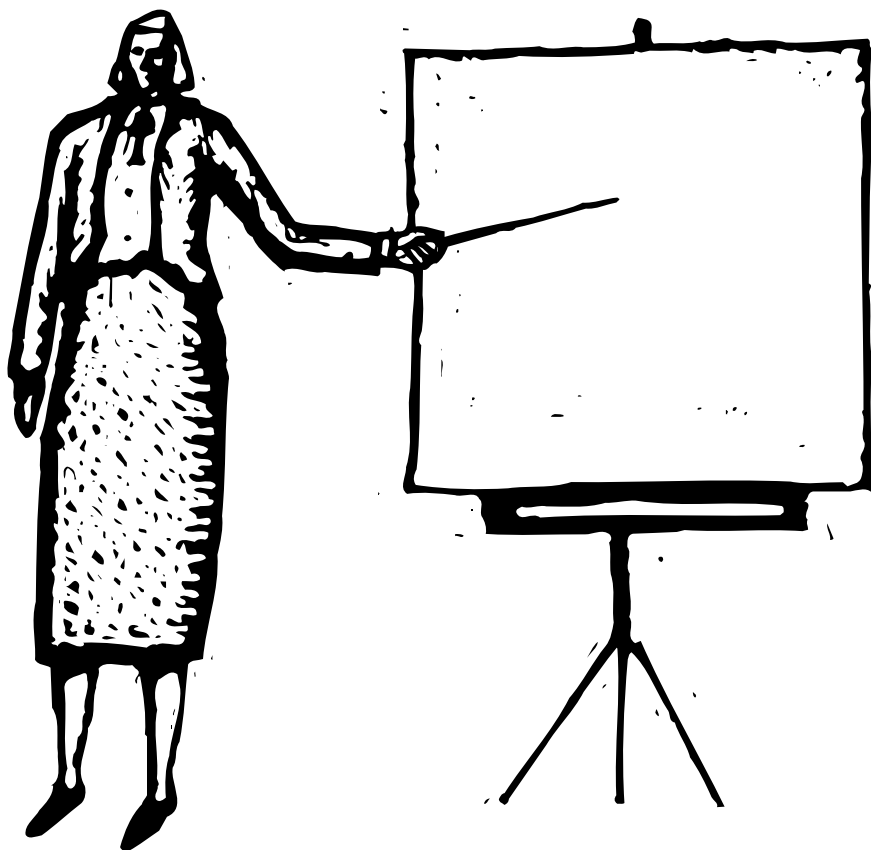
Compendium of Environmental

Acronyms - Association of Engineering Geologists

<http://web.umn.edu/~aeg/arco/arco.html>

Electronic and Engineering Acronyms and Abbreviations

<http://www.interfacebus.com/Engineerin>



[g_Acronyms.html](#)

CAS (Chemical Society of America) - Standard Abbreviations and Symbols

<http://www.cas.org/ONLINE/standards.html#listinga>

Chemical look up by abbreviation or name, with links out to data sheets, MSDS sheets and other information.

<http://www.chemfinder.com>

National Weather Service - Weather Acronyms

http://www.srh.weather.gov/jetstream/apend/acronyms_a.htm

Abbreviations and Acronyms of the U.S. Government

http://www.ulib.iupui.edu/subjectareas/gov/docs_abbrev.html

Glossary of Internet Abbreviations: Email and Chat Shorthand:

Part One:

http://netforbeginners.about.com/cs/netiquette101/a/abbreviations_p.htm

Part Two:

http://netforbeginners.about.com/cs/netiquette101/a/abbreviations_2.htm

Part Three: (emoticons/smilies)

http://netforbeginners.about.com/cs/netiquette101/a/bl_emoticons101_2.htm

Remember, there may be more than one definition of the "code" you are trying to "break". You have to consider the context in which it is used, the setting and even the region of the country. These resources are only meant to be a guide, taking into account new resources are added daily as well as others are being discontinued.

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In 2002 she was named the Association of Trial Lawyers of America's Paralegal of the Year. She provides litigation support for attorneys across the United States and specializes in case reviews and Internet information resources. Her website is <http://www.attorneysmedicalservices.com> and her e-mail address is jana@attorneysmedicalservices.com

Rate Your Tax Bite

Craig Hackler, Financial Advisor, Raymond James Financial Services

On average, many Americans do not know the percentage of their income that goes to paying taxes. Most associate taxes with income taxes and rarely take into account Social Security tax, state sales taxes, and other non-income taxes. The chart below will enable an individual to estimate his/her "effective rate" of tax – i.e., how much income really goes to paying taxes of various kinds. It is important that individuals understand the impact taxation has on achieving their financial goals. In order to get started, an individual will need a copy of his/her most recent federal and state income tax returns, along with his/her W-2 and 1099 forms for the same year. To estimate the percentage of income paid out in taxes, fill in the amounts indicated below.

Gross Income

\$ _____
This includes salary from all W-2s for both spouses, interest and dividend income from the 1099

forms, Schedule C net income, and any income from partnerships, S Corporations, or other business interests that appeared on the income section of your return.

Your Total Federal Tax

\$ _____
From Form 1040, Line 54-includes income tax, self-employment tax, and alternative minimum tax, if applicable.

Your total state income tax

\$ _____
Includes amount(s) shown on state income tax returns.

Your FICA Tax

\$ _____
Write the amount of Social Security tax and Medicare tax withheld: this is shown on your W-2. Note that if

you are self-employed, your self-employment tax (Social Security and Medicare tax for the self-employed) is included in the "total federal tax" item above.

Real Estate Tax

\$ _____
From Schedule A of your tax return, or from real estate tax bill.

Sales Tax

\$ _____
Multiply your Gross Income by 1/3 (an estimate of the average taxpayer's "disposable income"); then multiply that amount by the applicable sales tax rate for your state.

Total Taxes

\$ _____
Add together all the taxes you have paid.

Effective Tax Rate

\$ _____
Divide Total Taxes by Gross Income. This is an estimate of your effective tax rate.

It should be emphasized that this is merely a general discussion on estimating an individual's effective tax rate. If you are interested in completing a thorough analysis of your own tax situation consultation with a financial advisor or tax professional is recommended.

Craig Hackler holds the Series 7 and Series 63 Securities licenses, as well as the Group I Insurance license (life, health, annuities). Through Raymond James Financial Services, he offers complete financial planning and investment products tailored to the individual needs of his clients. He will gladly answer your questions. Call him at 512.894.0574 or 800.650.9517



Summary of the 2005 Paralegal Division Compensation Survey All Districts Report, May 2006

This is a short sampling of the report on paralegals in Texas in 2005: their work, compensation, benefits, and satisfaction. Statistics are presented on the organizations or firm's paralegals work in, paralegals' salaries, how billing for paralegal work is done, paralegals' education, office space and support, employee benefits, support for the paralegal professional, and paralegals' satisfaction with their work.

This particular report is of all paralegals across Texas. Reports in a similar format are also available on respondents within each Paralegal Division district as compared to all respondents. These reports are not limited to members of the Paralegal Division. Respondents are separated into the various Paralegal Division districts by their geographic location.

The information in this report was gathered in the 2005 State Bar of Texas Paralegal Division Compensation Survey, which was available to the members of the State Bar of Texas Paralegal Division and other invited groups from January 23, 2006 through February 8, 2006. This survey was conducted online through the Paralegal Division website. A total of 782 paralegal respondents completed the survey. Some 519 of the respondents were members of the Paralegal Division. There were 1,521 eligible members of the Paralegal Division at the time of this survey, so the Paralegal Division member response rate was 34 percent. The remaining 263 respondents were paralegals who were not members of the Paralegal Division.

A full report may be obtained through the Members Only section of the Paralegal Division website (www.txpd.org). If you are not a member of the Paralegal Division, you should check with your local paralegal organization to ascertain whether they participated in the survey program. If your local organization did participate in our survey program, a copy of the full report was provided to them along with an additional report with the survey information summarized specifically for your market area.

SECTION 1: FIRM/ORGANIZATION STRUCTURE

1.1 What type of organization are you employed by?

Law Firm: 79%
Corporation/Legal Department 14%
Government Entity 6%
Self-Employed 1%
Other 0.1%

SECTION 2: SALARY STRUCTURE

2.1 What is the gross amount of your annual base salary? (excluding overtime, bonuses, etc.) (full-time employees only)

Median gross annual salary:
for Corporation/Legal Dept is \$55,278
for Law Firm is \$45,695
for Government entity is \$37,334

2.2. What is the gross amount of your annual base salary? (excluding overtime, bonuses, etc.)

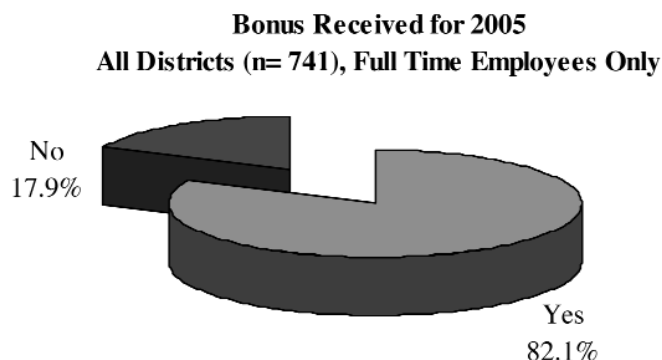
Median gross annual salary
for full time employees is \$46,645
for part time employees is \$28,751
or contract/freelance employees is \$45,001

2.3. If you began work during the past year with no prior legal experience, what was your starting annual base salary?

Median starting annual salary is \$17,292

2.4 Did you receive a bonus in 2005?

The chart below includes only those respondents who indicated they were "Full time employees" in question 4.1.



2.5 If you received a bonus in 2005, what was the total dollar amount of your bonus in 2005?

Median Bonus was \$2,319

SECTION 3: BILLING

3.1 If you have a billable requirement, how many hours per week are you required to bill?

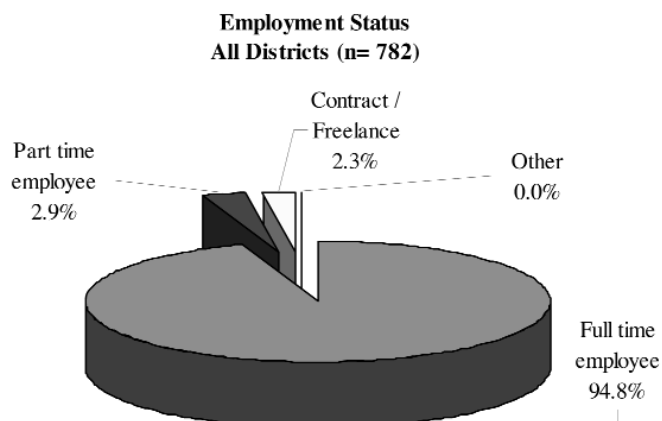
Median billing requirement is 34.2

3.2 If your time is billed at an hourly rate, what is the dollar amount of your hourly billing rate?

Median hourly rate is \$90

SECTION 4: EDUCATION / EXPERIENCE / PROFESSIONALISM

4.1 What is your employment status?



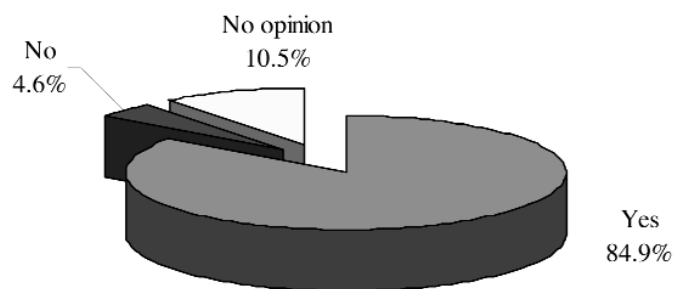
4.2 How long have you been a member of the Paralegal Division?

Median years as a member of the Paralegal Division is 5.9 years

4.3 Do you agree with the establishment of specific criteria for the use of the title "paralegal"?

Agree with Establishment of Criteria for Title "Paralegal"

All Districts (n=782)



SECTION 5: BENEFIT PACKAGE

5.1 How many sick/personal days do you receive per year?

Median number of sick/personal days per year is 7.7

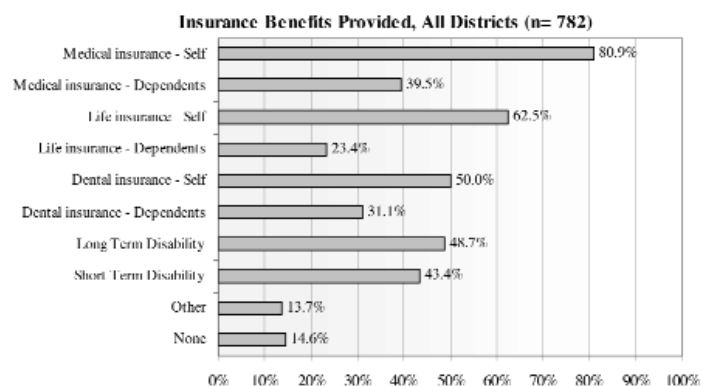
5.2 How many vacation days do you receive per year?

Median number of vacation days per year is 12.3

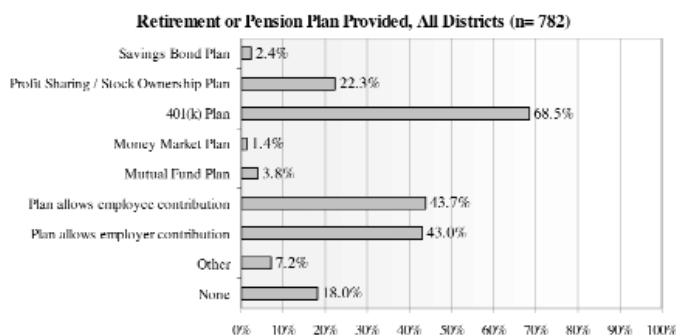
5.3 How many paid holidays does your employer offer per year?

Median number of paid holidays per year is 7.8

5.4 List the insurance benefits provided by your employer. (Check all that apply.)



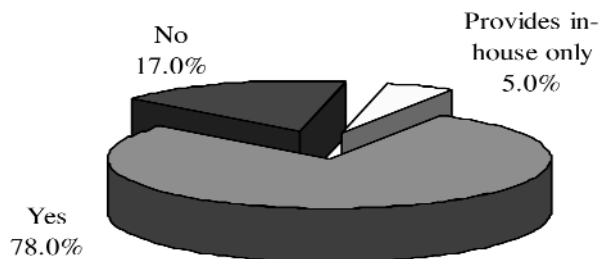
5.5 List the retirement or pension plans provided by your employer. (Check all that apply.)



SECTION 6: PROFESSIONAL BENEFITS

6.1 Does your employer provide paid CLE?

**Paid CLE Offered by Employer
All Districts (n= 782)**

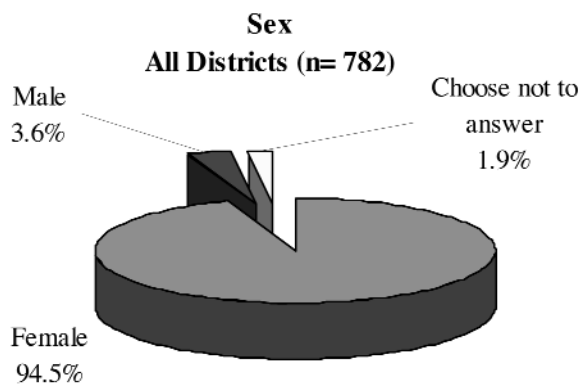


6.2 If your employer provides paid CLE, how many hours per year?

Median number of paid CLE hours per year is 11.2

SECTION 7: MISCELLANEOUS

Personal information: Sex



Personal information: Age

Median age is 46 years

Notes

Some percentages may not sum to 100 due to rounding. For questions in which respondents were allowed more than one answer, percentages may not sum to 100 percent.

Median value estimates in this report are calculated from grouped data. Care should be taken when interpreting results for cases in which the number of people who responded is less than 5.

Prepared by the Department of Research and Analysis, State Bar of Texas.

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Scruples

The Ethics of Using an Attorney Signature Stamp

Ellen Lockwood, CLAS, RP

Dear Reader: The following is an article written by Ellen Lockwood that originally appeared in the Spring 2003 issue of the TPJ. I have received many inquiries recently on issues related to attorney signatures and felt that we could all benefit from revisiting Ellen's article. Laurie Borksi, Professional Ethics Committee Chair

I was recently asked whether it is allowable for a paralegal to stamp particular documents, including those filed with the court, using an attorney signature stamp. The stamp is a rubber stamp of the attorney's signature, rather than a stamp of just the attorney's name.

At first glance it would appear this is an

easy way to get documents out the door when the attorney isn't available to sign. Get the attorney's approval, then just stamp it with his signature.

Unfortunately, using an attorney signature stamp is the same as signing a document "dictated but not read." Using an attorney stamp on letters that don't include legal advice and for some administrative matters is probably fine; using an attorney stamp on engagement letters, settlement offers and documents, correspondence including legal advice, and particularly court documents, is not appropriate.

I was unable to locate any Texas ethics opinions on this issue. I also only found two Texas cases, both from the Court of Criminal Appeals. In *State of Texas v. Shelton*, (830 S.W.2d 605, Tex. Crim. App.

1992), the court found that use of a signature stamp on the notice of appeal by the Travis County Attorney was "ineffective to show personal authorization" and did not "comply with the legislatively mandated 'guarantee that the only person permitted by statute to make an appeal on behalf of the State actually participated in the process.'" This opin-

ion was upheld in *State of Texas v. Roberts*, 940 S.W.2d 655, Tex. Crim. App. 1996).

Although these are criminal cases, the logical assumption is that it is never correct to use an attorney signature stamp on a pleading, settlement agreement, or other official document, even if the attorney instructs you to do so.

I also found a bankruptcy case from Illinois that also addressed this issue. In this case the court held that the signature of an attorney on a document implies that the attorney has come to a professional judgment about the case.

As these cases illustrate, an attorney's signature indicates he has reviewed the document and is confirming its contents *or his agreement to its contents*. This is imperative for the majority of documents an attorney signs. Most attorneys only send out letters that are "dictated but not read" in rare instances, and *then only* for correspondence that does not include legal advice or agreements.

The issue of using an attorney signature stamp is related to the issue of a paralegal signing by permission, which is not allowed on pleadings and other court documents (Texas Rule of Civil Procedure 57). Another attorney may sign by permission but the difference is that it is an *attorney* who is signing and there is a presumption that the attorney is qualified to act on the client's behalf, even if not actually representing the client.

One way to get an attorney's signature on a document that is not yet finalized but is approved is to put the signature block on a separate page and have the attorney sign before he leaves the office. You can then make the final corrections and still get the document mailed or filed.

The general rules for signatures on documents are as follows:

- Correspondence from paralegal – paralegal may sign as long as her title is



clearly indicated and the letter does not contain legal advice or agreements. Correspondence from attorney – paralegal may sign by permission as long as her title is clearly indicated and the letter doesn't contain legal advice or agreements.

- Correspondence from attorney – attorney may sign “dictated but not read” or with a signature stamp at his discretion, but it is advisable not to do so on correspondence containing legal advice or agreements.

- Correspondence from attorney containing legal advice or agreements – attorney should sign or another attorney may sign by permission.
- Documents to be filed with the court (including agreements between counsel) and pleadings – attorney should sign or another attorney may sign with permission.

If you have any doubt if it is appropriate to use an attorney's signature stamp, insist that the attorney sign the document him-

self. It is always safer, and never incorrect, to have an attorney's actual signature.

Ellen Lockwood, CLAS, RP, is the President of the Paralegal Division and former Chair of the Professional Ethics Committee, a position she held since 1997 prior to serving as president. She is also a past president of the Alamo Area Professional Legal Assistants in San Antonio.

Opinions TO THE EDITOR

The TPJ wants to hear from you! The Publications Committee will poll members concerning their thoughts on some of the “hot topics” of the day. During each quarter, the Committee will draft a question, which will be distributed to membership, through the Directors. Each question will direct you as to where to send your response. We will print the responses in the following TPJ, reserving the right to edit for space considerations. While we prefer to print a name and city with each response, we understand that some of you may prefer that we not print your name. We will honor this request, so long as the response is not contrary to the objectives of the Paralegal Division or the Publications Committee. We hope that this column provides a way for PD members to express themselves, constructively, on issues that impact our profession, our communities and our country.

Question of the Quarter:

Should the United States offer amnesty to those illegal immigrants who presently reside in the United States?

The issue of amnesty for immigrants who are illegally residing in the United States has become one of emotion rather than practicality. One side lauds the illegal as simply a person who wants a better life for himself and family and who should be given all rights and privileges of citizenship just by virtue of being on American soil, while the other side wants to felonize the illegal entrant and any individual who assists the purported felon.

Those who advocate blanket amnesty have lost sight of the ramifications of allowing rampant illegal immigration into this country. Besides disregarding security issues, they have minimized the financial burden this group places on our social system. Supporters of illegal immigration appear to have no problem offering a myriad of social services to the illegal with no questions asked while the American citizen struggles to work through our current system to obtain the same services. Rather than amnesty, let's at least get those that are here registered, conduct criminal background checks, determine if they are truly entitled to the social services, and return to their home country those with suspect backgrounds or who are a significant drain on our social services.

With regard to the guest worker program advocated by many, including our current President, there is the argument that these guest workers take jobs that Americans don't want or won't do. There appears to be a fallacy in this also. A recent news report dealing with illegal workers in the construction industry in southern California, finds that the American construction worker's weekly pay has been dropping dramatically in the past few years as they struggle to compete with the illegal workers who will work for much less.

It appears that the time has come to close the porous borders, enforce current laws on the hiring of undocumented workers, get an accurate accounting of who is already here, and legislate a comprehensive guest worker program that is geared to those jobs that business simply can't be filled with American citizens or documented workers.

In the wake of 911, we should have been smart enough to not have gotten ourselves in the position of having tens of millions of illegal immigrants residing and working here of whom we have no information.

Patricia, Unknown City

Amnesty — absolutely not. I think this would cause lots of problems in the international community. Plus, 99.9% of the “immigrants” protesting, marching, etc. are latino/hispanic. Hardly a cross-

tion of all of the immigrants who come to the U.S.

Temporary work visas where they have to pay US income tax – absolutely yes.

Kristine, Austin

This is the wrong question entirely. The true question is one of economics. We need to fix the Federal Minimum Wage in this country. We need to index it to the local cost of housing throughout the United States ensuring that anyone working 40 hours in a week will be able to afford basic rental housing wherever that work is done throughout the US. Once this nation has embraced this moral premise, other countries will follow. During the first massive immigration march in April, we saw Mexican flags everywhere. But they were quickly withdrawn when white North Americans found them offensive. But that does not change the true sentiment. People are willing to come to this country with the immediate goal of earning a lot of money and quickly returning home.

They are willing to live eight people to a room, leave their families and stay here up to eight years, sending 85% of their earnings back home to La Familia.

Ultimately, missing their families, they send for them at great personal risk and cost. If all businesses were made to be good community partners and paid fair living wages that provide for basic food clothing and shelter, people would not feel compelled to leave their families and their homeland to come here. This question would then be mute. See www.UniversalLivingWage.org for more clarity.

Richard, Austin

Blanket amnesty would not be a good idea, because it would not encourage immigrants to come into the country legally. Obviously, however, we do not have the man power to send back several million immigrants. They should be checked out thoroughly, though, and those with criminal records should be immediately exported back their country of origin. Those left could be given an opportunity to earn their citizenship, by

keeping their record clean, being gainfully employed, learning English, etc., with more consideration in this regard given to relatives of American citizens. The chance of gaining citizenship would most likely give illegal immigrants an incentive to come forward.

Beth Pippin, Fort Worth

NO. But all the Immigrants should be given the opportunity to become an American citizen. They should be required to follow the same rules and guidelines that all other immigrants must follow in order to become a citizen of the United States. Also, if they want to live in America - all immigrants should be required to learn the English language, as well.

Susan, Unknown City

I keep asking myself “If they ignore the very laws for entry into this country, what other laws will they ignore once they get here? What incentive do they have to do things our way if they do not respect the very things we stand for?”

Kathy, Longview

First the borders need to be sealed either with a real wall or both a wall, more Border Patrol Officers, and electronic means. Those caught get deported immediately.

I believe there are, too, many illegal immigrants to try to round them up and deport. I would opt for background checks on all who want to become legal. Those with criminal records should be deported immediately. Those who do not register to become legal and are caught get deported immediately. The rest would have to pay a fine for each family member who stays. They would have to then wait for 5-6 years, pay their taxes, and agree to become citizens including learning English, our history, our symbols, and swear allegiance to our constitution, and country.

They also, should not get any social welfare of any kind until they are citizens. Once they become citizens then they can enjoy the “fruits” of citizenship.

JoAnn, Unknown City

Only if they agree to get a job, learn to speak English, and become a citizen. In addition, make them ineligible for welfare, medicaid, food stamps and/or unemployment benefits until everyone in the family has been a US citizen for at least 5 years and do not grant any child born in this country to an illegal immigrant “automatic” citizenship

Linda, Unknown City

Philosophically, I say, “No!”, for the following reasons:

1. Illegal acts should not be rewarded.
2. Illegal immigrants are demanding so-called “rights” to which they are not entitled. They demand to be taught in their own language. They demand special privileges—affirmative action. They demand ethnic studies that glorify their culture. The whole established culture of the U.S., particularly in the Southwest, is being changed to a Mexican culture. If you are in my country, do what the Italians and Irishmen before you have done - enter the country legally, learn the language of this country, and become a law-abiding citizen. Don’t come here and try to make it like the country from which you came. If you want that, stay there!
3. This country should not have to pay for the welfare benefits illegal immigrants are obtaining without making any contribution to the system.
4. Many illegal immigrants have no proprietary interest in this country. They drink, rob, rape, and kill, then run back to Mexico.
5. If we grant amnesty to one group of illegal immigrants, what about the others - Iraqis, Iranians, North Koreans, etc.?

Pragmatically, I see nothing else we can do, for the following reasons:

1. There are too many illegal immigrants to round up and return to Mexico.
2. We can’t, in good conscience, separate mothers from legal children who were born in this country. The law establishing citizenship for anyone born here has outlived its usefulness and should be rescinded.

From *Excelsior*, the national newspaper of Mexico, “The American Southwest

seems to be slowly returning to the jurisdiction of Mexico without firing a single shot.”

Carol, Austin

No, the U.S. should not offer amnesty to illegal immigrants, because I think it sends the wrong message about our laws. It is true that many of these immigrants are working at jobs that no one else wants to do, at a lesser pay; however, they send a large portion of their money home to their families, outside of the U.S., which does nothing to contribute to the local economy. And we also are providing free services to them, i.e. health care and education. From what I've heard, those who have legally gone through the process have admitted that it is cumbersome and lengthy. Maybe the issue is not just illegal immigrants, but an inadequate legalization process.

Pennie, Fort Worth, TX

No. Amnesty should not be provided to anyone who breaks the laws of the United States. Citizenship should only be granted after meeting U.S. requirements. It is unfair for amnesty to be granted to illegal immigrants when legal immigrants played by the rules.

Betty, Fort Worth, TX

My initial response to this question was a resounding “No!” Then I began to examine my feelings regarding that answer, and came up with several reasons for it. For one, I think it is a slap in the face to those immigrants who gave up citizenship in their homelands and worked so hard to learn our language and become citizens of the U.S. Secondly, I think it is an insult to Americans for these illegal immigrants to refuse to learn our language and to still claim allegiance to another country, all the while expecting to receive the benefits of citizenship here. I hear the argument that they will take jobs that Americans will not take, and I simply do not believe this is true. However, they will work for less money than most Americans will, so perhaps that is why they find jobs so easily – American businesses are always looking at the bottom line, and salaries are a huge

chunk of the budget for them. I don't think there is any “quick fix” to this problem, and I think that amnesty is clearly the wrong approach. If these millions of illegal immigrants (does that sound better than “criminals”?) want to stay here, then I believe they need to make the decision to become citizens of our country and pledge allegiance to the United States of America. If they are not willing to pay that price, then we need to deport them back to their country of origin. I say the ball is in their court, not ours. I remember something about a couple of skirmishes at a little mission called the Alamo and some place called San Jacinto – seems as though Texans were determined to live independently of Mexico. Imagine that!

Mona, Longview, TX

No, I do not believe in granting amnesty to someone just because they are already here. Those people entered our country illegally, many of which have enjoyed the services paid by tax dollars of the citizens, while contributing nothing themselves by NOT paying taxes. I believe they are a drain on our Nation's economy, which outweighs whatever benefit they serve to industries in cheap labor.

Rhonda, Austin, TX

My father came to the United States in 1961. He came here legally and lived his life every day thankful for the opportunity to live in a free country where he could make his own choices of where he lived, worshipped, worked and played. I believe that everyone dreaming my Dad's dream should be given the chance to see that dream realized. However, obtaining the dream by dishonest means is not acceptable to those who struggle through and get here by following the rules.

Consider: (1) Most people repeat behavior. If a person is here illegally now, what makes you think that person will respect and follow our laws if that person is allowed to stay? We have enough problems with crime; let's not invite trouble if we can avoid it. (2) What are we doing for the US citizens who are living in poverty already? Do you think bringing in the poor from other countries (which I

must assume they are, otherwise they would follow the proper procedure to enter this Country) to take the already scarce jobs for the unskilled labor force, and draw from the already strained welfare resources is going to improve the already depressing living conditions of any of them?

Historically, America has always welcomed the unwanted, the outcasts and refugees from other countries. When our country was young and there was more than enough “space” to go around, the rules could be bent and no harm done. Today, everywhere you go, overpopulation is a problem; employment opportunities for those who do not have a college education or a trade are scarce; farms that once fed our Country are being turned into subdivisions. A prudent person would rethink the offer of amnesty to any illegal immigrant living in the United States.

Judith, San Antonio

I do not believe that illegal aliens currently residing in the United States should be offered amnesty. Where do we draw the line? They are breaking the law—Why should they be treated differently than others who have previously illegally entered this country and were subsequently deported. My ancestors and my husband's ancestors are here legally after coming to this country and painstakingly doing what was required of them to become American citizens. To let illegal aliens into this country and have them not be held accountable for their illegal activity is a slap in my ancestors faces.

Marsha, Austin

No. Why should we reward them for disobeying our laws? It doesn't seem like that gives them any incentive to obey any of our other laws.

Jan, Austin

No, while I understand their plight, they should go through the steps that ALL individuals who want to become American citizens must go through. I think what needs to be looked at are the immigration procedures and making these procedures more responsive to the needs of both the

US and its citizens and those wanting to become US citizens.

Lynda, El Paso

Absolutely not! I think too many people are allowing their emotional attachment to the issue to cloud their judgment in this matter. Common sense dictates that anyone who has arrived in the United States, illegally, should either seek citizenship or other legal authority to stay in the U.S. or should go back from whence they came. I realize that most of us are descended from immigrants. However, the descendants of the founding men and women of this country and those who have legally sought and obtained citizenship in the United States have earned the right to call the United States their home. If those who are currently in the U.S. illegally are allowed to stay, what happens tomorrow and the next day and the next. Too many people currently live in the United States who are not loyal to our foundation. They want the benefits, but neither they nor anyone in their families have earned the benefits. If

they want to live in the United States, they need to embrace our culture. If they do not want to embrace our culture, then they do not need to seek to live in the United States. Those who have sought citizenship have learned about our culture, our foundation, our Constitution and have accepted the United States as their home. Anyone who is in the United States illegally now should not be granted a free pass. It should be earned.

Deirdre, Lubbock

No. These individuals should go through the proper channels to obtain legal status in the United States.

Peggy, El Paso

No. The rules for citizenship are there for a purpose, and every time we bypass the rules or laws, the standards for citizenship are lowered. Amnesty would also lessen the person's ability to become a part of the melting pot. They would never understand how America came to be, the struggle it had to become what it is today, and

why the constitution is the way it is. They would just be a person of another nation living in America. They would never learn what it means to be an American. For those of us who are born in America, we go to school and learn the history of our country and who our forefathers were. If the immigrant is not of school age, how do they ever learn what it means to be an American? Would they cling to their own culture? Could they be loyal to this country?

My great grandfather was a Czech immigrant. There was no amnesty for him, and he proudly stood up and said he was an "American" and wanted to be a part of all this country had to offer and do his part. He was Czech by heritage, but his nationality was American. My mother did not speak English when she started school, and she was in a Czech community. She had to learn to speak English. There was no special bilingual education for her.

Juanita, Temple

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