

PARTIAL SUMMARY JUDGMENTS IN FAMILY LAW CASES

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I. INTRODUCTION

Rule 166a of the Texas Rules of Civil Procedure permits a trial court to grant summary judgments. Summary judgments may be granted only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 166a(c). The Rule also permits partial summary judgments, or in other words, judgments adjudicating discrete parts of a case.

Summary judgments are widely used in many types of litigation, particularly commercial litigation. Summary judgments are less frequently used in tort cases because issues such as negligence are mixed questions of law and fact and therefore not readily amenable to a summary judgment motion.

Family law practitioners have not frequently utilized the summary judgment procedure. With respect to parent/child issues, it is difficult to see how a summary judgment could be appropriately utilized. But on property issues - especially characterization of property - summary judgments should have an increasing role in family law litigation. By obtaining partial summary judgments on such issues, counsel may streamline a case for trial and increase the chances for settlement of the case.

This article examines the use of partial summary judgments in family law cases. To this end, the article first generally examines the policies underlying summary judgments and the intended uses of summary judgments. The article then reiterates the "boilerplate" law of summary judgments. The next section of the article reviews, in detail, actual summary judgment motions in litigated cases. Following that review, the article sets forth some practical tips for prosecuting summary judgment motions.

II. ABOUT SUMMARY JUDGMENTS

Summary judgments are governed by Tex. R. Civ. P. 166a. Under this rule, a court may render a summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Tex. R. Civ. P. 166a(c). Summary judgments circumvent trials. The purpose of a summary judgment is to obtain a legal ruling by the court when the facts are not in dispute. If the facts are in dispute, then the fact finder - either the court or a jury - must find the facts before the court can apply the law to them.

One of the foundations of our system of law is the concept of having a day in court. Both lawyers and lay people view a trial, whether before the court or a jury, as a basic constitutional right. A summary judgment does away with the need for a trial because the purpose of a trial is to find the

facts. But because a summary judgment makes a trial unnecessary, the law bends over backward to make sure that there is no issue of fact before a court grants a summary judgment.

A. Legal Standards for Summary Judgments

Thus, the courts frequently reiterate the stringent legal standards for obtaining a summary judgment. For example, the courts often state that a movant must conclusively prove all the essential elements of his cause of action as a matter of law. *E.g.*, *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979). Further, the non-movant never has a burden of proof unless and until the moving party has met his burden. *E.g.*, *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). It is also said that every reasonable inference is indulged in favor of the non-movant, and any doubts are resolved in his favor. *E.g.*, *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985).

B. Inappropriate Summary Judgment Issues

Some issues simply cannot be determined by summary judgment. These issues are inherently factual and therefore require a trial to determine what the facts are. Issues are inherently factual when they cannot be determined even upon undisputed facts if the undisputed facts lead to conflicting inferences. *E.g.*, *Ridgeline, Inc. v. Crow-Gottesman-Shafer #1*, 734 S.W.2d 114, 116-17 (Tex. App. - Austin 1987, no writ) (issue of "reasonableness" not subject to summary judgment even when summary judgment evidence uncontroverted).

Other cases in which a summary judgment is inherently inappropriate are those "involving intent, reliance, reasonable care, uncertainty, and the like." *Dan Lawson & Assocs. v. Miller*, 742 S.W.2d 528, 530 (Tex. App. - Fort Worth 1987, no writ). *Accord*, *Lutheran Brotherhood v. Kidder Peabody & Co.*, 829 S.W.2d 300, 305 (Tex. App. - Texarkana), *vacated by agr.*, 840 S.W.2d 384 (Tex. 1992); *El Paso Assocs. v. J.R. Thurman Co.*, 786 S.W.2d 17, 21 (Tex. App. - El Paso 1990, no writ); *Hilton v. Texas Investment Bank, N.A.*, 650 S.W.2d 545, 547 (Tex. App. - Houston [14th Dist.] 1983, no writ); *Kolb v. Texas Employers' Insurance Ass'n*, 585 S.W.2d 870, 873 (Tex. Civ. App. - Texarkana 1979, writ ref'd n.r.e.).

Further issues which are not appropriate for disposition by summary judgment are negligence and contributory negligence (*Hennessy v. Estate of Perez*, 725 S.W.2d 507, 509 (Tex. App. - Houston [1st Dist.] 1987, no writ); *Moeller v. Fort Worth Capital Corp.*, 610 S.W.2d 857, 862 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.)); the credibility of witnesses (*Chapa v. Club Corp. of America*, 737 S.W.2d 427, 431 (Tex. App. - Austin 1987, no writ)); and whether a juvenile has engaged in delinquent conduct and consequently is in need of supervision or rehabilitation (*State of Texas v. LJB*, 561 S.W.2d 547, 549 (Tex. Civ. App. - Dallas 1977), *rev'd on other grounds*, 567 S.W.2d 795 (Tex. 1978)).

C. Family Law Opportunities

Under these standards, a summary judgment cannot be used, for example, to establish a "just

and right" division of property upon divorce. Family Code § 3.63(a). Further, how could a summary judgment ever be used to determine a motion to modify conservatorship? But summary judgments are not limited to entire cases: a summary judgment can be limited to distinct issues within a case. *See* Tex. R. Civ. P. 166a(a) & (e).

Probably the greatest opportunity to use partial summary judgments in divorce cases lies in the characterization of property. Marital property is presumed to be community property. Family Code § 5.02. However, if a spouse owned or claimed property prior to marriage, it is separate property. Family Code § 5.01(a)(1). To demonstrate that premarital property is separate property, a spouse must invoke the inception of title doctrine to demonstrate his premarital claim to the property.

Property that is separate property by virtue of acquisition before marriage can take a number of forms. Such property typically consists of real estate. If the opposing party insists that certain real estate is community property, but you know that it is not, you should consider filing a motion for partial summary judgment. Your evidence that the realty is separate property could be the deed to the property. Similarly, bills of sale, certificates of title or similar documents typically are generated during the conveyance of personal property of significant value. You could move for partial summary judgment on characterization of a boat, a computer, a work of art, or some other item of personal property. Further, if your client owns and operates a corporation for his livelihood, you may be able to obtain a partial summary judgment that the stock in the corporation is his separate property by proving that your client incorporated prior to marriage.

III. SUMMARY JUDGMENT PROCEDURE

If you decide to move for a summary judgment, you must file a motion which "shall state the specific grounds therefor." Tex. R. Civ. P. 166a(c). In the past, many lawyers commonly have filed briefs in support of motions for summary judgment and have used the briefs to set forth the specific grounds for summary judgment. But the Supreme Court recently has rejected this practice. In *McConnell v. Southside Independent School District*, 36 Tex. S. Ct. J. 792 (April 21, 1993), the court held "that grounds for summary judgment must be expressly presented in the summary judgment motion itself" rather than in the brief in support of the motion or in the summary judgment evidence. *Id.* at 792.

Rule 166a(c) requires that "the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." The day of the hearing and the date of notice are excluded from this twenty-one day period. *Williams v. City of Angleton*, 724 S.W.2d 414 (Tex. App. - Houston [1st Dist.] 1987, writ ref'd n.r.e.). Therefore, counsel must file and serve a motion for summary judgment, plus give notice of the hearing, not later than the twenty-second day prior to the hearing.

A motion for summary judgment may be based upon

- (i) the deposition transcripts, interrogatory answers, and other discovery responses

referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court.

Tex. R. Civ. P. 166a(c). If affidavits are used in support of a motion for summary judgment, the affidavits must be factual rather than conclusory. *Anderson v. Snider*, 808 S.W.2d 54 (Tex. 1991). Although an opposing party may file a response to a motion for summary judgment, the response, even if sworn, is not proper summary judgment proof. *E.g., Nicholson v. Memorial Hospital System*, 722 S.W.2d 746 (Tex. App. - Houston [14th Dist.] 1986, writ ref'd n.r.e.) (citations omitted). You can use the other side's interrogatory answers against the other side, but you cannot rely upon your client's own interrogatory answers to support a motion for summary judgment. *E.g., Elliott v. State of Texas*, 818 S.W.2d 71, 73 (Tex. App. - San Antonio 1991, writ denied) (citing cases). Finally, a summary judgment must be based upon evidence. A moving party may not rely upon a presumption to prove his case in lieu of evidence. *Missouri-Kansas-Texas Railroad Co. v. City of Dallas*, 623 S.W.2d 296, 297-98 (Tex. 1981).

Because summary judgments are appropriate only when the facts are undisputed, Rule 166a(c) expressly states: "No oral testimony shall be received at the hearing." For this same reason, the Houston courts have held that it is not necessary even to have an oral hearing on a motion for summary judgment. *See Goode v. Avis Rent-A-Car, Inc.*, 832 S.W.2d 202, 204 (Tex. App. - Houston [1st Dist.] 1992, writ denied)(citing cases). *But see Williams v. Carpentier*, 767 S.W.2d 953 (Tex. App. - Beaumont 1989, no writ) (oral hearing mandatory).

Finally, a summary judgment cannot be used as a substitute for the forbidden general demurrer. *See Tex. R. Civ. P. 90*. Special exceptions ordinarily should be used to test the sufficiency of a pleading. *E.g., Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). However, if a party pleads facts which affirmatively negate his cause of action, a summary judgment is appropriate. *E.g., Jacobs v. Cude*, 641 S.W.2d 258, 261 (Tex. App. - Houston [14th Dist.] 1982, writ ref'd n.r.e.) (pleading showed that res judicata barred action). Further, if it appears that the opposing party cannot amend his pleadings in such a way that he can state a claim for relief, then a summary judgment is appropriate. *E.g., Thompson v. Dart*, 746 S.W.2d 821, 825 (Tex. App. - San Antonio 1988, no writ) (citing cases).

IV. SUMMARY JUDGMENTS IN FAMILY LAW CASES

Summary judgments in family law cases typically have involved bill of review proceedings (*e.g., Kennell v. Kennell*, 743 S.W.2d 299 (Tex. App. - Houston [14th Dist.] 1987, no writ)) or attempts at post-divorce enforcement (*e.g., Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984)), although on occasion a court has addressed the validity of a premarital agreement (*Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App. - Corpus Christi 1990, no writ)) or the existence of a common law marriage (*Grigsby v. Grigsby*, 757 S.W.2d 163 (Tex. App. - San Antonio 1988, no writ)). Cases involving day-to-day family law issues such as characterization are rare. To explore the possible range of summary judgment practice in family law cases, this article reviews some

Dallas County cases in which parties moved for summary judgments.

A. Characterization of Property

In *C. v. C.*, Cause No. 88-2113-D, 303rd Judicial District Court, Dallas County, Texas, the wife successfully obtained a summary judgment in the trial court which characterized almost all the parties' property as the wife's separate property.

The underlying facts began with the purported marriage of the parties on November 22, 1951. The marriage was "purported" because the husband had been married and divorced several times before marrying the wife. However, one of the husband's marriages never had been dissolved.

In 1963, the parties contributed all their properties to a limited partnership. In 1966, the parties dissolved the partnership and received assets of the partnership in exchange for their partnership interests. In 1972, the parties reformed the limited partnership.

In 1982, the husband was convicted for racketeering. As the "Range Boss" of the "Cowboy Mafia," the husband had been responsible for importing and distributing some 147,000 pounds of marijuana into the United States from 1976 through 1978. As part of the husband's RICO conviction, the husband's partnership interest in the parties' partnership was forfeited to the United States.

In 1985, the wife entered into a settlement agreement with the United States Government by which the United States conveyed the husband's forfeited partnership interest to the wife in exchange for certain real property and stock. To culminate this transaction, the partnership borrowed money from a bank. The bank required the husband to execute an Affidavit and Release in 1986. In the Affidavit and Release, the husband acknowledged the federal court's forfeiture of all his interest in the partnership and warranted and represented that he claimed no interest of any kind in any of the partnership's assets.

The partnership owned almost everything the parties had. The parties owned almost nothing because the parties had conveyed everything they owned to the partnership. Therefore, the wife's interest in the partnership represented the only property of significant value when the parties divorced.

After the divorce suit was filed, the wife moved the trial court for a partial summary judgment that the husband had no community property interest in the partnership. The wife pressed four alternative grounds in support of her motion:

1. The parties' marriage was void because one of the husband's previous marriages never had been dissolved. Absent a valid marriage, the husband could have no community property interest in the partnership;
2. The limited partnership agreements signed in 1963 and 1972 operated as

partitions of the community estate;

3. The husband's interest in the partnership was forfeited to the United States in connection with the husband's RICO conviction in 1982; and,

4. The husband had released any claim to the partnership by participating in the RICO settlement in 1985 and by executing the Affidavit and Release for the bank in 1986.

The summary judgment evidence relating to the partitions, the forfeiture, and the Affidavit and Release was fairly straightforward, although voluminous. However, the evidence relating to the void marriage presented some difficulties: When a person has been married more than once, the most recent marriage is presumed to be valid. Family Code § 2.01. Thus, the wife was placed in the position of proving a negative - that the husband had never been divorced from one of his previous spouses.

To rebut the presumption that a person's most recent marriage is presumed valid, a party must show that a prior marriage never was dissolved. However, a party need not:

prove the non-existence of divorce in every jurisdiction where [divorce] proceedings could have been possible; it is only necessary to rule out those proceedings where [the other party] might reasonably have been expected to have pursued them.

Davis v. Davis, 521 S.W.2d 603, 605 (Tex. 1975).

The jurisdictions where a spouse might reasonably have been expected to pursue divorce proceedings are the ones where the spouse lived. *Id.*; *Rodriguez v. Avalos*, 567 S.W.2d 85, 87 (Tex. Civ. App. - El Paso 1978, no writ); *Caruso v. Lucius*, 448 S.W.2d 711, 715 (Tex. Civ. App. - Austin 1969, writ ref'd n.r.e.). The wife therefore obtained certified copies of records of prior marriages and divorces together with an affidavit from a private investigator that he had reviewed the divorce records in various counties in which the husband had lived but found no divorce of the husband from the spouse in question.

The trial court granted the summary judgment. As was the trial court's right, the trial court did not specify which ground it found compelling. The trial court simply granted the wife a summary judgment "in accordance with her Motion for Summary Judgment."

The husband appealed to the Dallas Court of Appeals under Cause No. 05-90-00183-CV. The husband's primary contention on appeal was that the trial court should not have granted the summary judgment. But the Dallas Court of Appeals did not directly address this issue: The court assumed, but did not decide, that the summary judgment had been wrongly granted. The Dallas Court of Appeals nevertheless affirmed the trial court's decision. The court ruled that the husband's misconduct during the marriage had been so reprehensible that the misconduct justified the trial court's award to the wife of the vast majority of the property at issue in the divorce suit. Any error

in granting the summary judgment was harmless error.

B. Res Judicata

In *B. v. B.*, Cause No. 79-18400-Y, 330th Judicial District Court, Dallas County, Texas, the ex-husband obtained a summary judgment on a fraud claim by invoking a res judicata defense.

In 1987, the former wife filed suit for post-divorce partition, alleging that the parties' divorce decree failed to dispose of the parties' community interest in fees from certain lawsuits settled by the former husband's law firm after the divorce. The former wife also sought relief by a bill of review. The former wife alleged that the former husband had fraudulently misrepresented the value of the former husband's interest in his law firm to the former wife at the time of divorce.

In 1988, the former husband moved the trial court for a summary judgment on the partition/bill of review suit. The trial court granted this motion in 1989. Immediately after the trial court granted the motion, the former wife filed another petition for post-divorce partition alleging common law fraud and seeking damages. The fraud was the same fraud that the former wife had alleged in support of her earlier action for partition and bill of review.

The former husband then filed a second motion for summary judgment. The former husband claimed that the former wife's second lawsuit was barred by the statute of limitations for fraud and by res judicata based upon the previous summary judgment. The trial court granted the judgment but based its decision only upon the ground of res judicata.

The Dallas Court of Appeals affirmed the trial court's summary judgment in Cause No. 05-90-00860-CV. According to the court, the fact that the wife sought damages rather than rescission of the divorce settlement by her second lawsuit did not remove the second suit from the operation of res judicata. Res judicata extends not only to matters actually litigated but also to causes of action or defenses that arise out of the same subject matter and that the parties might have litigated in the first suit. *Texas Water Rights Commission v. Crow Iron Works*, 582 S.W.2d 768, 771 (Tex. 1979). Because the trial court had adjudicated the issue of fraud against the wife in the partition/bill of review proceeding, res judicata barred the wife from raising the issue of fraud again.

C. Modification of Conservatorship

In *W. v. W.*, Cause No. 89-15331-R, 254th Judicial District Court, Dallas County, Texas, the former wife had been appointed sole managing conservator of the parties' children in the parties' divorce. The former husband moved the court to modify the decree of divorce to appoint the parties joint managing conservators of the children.

A change from sole to joint managing conservatorship requires a trial court to find that:

(A) the circumstances of the child or the sole managing conservator have materially and substantially changed since the rendition of the order or decree to be

modified;

(B) retention of a sole managing conservatorship would be detrimental to the welfare of the child; and

(C) the appointment of the parent as a joint managing conservator would be a positive improvement for and in the best interest of the child.

Family Code § 14.08(c)(5).

During the course of the modification, the former wife deposed the former husband and also propounded interrogatories upon him. The deposition questions and the interrogatories included a request that the former husband enumerate the facts that he believed justified a change in conservatorship.

The former wife then moved the trial court for a summary judgment on the former husband's motion to modify conservatorship. The former wife listed the facts that the former husband had recited in his deposition and also set forth the former husband's interrogatory responses. The former wife contended that, as a matter of law, each one of the various facts set forth by the former husband was insufficient to establish the second requirement to change from sole to joint managing conservatorship - that retention of the sole managing conservator would be detrimental to the child's welfare.

The former husband responded to the motion by raising numerous technical defenses and by arguing that although none of the various factors the former husband had mentioned, standing alone, might warrant modification, one or more of them together could warrant modification. *Scroggins v. Scroggins*, 753 S.W.2d 830, 832 (Tex. App. - Houston [1st Dist.] 1988, no writ). But the gist of the former husband's response was that the tests for modification of sole managing conservatorship require inherently factual determinations - much like issues involving intent, reliance, reasonable care, uncertainty and the like - and therefore that motions to modify conservatorship are not amenable to summary judgments. The trial court agreed with the former husband's position and therefore denied the former wife's motion for summary judgment.

D. Characterization, Value and Tracing

In *C. v. C.*, Cause No. 89-16682-Y, 330th Judicial District Court, Dallas County, Texas, the wife alleged that she owned numerous items of property as her separate property. These items included contingent interests in trust corpus and income, real estate purchased pre-marriage, and specific items of property the wife had inherited.

The wife moved the trial court for a summary judgment that these items were her separate property. To establish the existence of testamentary trusts and their terms, the wife filed certified copies of Wills obtained from the probate court. To secure the same evidence for inter vivos trusts, the wife submitted the affidavit of the attorney who had drafted the trust instruments. Proving that

realty had been acquired pre-marriage required only the filing of a certified copy of the deed to the realty. Establishing the separate property character of specific bequests required the wife to trace the property through a decedent's estate by estate inventory and affidavits of the persons involved in the transactions. Finally, for liquid assets such as a bond, the wife submitted business records affidavits showing a "chain of custody," ultimately to the wife.

The wife also filed two motions for summary judgment in which she contended that the value of certain tracts of real estate was undisputed and therefore should be adjudged. To support these motions, the wife attached valuations by qualified appraisers. In making these motions, the wife relied upon Tex. R. Civ. P. 166a(c), which states in material part as follows:

A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

Prior to hearing on these two motions, the husband informed the wife that the husband had obtained substantially different appraisals on these two properties. Because the husband thereby raised a genuine issue of material fact, the wife never brought the valuation motions on for hearing.

The trial court granted the remaining motions for partial summary judgment, some by agreement, the others after argument to the court. The trial court's granting of these motions helped to settle the lawsuit.

V. PRACTICAL TIPS ON SUMMARY JUDGMENTS

In an earlier section of this article, the procedural rules for seeking and resisting a summary judgment are set forth, together with some "boilerplate" law fleshing out those rules. But the rules of law by themselves do not tell the complete story with respect to motions for summary judgment. There are some practical tips you should follow in seeking or opposing summary judgments. This section of the article offers some practical tips.

A. No Parent-Child Issues

Most divorce suits includes property issues, however minor those issues may turn out to be, because few divorcing couples have no property at all. As otherwise discussed in this article, some property issues are amenable to a summary judgment. But parent-child issues should rarely, if ever, be addressed in a summary judgment motion. Parent-child issues are inherently factual because the court is required to make its decisions based on the best interest of the child. A court should see and hear for itself the parties involved in making these important decisions.

B. Motions Should Be Asset-Oriented, Not Issue-Oriented

Rule 166a of the Texas Rules of Civil Procedure contemplates that a trial court may grant a summary judgment on "issues." Tex. R. Civ. P. 166a(c). But "issues" can cover a lot of ground. It would be inappropriate to ask a court to issue a ruling on an abstract point of law; the motion must be tied to the facts of the case. In particular, in property cases, a party should ask the court to adjudge whether a specific asset is separate or community property, not request a general ruling on characterization of property.

To the greatest extent possible, motions for partial summary judgment in property cases should be asset-oriented, not issue-oriented. If an issue-oriented ruling is sought, a trial court will be justifiably reluctant to commit itself to a broad ruling of law which might affect other aspects of the case, not currently before the court, in unforeseen ways. The court might get "boxed in" on a ruling that the court did not really intend to make. Furthermore, a motion for partial summary judgment directed toward a specific asset is far easier for counsel to present and the court to grasp because the motion has a clear direction and purpose.

C. "KISS"

The acronym "KISS" stands for "keep it simple, stupid!" The acronym is not a reflection on lawyers or judges. It serves merely as a convenient means of recalling that when a lawyer presents his case with clarity, he is more likely to prevail. In other words, don't overload the judge: pick one asset or one issue at a time, file separate motions for each of them, brief them separately, and then argue them separately unless they are factually or legally related. You are more likely to have a judge rule in your favor if you take things one step at a time.

D. Don't Yank the Judge's Chain

Motions for summary judgment do away with the constitutional right to a jury trial. The reasoning behind permitting this result is that juries exist to determine what the facts are. If the facts are not in dispute, there is no need for a jury, so a summary judgment may be appropriate.

Because a summary judgment supersedes a constitutional right, courts must carefully scrutinize motions for summary judgment. As set forth in the procedure section above, requirements for summary judgments are technical and must be precisely followed. Otherwise, a trial court should not grant a summary judgment.

For these reasons, you must not try to yank the judge's chain. If you go into court with a shaky motion for summary judgment, and the trial court grants it, the trial court will be embarrassed if the case is appealed and the trial court ridiculed. The impact upon your future credibility with that court cannot be understated. If you intend to file a motion for summary judgment, you should make sure that your motion is bulletproof. The motion should clearly rest upon undisputed facts, and the law should clearly be in your favor, with the following caveat: Sometimes the facts are clear but the law is not. In that situation, the trial court will realize that you are not asking the court apply established law but are asking the court to make a ruling in an unsettled area. There is no problem with approaching a court on this basis so long as you comply with the ethical rules

requiring you to bring binding authorities contrary to your position to the trial court's attention.

E. File Briefs

Although a motion for summary judgment must recite the various grounds upon which the movant seeks a summary judgment, it is invaluable to supply the court with a brief if the facts or the law are at all complicated. A good trial judge will read your brief. Because the judge is willing to take scarce time to read your brief, you should make your brief as concise and to the point as possible.

Much has been written about the writing of briefs. The Texas Rules of Appellate Procedure include a pungent admonition: "Briefs shall be brief." Tex. R. App. P. 74. But before you can heed this admonition, you must discern the point you wish to make:

The most common difficulty in speaking or writing clearly lies in not knowing clearly what one wishes to say. Axiomatically the picture will then be out of focus because the distance to the subject was unknown. The first step, therefore, is to refine and crystalize the concept so that its edge is sharp and its meaning is exact.

Gibson, *Effective Legal Writing and Speaking*, Bus. Law., Nov. 1980, at 1, 1.

Once the point has been determined, the writing may begin. Some rules to follow in writing briefs are:

1. Be brief.
2. Use active verbs.
3. Get to the action early.
4. Use non-conclusory words.
5. Emphasize facts.
6. Make lists.
7. Use good grammar.
8. Get an objective proofreader.

Fardon, *Writing to Persuade*, Tenn. L.J., Jan.-Feb. 1993, at 22. Following rules such as these will enhance your presentation to the court and increase the likelihood that the court will grant the relief you have requested.

F. Use Charts and Graphs

Although there is no jury in a summary judgment hearing, and the judge is not deciding what the facts are, a summary judgment hearing nevertheless is a trial. Just as in any trial, you should utilize charts and graphs when appropriate. The summary judgment rules prohibit the judge from considering as evidence anything that has not been on file for the requisite period of time, but you may nevertheless use charts and graphs as part of your argument - not as part of the record - in presenting your case to the court. Again, if the facts are at all complicated, using a chart and a pointer will assist the court in understanding them.

G. Consider Several Theories

You may have two or more alternative theories which would justify a summary judgment on any given set of facts. A trial court is not required to specify which theory or theories it found compelling in granting a summary judgment. Obviously, if a motion is granted, it is to the movant's advantage that the trial court not specify which theory the court found convincing. In that situation, counsel for the losing party is charged with the burden of demonstrating on appeal that every single one of the grounds raised for the summary judgment is invalid.

If you have more than one ground for a summary judgment, consider presenting more than one of them to the court. As always, be brief, precise, and to the point. Beware of the "KISS" admonition above - you might, for example, advance several theories to obtain a summary judgment characterizing a single asset.

H. Prepare for Argument

Just as you should take care in preparing your brief, you should prepare for oral argument on your summary judgment motion. Many excellent articles have been written about oral argument. Most of these articles discuss argument in appellate courts, but their advice is of nearly equal applicability in trial courts.

Probably the best single article about legal argument is Davis, *The Argument of an Appeal*, 26 A.B.A.J. 895 (1940). This article states ten rules of argument:

1. Change places (in your imagination of course) with the Court.
2. State first the nature of the case and briefly its prior history.
3. State the facts.
4. State next the applicable rules of law on which you rely.
5. Always "go for the jugular vein."

6. Rejoice when the Court asks questions.
7. Read sparingly and only from necessity.
8. Avoid personalities.
9. Know your record from cover to cover.
10. Sit down.

Another good article is Bright, *The Ten Commandments of Oral Argument*, 67 A.B.A.J. 1136 (1981). Commandment VIII is most perceptive: "Don't snatch defeat from the jaws of victory." *Id.* at 1139. Keep to the point in arguing for a summary judgment. Otherwise, the trial court may conclude that there must be an issue of fact somewhere in the case.

I. Have Judgments Prepared

Whenever you go to court to argue a motion for summary judgment, you should have a judgment prepared and ready to give to the court. The obvious advantage of having a judgment prepared is that if the judge is leaning your way, the judge might very well make his decision on the spot and sign the summary judgment order. But even if the judge decides to mull over the motion, the proposed judgment can be very helpful to the judge. If the judge understands the basis for the motion, but you have not made clear exactly what you want the court to do, the judge can simply refer to the proposed judgment to see what you say the court's ruling should be.

VI. CONCLUSION

Innovation is the essence of practicing law. Motions for summary judgment provide endless opportunities for innovation - limited, of course, by the existence of genuine issues of material fact.

Summary judgments have not been used widely in family law, but opportunities for using them exist. Successfully prosecuting a motion for partial summary judgment can win your case by pulling significant amounts of property off the table or by deflating your opponent's case enough to bring him to the settlement table. Take the time to analyze your next family law case with Rule 166a in mind. You might be surprised at the opportunities presented.

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