By Stephen Gibson[1]

***Summary Judgment Procedure*: Evidence Filed Untimely Without Leave of Court, Even If Substantively Defective, May Be Used As Grounds for Reversal of a Summary Judgment Without a Written Order Sustaining the Movant's Objection.**

In *Seim v. Allstate Ins. Co.*, the Court resolved a conflict among the appellate courts over summary judgment procedure by *per curiam* opinion. The issue is
what happens when a trial court fails to rule on a movant's objections to the non-movant's summary judgment evidence but grants the motion. Some courts followed *Frazier v. Yu*, 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied), which held the trial court implicitly overruled the objections when the summary judgment recites, as they routinely do, that the trial court considered "the summary judgment evidence" without further specificity. Other courts refused to imply a ruling. They reasoned objections in writing must be ruled on expressly for the objection to be "preserved." The Supreme Court of Texas adopted the rule that the objection is waived and cannot be used to uphold a summary judgment unless the record *clearly implies* that the trial court considered the objection.

In *Seim*, the complaining party was not the movant – the objecting party – but the party whose evidence was the subject of the objection – the non-movant seeking to overturn the summary judgment. The non-movant's timely-filed response referred to summary judgment evidence, but did not attach or otherwise seek to file that evidence until the day of the summary judgment hearing.

The late-filed evidence included two expert reports concerning cause of loss but neither report was verified. The untimely summary judgment evidence also included the expert's affidavit, which identified the reports and stated that the facts in the affidavit were true. The expert did not, however, specifically identify the particular reports referred to, nor did he testify the facts in the *reports* were true.

Moreover, the jurat for the affidavit was not signed by a notary. The movant objected to the absence of the notary's signature and the failure to attach the expert reports. [2] The trial court rendered summary judgment without ruling on the movant's objections to the non-movant's summary judgment evidence.

The opinion begins its analysis with the preservation of error rule in Texas Rule of Appellate Procedure 33.1 which was the centerpiece of the ruling of the court of appeals. Rule 33.1 is the general preservation of error rule. It requires a timely objection, request or motion and an adverse ruling or refusal to rule.

Further, if the defect in summary judgment evidence is one of form rather than substance, the defect is not grounds for reversal unless the proffering party has a chance to amend and refuses to do so. Tex. R. Civ. P. 166a(f). As a

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

[2] In *Lance v. Robinson* decided March 23, the Texas Supreme Court decided that the trial court was entitled to consider appropriate summary judgment evidence even if not attached to the motion or response so long as it was on file with the trial court.

practical matter, this rule is only meaningful for the non-movant's objection to the movant's evidence. After all, denial of summary judgment is not a final judgment, so the movant would never have the opportunity to appeal.

According to the opinion, just because the trial court granted summary judgment does not necessarily mean it also sustained the movant's objections. It is equally possible that the trial court granted the motion because it found, possibly incorrectly, the evidence legally insufficient to prevent summary judgment if the objection was one of substance. If the objection was to form, it could not have been sustained without an opportunity to correct the formal defect. The bottom line to all this is that the objecting movant must obtain a ruling on its objection if it wants to rely on the exclusion of that evidence to uphold its summary judgment.

In this writer's opinion, the *per curiam* opinion is misguided in its consideration of rules concerning *preservation* of error for appellate review. Preservation is germane when one wishes to argue a trial court's ruling was reversibly erroneous. The successful movant seeks affirmation, not reversal, for reasons in addition to the non-movant's failure to present sufficient controverting evidence. The movant has no *complaint* to preserve and rule 33.1 simply does not apply. The correct reason why, in this writer's opinion, summary judgment cannot rest on an implied ruling is that, unlike judgments after plenary trials, there are no presumptions in favor of judgments rendered without a plenary trial. Nevertheless, this principle is itself not consistently recognized. Several Texas Supreme Court decisions indulge presumptions in favor of summary judgments. *E.g.*, *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985).

The practitioner's takeaway from *Seim* is that objections to summary judgment evidence, valid or otherwise, cannot be considered on appeal to have been sustained without a written order to that effect. Get a written ruling.

Political Questions Doctrine **Makes a Case Nonjusticiable If It Would Require Questioning Whether a Military Decision Was a Contributing Cause.**

A bomb-sniffing dog escaped a roofless pen constructed by the Army at a base in Afghanistan. The dog attacked a civilian worker on the base. The worker sued the military contractor for negligent training and handling of the dog. The contractor claimed the dog's escape and attack was "caused by the Army's use and prescribed manner of quartering the dog" and sought to name the Army and DOD as responsible third parties under Texas's comparative negligence scheme. The Army and DOD resisted on the ground, among others, that the allegations against it were political questions not justiciable by the judiciary.

In *American K-9 Detection Services, LLC*, for a 7-2 majority, Chief Justice Hecht sunk his teeth into what separates a non-justiciable political question from the ordinary tort claim against a governmental entity. His opinion began with the first pair of *Baker v. Carr*'s six alternative tests for a political question: (1) the Constitution's text demonstrably commits the issue to a political department; (2) lack of judicially ascertainable and manageable standards to resolve it.[3] What makes this case unusual is that the separation is not between coordinate branches of the federal government, but between the Texas judiciary and federal executive and legislative branches to which the explicit separation-of-powers provisions in the Texas Constitution should apply. Recognizing that the federal law on political questions limits judicial review of military decisions dedicated to the executive and legislative branches, the *American K-9* majority deems this limitation applicable to Texas's separation-of-powers guarantee. Ordinarily justiciable tort suits touching on military matters cross the political question threshold if they require "judicial reappraisal of judgments [constitutionally] committed to the [executive and legislative] branches."

When a contractor operates under plenary military control, the contractor's decisions are deemed *de facto* nonjusticiable military decisions. Even when the contractor retains discretion, the suit may be nonjusticiable if the claims or defense revolves around the reasonableness of a military decision such as when there is a dispute over contributory negligence or the degree, if any, of the military's or contractor's role in causing injury. If the military

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3 The other four are (3) necessity of an initial policy determination clearly calling for non-judicial discretion; (4) impossibility of independent judicial resolution without disrespecting a coordinate governmental branch; (5) unusual need for unquestioning adherence to a previous political decision or (6) the potential embarrassment by inconsistent pronouncements.

decisions – especially those involving resource allocation in battlefield deployments – are beyond the judiciary's competence to evaluate and cannot be "insulated from judicial review," the matter is nonjusticiable.

Applying this standard to the alleged circumstances under which the dog attacked the plaintiff, the majority considered the causation *allegations* to revolve around the military decision concerning the kennel design appropriate for the deployment. The lynchpin of the majority's reasoning was that a comparative causation finding would inevitably involve re-evaluation of military decisions. Because those issues were not justiciable, the majority ruled that the case against the contractor could not go to trial and must be dismissed on the pleadings alone

Justice Guzman dissented because the majority, in her opinion, "struck the wrong balance" by authorizing dismissal before there was sufficient discovery or any *evidentiary* determination that a political question was "in play." Analogizing to the evidentiary hearing required for jurisdictional pleas, Justice Guzman urged a summary judgment-style procedure before permitting dismissal for want of justiciability. She deems the majority's reasoning too favorable to tortfeasors if it allows dismissal on nothing more than a private contractor *allegation* that the military was ultimately to blame. Justice Guzman also joined Justice Devine's dissent in which he maintained that the political question dispute involved a classic fact dispute that must be decided by the trier of fact after full discovery.

The majority responded that postponing the justiciability decision until after discovery and trial defeats the doctrine's purpose. Participation in the lawsuit itself may harm the interests the political question doctrine was designed to protect, such as determination of military prerogatives and insuring procurement by limiting contractor liability. According to the majority, the case was nonjusticiable because it would examine the Army's military decisions at all. Justiciability did not depend on whether the military's decision in fact contributed to the plaintiff's injuries.

***Texas Citizen's Participation Act*: Suits to Remove Elected Officials For Attempting to Frustrate the Purpose of a Quasi-Governmental Entity Is Not an "Enforcement Action" Exempt From the Act's Remedies.**

***Sovereign Immunity From Suit*: The TCPA's Attorney's Fees Provision Waived Sovereign Immunity from Suit.**

In *State ex rel. Best v. Harper*, Justice Brown ruled for a five-Justice majority that an action by the State to remove an elected county official is not an "enforcement action" for which the remedies under the Texas Citizen's Participation Act (TCPA) are available. But, the TCPA applied to other causes of action in the State's suit so that the board member was entitled to recover costs and attorney's fees on appeal. Sovereign immunity did not insulate the State from suit for such liability.

Harper was a member of a county hospital district board elected after promising to eliminate the tax for the district and to replace administrative employees. After allegedly moving to reduce the tax rate to zero and falsely accusing district employees of legal violations, the State joined and prosecuted a citizen's suit to remove Harper from office pursuant to Local Government Code chapter 87 in addition to other claims. Chapter 87 removal is permitted for "incompetency," which includes gross ignorance of or gross carelessness for official duties. Also included is inability or unfitness to perform official duties because of a serious physical or mental defect that occurred after the officer's election. Loc. Gov't Code §87.011.

Harper moved to dismiss the incompetency claim under the TCPA, claiming that the petition related to his free speech exercise. The trial court denied the motion, but the court of appeals reversed in Harper's interlocutory appeal and remanded the for a determination of fees and costs allowed under the TCPA. Meanwhile, Harper lost his bid for re-election, but the case was not moot thanks to the pending issue of costs and attorney's fees.

An Action to Remove an Elected Official Is an Action for "Legal or Equitable Relief" to Which the TCPA Applies.

The majority first tackled the State's argument that the TCPA did not apply to the Chapter 87 removal action because it was not a "legal action" to which the TCPA applied. The TCPA defines a "[l]egal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests

legal or equitable relief." Tex. Civ. Prac. & Rem. Code § 27.001(6). That definition was broad enough to convince the majority that the removal petition was a "legal action" despite the State's attempt to limit "legal actions" to those seeking legal or equitable relief.

The majority rejected the State's attempt to segregate removal from office, which it characterized as "constitutional" or "political" relief, from ordinary "legal or equitable relief." The majority concluded that seeking a statutory remedy was nonetheless an action for "legal or equitable relief" to which Chapter 27 applied. The court also ruled that the unique Chapter 87 removal procedures were not enough to make the action one for something other than legal or equitable relief.

> *But an Action to Remove an Elected Official Is Not an "Enforcement Action" Exempted from the TCPA* Unless *It Seeks to Enforce a Substantive Legal Prohibition against Unlawful Conduct*.

The more controversial issue was whether the Chapter 87 removal action was a statutorily undefined "enforcement action" to which the TCPA does not apply. The statutory exception includes various "legal action[s]" and " 'an enforcement action' … in the name of the state." After deciding that the exemptions must be narrowly construed and that there must be some significance in the Legislature's distinction between "enforcement" and "legal" actions, the majority concluded that "enforcement action" is one that "enforce[s] a substantive legal prohibition against unlawful conduct."

> *Removal Based on Well-Known Political Beliefs or Violations of Bylaws Does Not Seek Enforcement of a Substantive Legal Prohibition.*

According to the majority, the effort to remove Harper on grounds of incompetency because of his open disapproval of the existence of the hospital district did not involve removal for "unlawful conduct." Rather, they deemed the removal action retaliation for Harper's political beliefs and an effort to achieve a political goal rather than enforce an existing law. The majority was also unpersuaded by that Harper's open efforts to hinder the district's ability to perform its business and to work against the district's interests in violation of its bylaws was a "violation of law." Bylaws, even though authorized by statute, are not themselves laws it reasoned. Therefore, according to the majority, the action to remove Harper for incompetence was not subject to the TCPA "enforcement" exemption. The only allegation that the majority deemed to be an enforcement action was the allegation that Harper had violated the Open Meetings Act. The takeaway from the majority opinion is this: "A removal petition is not an 'enforcement action' unless it seeks to enforce a *substantive legal prohibition against unlawful conduct*."

> *State Not Immune From Suit Because Joining Retaliatory Litigation to Remove a Public Official Was Not Within the Scope of Sovereign Immunity; Liability for Attorney's Fees and Costs No Threat to Public Coffers.*

The next issue was whether the State's sovereign immunity insulated it from further suit and from liability for any costs and attorney's fees otherwise recoverable under the TCPA. Generally, the State waives immunity from suit and is subject to counter-claims for related matters when it initiates litigation. In this case, however, it joined litigation already initiated by a citizen. After outlining various, seemingly conflicting, holdings on the issue, the majority ruled that sovereign immunity did not protect the state from suit because of the "TCPA's unique role in protecting the democratic processes that allow our state to function."

The State was not acting "within sovereign immunity's bounds" because "the state should not be suing to prevent its own citizens from participating in government—especially when it lacks even a prima facie case…." Exposing the State to liability for attorney's fees and costs – as opposed to liability for damages – "does not present any grave danger to the public fisc." The majority also ruled the State waived its immunity from *liability* by failing to argue it. Accordingly, it remanded the case for proceedings to determine the amount of attorney's fees and costs that Harper should recover.

Justice Boyd dissented, joined by Justices Johnson and Lehrmann, asserting an elected official's refusal to fulfill the oath of office and advance the district's statutory objectives *is* a failure to discharge an official duty imposed by statute. According to the dissent, this failure is an exempt "enforcement" action whether the grounds asserted are for violation of a statute or incompetence. According to the dissent, Chapter 87 makes clear that its objective is to

compel enforcement of statutorily "official duties." The dissenters consider the majority's attempt to distinguish the intentional failure to perform based on the official's political agenda misreads and frustrates Chapter 87's objectives. They reason the alleged failure to fulfill an official duty is, *ipso facto*, a statutory violation of duties statutorily imposed. According to the dissent, whether the failure is the result of incompetence or misconduct, the action is one that seeks removal to enforce an official duty and, therefore, within the enforcement exception under the TCPA.

The dissent regards the majority's sovereign immunity analysis a "a radical departure from our immunity jurisprudence." They assert the counterclaim exception to immunity inapplicable because the State is not seeking monetary damages. The dissent charges, "The Court reveals its true motivation … by expressing its own view that the state 'should not be suing to prevent its own citizens from participating in government—especially when it lacks even a prima facie case against them.'"

It urges that erstwhile confusion about the scope of waiver of immunity from suit when the government seeks affirmative relief was resolved in *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 18 371, 376 (Tex. 2006). There, the Court held that immunity from suit does not apply to its opponent's counterclaims *if* (1) the government is seeking to recover "monetary relief," (2) the counterclaims are "germane to, connected with, and properly defensive to" the government's claims, and (3) any recovery on the counterclaims serves only to "offset" the monetary relief the government may recover. The dissent treats as unwarranted the inference the TCPA intended to create such an exception for costs and attorney's fees. According to the dissent, waiver of immunity from suit requires a more explicit legislative intent.

***Oil & Gas – Fixed v. Floating Royalty Interests*: When the Royalty Is Tied to a Floating Royalty, Additional Reference to a Fixed Royalty Only Described the Then-Existing Royalty.**

In *U.S. Shale Energy II, LLC v. LaBorde Properties, L.P.* , the grantors[4] reserved a non-participating royalty in the minerals to a tract of land as follows:

> There is reserved and excepted from this conveyance unto the grantors … an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals in and under or that may be produced or mined from the above described premises, the same being equal to one-sixteenth (1/16) of the production.

U.S. Shale and the grantor's heirs currently own the grantor's royalty interest under a lease giving them a 20% royalty. Laborde was successor in interest to the grantee. After acquiring that interest, Laborde received a division order that the lessee was entitled to ½ of the 20% royalty – i.e., 10% of total production. Laborde claimed the grantor was only entitled to a 1/16th fixed royalty under reservation quoted above. U. S. Shale urged that the royalty was "floating" – i.e., varied with the royalty under the lease in effect. Neither party asserted that the reservation was ambiguous.

The majority began its analysis by noting that a royalty may be created as either: 1) a *fixed*, constant fraction of total *production* or 2) a *floating* fraction of the total *royalty interest* that varies according to the royalty interest provided by the lease in effect.

The majority resolved the conflict by giving priority to the first clause reserving the "floating" royalty. The majority justified this choice because it was the more specific expression of the parties' intent to tie the royalty reserved to the royalty rate in any lease. They deem the fixed rate a mere description of the circumstance existing when the reservation clause was drafted. They also observed that a 1/8th royalty had been a *de facto* standard for so long that the parties simply assumed that it would be the applicable royalty in the future.

The opinion also relies on grammar to support its conclusion by pointing out that the comma preceding the "the same being equal to one-sixteenth (1/16) of the production" makes it a nonrestrictive dependent that adds nothing to the meaning of the remainder of the sentence. Stated more plainly, the antecedent for "the same being equal to one-

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[4] To avoid unnecessary complexity, "grantor" and "grantee" will be used to refer to the original parties and their successors in interest.

sixteenth (1/16) of the production" is the "undivided ½ interest" in the floating royalty reservation. Further, use of the present tense "being" necessarily refers to what that "undivided ½ interest" amounted to when the reservation was drafted.

Justice Boyd dissented in an opinion joined by Justices Johnson and Blacklock. It criticized the majority's interpretation because it rejects the majority's premise: that the floating royalty clause was intended to identify the reserved interest. The dissent discusses several decisions involving similar language to show that such provisions can describe either a fixed or floating royalty depending on context and other factors. In this regard, the dissent maintains the majority failed to consider the rest of the deed, by which it means failing to give due weight to the fixed royalty provision. The dissent likewise rejects the majority's grammatical argument as reading the floating royalty clause in isolation without giving due weight to the only clear manifestation of the grantor's intent that they were to receive a $1/16^{th}$ royalty interest.

***Family Law – Just and Right Division*: Awarding 100% of the Home to Wife Was No Abuse of Discretion As a Matter of Law When the Husband Used the Home to Sexually Assault Step-Daughters**

The 3-2-4 decision in *Bradshaw v. Bradshaw* may be the most fractious decision the Court has handed down recently. In this case, the wife was awarded 100% of a community property home as part of a "just and right" division of the community estate. Before the marriage termination and property division, the husband was convicted of sexually abusing one of his wife's teenage daughters for a prolonged period. There was testimony that the husband also abused two other stepdaughters. The abuse occurred at the community property home during the three-year marriage. The husband was convicted for continuous sexual abuse of one of the daughters and sentenced to 60 years in prison. His conviction and sentence were affirmed on appeal. The courts below ruled that there was no abuse of discretion in awarding a 20% interest in the home to the husband.

Chief Justice Hecht, joined by Justices Brown and Blacklock framed the issue as whether, *as a matter of law*, it was just and right to award the husband an interest in the home where he abused the wife's daughters. Acknowledging that it was not the purpose of the just and right division to punish the husband for fault in the breakup of the marriage, Chief Justice Hecht ruled that as a matter of law granting the husband an interest in the home he used to abuse his stepdaughters was not "just and right." Chief Justice Hecht's opinion recommended a remand to the trial court so that the division of the community estate could be reevaluated. Chief Justice Hecht explicitly limited the opinion "to narrow circumstances where the behavior involves the use of community property, is as egregious as Barney's, and results in a criminal conviction."

Justice Devine, joined by Justice Guzman, concurred with the decision to remand because they did not believe the record had sufficient information to equitably divide the marital estate. They reasoned that the trial court's discretionary division "is not grounded in the evidence but on our admonition that a fair-and-just division 'should not be a punishment.'" These judges deemed significant the husband's fault, the relative need for support, and the value of the wife's separate property that had been commingled into the marital estate. They also faulted a division based on, at best, very general testimony that the husband had worked on an addition to the house – testimony that did not describe precisely the amount or type of work performed.

Justice Boyd, joined by Justices Green, Johnson and Lehrmann dissented. They complained that the plurality ignored preservation of error to consider what was in effect a no-evidence argument presented by the wife. They dismiss the plurality's conclusion as "irrelevant" because the issue to be decided is whether the trial court abused its discretion in concluding that an 80-20 division was just and right. They reason that the supreme court cannot restrict the trial court's discretion by developing legal rules that retroactively make the trial court's decision out of bounds.

The dissenters also criticized the concurring analysis because their complaint is addressed to the lack of explanation, not lack of evidence. They consider it unfair to now treat the wife's complaint as one grounded in a lack of evidence when the wife had never complained the evidence was insufficient to support what the trial court did. They conclude, "In this Court, the controlling issue is whether the trial court abused its discretion, not whether Barney abused Amanda and her daughters. The trial court divided the interests as it deemed just and right, and we cannot legitimately conclude that it acted arbitrarily or violated guiding rules and principles."

Justice Lehrmann also dissented separately to reiterate that Texas precedent "does not impose any specific limits on

the size or percentage of a community property award" and to remind practitioners that none of the opinions are binding precedent in future cases.

***Family Law*: Alternative Request for a "Just and Right" Division of the Marital Estate Attempted to Rescind Triggered the Penalty Clause for Attempts to Invalidate a Pre-Marital Agreement.**

The premarital agreement at issue in *In re I.C. and Q.C.* provided, in addition to recovery of attorney's fees, a no-contest clause. It specified that if the wife "seeks to invalidate some or all of this Agreement, or seeks to recover property in a manner at variance with [it], [she] forfeit[s]" the $5 million cash payment payable if the couple divorced. When they did, the husband fell behind making the specified payments. Among other remedies, the wife asserted a counterclaim in the alternative seeking to rescind the agreement due to the husband's failure to perform and alleged fraud. She also moved for summary judgment on the ground that she should be permitted to treat the agreement as extinguished. The jury found that the wife violated the no-contest clause but that her breach was excused by the husband's prior breach.

The majority opinion by Justice Blacklock ruled that the wife's contentions, even though presented alternatively, sought a "just and right" division at variance with the agreed upon division. The majority refused to read into the no-contest clause a "just cause" exception. The trial court ruled that the husband's failure to pay was not a breach of the no-contest clause. Because the wife did not appeal that ruling, she had not just cause for seeking to invalidate the agreement. The majority pointed out that she could have sued to recover damages for breach, sued to enforce, or sought temporary orders. The Family Code provides that pre-marital agreements are unenforceable if unconscionable or entered involuntarily. The majority declined to judicially expand the permissible reasons for avoiding such agreements beyond those allowed by the Legislature.

The majority also invoked freedom of contract to justify its refusal to re-write the pre-marital agreement. It noted that equitable exceptions to enforcing as written otherwise valid contracts are disfavored. It did not deem its interpretation of the agreement a violation of the rule against construction in favor of forfeiture because the parties had explicitly agreed to a forfeiture. The wife had no unconditional right to the payment except by complying with the agreement as written.

Justice Lehrmann joined the majority opinion, but filed a separate concurrence to question the "extraneous matter" of whether Family Code §4.006 as strictly limited the bases for rescission as the majority opinion suggested. Justice Lehrmann posits, however, that even if an action to rescind had been permitted, it would have nonetheless triggered the no-contest clause.

***Family Law*: Texas Public Policy Prohibits Enforcement of a Spousal Support Provision Not Authorized by Texas Family Code Chapter 8 as a Judgment, Even If Rendered in Another Jurisdiction That Enforces Such Agreements as Judgments.**

Dalton v. Dalton questioned whether an agreed Oklahoma judgment for alimony by agreement incorporated by reference in a Texas divorce decree is enforceable as a judgment under Texas law. Traditionally, Texas public policy disallowed post-divorce alimony. The Legislature created a narrow exception by permitting limited spousal maintenance orders, Family Code chapter 8, and by contract enforcement of settlement agreements including spousal support. Family Code chapter 7. After the final judgment of divorce, the husband failed to fully perform the terms agreed to in the Oklahoma judgment and incorporated in the Texas decree.

Treating the agreement as part of the Texas judgment, the trial court issued an order to have the husband's employer withhold enough from his earnings to satisfy the spousal support agreement, and awarded the wife an additional portion of the husband's retirement accounts to make up for past short falls. Neither party claimed the agreement was enforceable as Chapter 8 spousal maintenance. Thus, it could not be enforced as a judgment. The majority rejected the argument that it could be enforced to the extent permitted under Chapter 8. To fall within the Chapter 8 exception, the support arrangement had to comply with Chapter 8's requirements from the beginning. It could not be brought into compliance with Chapter 8 by having a court enforce the agreement only to the extent allowed by statute.

Giving the Oklahoma order the necessary full faith and credit did not require Texas to apply Oklahoma law concerning its manner of enforcement. Texas law only permits such agreements to be enforced as a contract, not as a judgment. The order garnishing the husband's wages was a judgment enforcement mechanism. Thus, that order was void.

The order awarding the wife an additional portion of the husband's retirement accounts was likewise void. The wife argued that the federal ERISA statute authorized the reallocation. While that may be true, the majority acknowledged, it held it to be equally clear that "ERISA does not strip a state's power to determine how it will govern divorce and support issues in its borders." Garnishment is a judgment enforcement mechanism. Because Texas law proscribes the enforcement of support agreements as judgments, that remedy is not available to the wife and the trial court's order garnishing the husband's retirement was void. The majority suggested that this result was not limited to maintenance agreements, but would also apply to prevent such federally permitted modifications to be used as a means for enforcing child support or maintenance arrearages.

Justice Lehrmann concurred to point out her disagreement with this observation, but otherwise agreed with the majority's resolution of the issues presented.