By Stephen Gibson[1]

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***Finality of Judgments*: To be final, a judgment must either explicitly state that it is final. Otherwise, it must actually dispose of all claims between all parties and resort to the record is appropriate *only* if it does not explicitly state that it is final. In suits affecting parent-child relationships, a final order that does not explicitly state finality must at least address the statutorily-required issues.**

Seventeen years ago, *Lehmann v. Har-Con Corp*., 39 S.W.3d 191 (Tex. 2001), was decided in hopes of bringing some certainty to whether an order was a final, appealable judgment, which in turn started the countdown of the time allowed to amend the judgment and perfect appeal. *Lehmann* essentially held that if a judgment – rightly or wrongly – *said* it is final, it *is* final. Its rendition starts the clock on the limited time to perfect appeal from and change the substance of the intended judgment.

Evidence extrinsic to the judgment itself may be considered in ascertaining whether the judgment is final *only* when the judgment fails to say whether it is final. If it fails to do so, a court may consider other parts of the record to decide whether the judgment was intended to be final. To be final without an explicit declaration of finality, a judgment must clearly and unequivocally dispose – not just says it disposes – of all claims against all parties. A "Mother Hubbard" clause alone does not mean the judgment is final.

Under the Family Code, the time to appeal a final order in a suit affecting the parent-child relationship ("SAPCR") begins running out when the order is signed. The Family Code also requires such orders to include certain information, notices and warnings. *In re R.K.K.* present the issue of whether a memorandum on an order modifying a previous possession and support order was a final order that triggered appellate jurisdiction and perfection deadlines. The order contained a "Mother Hubbard" clause but did apparently did not explicitly state that it was the final order.

Other documents filed by the parties suggested that they did not consider this memorandum as *the* final possession and support order. Further, the parties themselves filed a letter agreement stating that the letter agreement was in anticipation of drafting a final order, for the entry of which the parents later moved. The trial court entered a modification order much lengthier and more detailed than the previous memorandum. The mother timely perfected her appeal from the later order, but not the earlier memorandum. On its own motion, the court of appeals later dismissed the appeal because it believed the time to perfect appeal was triggered by the earlier memorandum instead of the later, more comprehensive order.

Writing for a unanimous court, Justice Bland reinstated the appeal, explaining that there were two central reasons the memorandum was not a declaration that it was a "final order." First, it did not contain many of the statutory requirements of a final order affecting possession and support, including a clear disposition of possession of the child over various holidays. Second, it did not contain the usual "Mother Hubbard" language that it was intended to be a final order, that it disposes of all claims by all parties by denying all relief not granted, and that the order was appealable.

Thus, the court considered the record outside the initial memorandum itself – i.e., extrinsic evidence – and determined that the omissions from the one-page memorandum, including disposition of the child's possession over holidays, indicated that it was not intended as a final order. Indeed, the agreed supplementation of the memorandum to clarify their understanding explicitly stated it anticipated the later entry of a final order. Thus, the memorandum neither stated that it was final nor disposed of all the necessary claims and issues to actually be a final order. Therefore, the court of appeals could and should have considered this extrinsic evidence to decide whether the judgment was *actually* final. Because of the omissions necessary to actually constitute a final SAPCR order, the initial memorandum did not start the stopwatch on the time to perfect appeal. Only the later order was "final" for that purpose.

***Governmental Immunity from Suit*: A no-evidence motion for summary judgment is a proper procedural vehicle for asserting governmental immunity to defeat subject-matter jurisdiction.**

***Governmental Immunity from Suit*: The Texas Open Meetings Act only waives immunity only for writs of mandamus or injunction, not declaratory relief.**

***Trial by Consent*: A summary judgment is a "trial" so that unpleaded issues addressed in a summary judgment motion without objection are tried by consent.**

***Appellate Procedure*: A cross-petition for review is not required when a judgment is silent on an issue that is fairly raised by the principal petition for review.**

During executive session, Shady Shores' Town Council voted to terminate the Town's secretary. Swanson, the terminated secretary, claimed she was fired for refusal and reporting of a request to destroy a committee meeting record. Swanson asserted her termination violated *Sabine Pilot*'s prohibition against termination for refusing to perform an illegal act, the Whistleblower Act, and her constitutional free speech rights. She also sought declaratory relief that the alleged basis for her termination violated the Texas Open Meetings Act.

Interlocutory appeals are authorized for governmental immunity challenges to jurisdiction whether raised by jurisdictional plea or summary judgment motion.

The trial court granted the Town's jurisdictional plea as to the Whistleblower and *Sabine Pilot* claims but denied that governmental immunity warranted summary judgment disposing of Swanson's other claims. The Town pursued an interlocutory appeal under Texas Civil Practice & Remedies Code §51.014(a)(8) for denials of a governmental entity's immunity-based *plea to the jurisdiction*. Reiterating *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004), Justice Lehrmann ruled for a unanimous court in *Town of Shady Shores v. Swanson* this statute authorizes interlocutory review of the denial of a governmental entity's assertion of immunity, even if the immunity is asserted in the form of a summary judgment motion instead of a plea to the jurisdiction as anticipated in the interlocutory appeal statute. The statute's application turns on the substance of the issue, not the procedural vehicle.

Presentation of jurisdictional issue based on governmental immunity by summary judgment does not increase the nonmovant's burden to present evidence of a waiver of governmental immunity.

Swanson fared little better on her appeal's merits. As plaintiff, she bore the burden of establishing the government's waiver of immunity from suit. This included presenting the necessary evidence. The opinion disapproved the court of appeals' reasoning that a no-evidence summary judgment motion is an impermissible means of asserting immunity. The court of appeals reasoned that allowing immunity to be asserted by summary judgment motion abrogated the government's burden to negate jurisdictional facts as a prerequisite to the plaintiff's obligation to present evidence raising a jurisdictional fact issue. The supreme court reasoned that, in the case of a no-evidence motion, the non-movant enjoys the protection that no such motion may be presented until there has been an adequate time for discovery and that this protection alone is adequate.

> "Because jurisdiction may be challenged on evidentiary grounds and the burden to establish jurisdiction … is on the plaintiff, we see no reason to allow jurisdictional challenges via traditional motions for summary judgment but to foreclose such challenges via no-evidence motions."

Even when jurisdiction is "intertwined with the merits," the plaintiff must present sufficient evidence whether the jurisdictional issue is presented by no-evidence summary judgment motion or by jurisdictional plea. In the case of a no-evidence motion, there is no practical difference in the non-movant's burden. In both, the nonmovant need only adduce some evidence creating a fact issues.

The Texas Open Meetings Act does not waive governmental immunity from claims for declaratory relief.

Swanson included in her suit a request for declaratory relief concerning interpretation of the Texas Open Meetings Act. The Uniform Declaratory Judgment Act in chapter 37 of the Civil Practice & Remedies Code only waives governmental immunity for challenges to the *validity* of a statute or ordinance, not requests concerning its *interpretation*. Thus, the court turned to whether the Open Meetings Act itself waived governmental immunity. § 551.142 of that act authorizes "action[s] by mandamus or injunction to stop, prevent, or reverse [governmental]violation[s] or threatened violation[s]." Hewing to the precise text of § 551.14 and refusing to go beyond it, the court ruled that this waiver was not expansive enough to authorize declaratory relief. It supported this conclusion by examining statutory waivers in other Government Code provisions that expressly provide for or refer to actions for declaratory relief.

The opinion harmonized this decision with its March 2019 decision in *Hays Street Bridge Restoration Group v. City of San Antonio*. The specific waiver in *Hays Street* of immunity from suits for contractual *damages* involved was deemed broad enough to waive immunity when the relief sought was for specific performance instead. The difference between statutory waiver in *Hays Street* and the Open Meetings immunity waiver is that the former included a "general waiver of immunity" preceding the section that limited the damages recoverable. The Open Meetings Act contained no such broad general waiver. Thus, the scope of the waiver in *Hays Street* was governed by the general provision, not the limitation of damages contained in the later section.

The opinion also denied persuasive value to the supreme court's own opinions allowing declaratory relief under the Open Meetings Act. It explained that the immunity waiver issue was never raised in those cases and, therefore, were unpersuasive on an issue not addressed.

For purposes of the trial by consent doctrine, summary judgment is a "trial."

Swanson also addressed interesting, albeit obscure, procedural points. It ruled that the Open Meetings claim was pleaded sufficiently if it gave fair notice of the claim involved. The litigants clearly understood relief under the Open Meetings Act was at issue because they addressed it in their respective summary judgment filings and, by doing so, the Town tried the issue by consent.

A cross-petition for review is not required to challenge matters not included in the appellate court's judgment and fairly raised by the opponent's petition.

The second procedural issue concerned whether Swanson needed to cross-petition for review to challenge its observation that she did not plead a stand-alone claim under the Open Meetings Act. According to the opinion, the appellate court's judgment was silent about that particular *ruling*. Because Swanson was not attempting to overturn something that was part of the *judgment*, a cross-petition was unnecessary. Her complaint about that aspect of the reasoning of the court of appeals was presented among the issues raised by the Town's petition for review.

An editorial note about statutory construction and Legislative Counsel.

Swanson is the most recent poster child for the practical limitations about outmoded presumptions inherent in some principles of statutory interpretation. For example, here the court found it significant that the immunity waiver in the Open Meetings Act did not refer to declaratory relief when the waivers in other statutes included an explicit reference. A presumption of legislative awareness of these other statutes necessarily underlies such rulings. In a world of unlimited time and freely available resources, such a presumption is reasonable enough. However, as anyone familiar with any local newspaper or who passed a social studies course in school knows, the Texas Legislature does not operate in such an environment. Legislative language is frequently cobbled together at the last minute under the pressures created by the arcane limits on the legislative calendar which, in turn, places impossible demands on

Legislative Counsel to assure that the final work product is harmonious with all other statutes to effect the Legislature's true intent.

This writer questions the viability of the presumptions of legislative knowledge and the inferences from linguistic differences among statutes executed at disparate times and under vastly different circumstances. Such assumptions used to inform statutory construction should be challenged when they do not comport with the on-the-ground reality. That cannot exist until such time as the people decide to decompress the window for legislating and devote sufficient resources to the office of Legislative Counsel. Only then will the reality approximate the ideals that underlie many of the maxims of statutory construction.