TCMP — Texas Catholic Marriage Project

Cusack v Cusack and the Limits of No Fault Divorce

Statutory proof excluded rebuttal evidence and the unresolved constitutional question

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Consolidation of the October 14 discussions available for review.

Texas's abolition of recrimination does not answer every question about a respondent's ability to contest insupportability. The central question developed in today's discussions is whether a court may treat evidence as inadmissible merely because it reveals marital misconduct, even when the respondent identifies a separate, material purpose: contradicting testimony, demonstrating bias, or disputing the statutory conditions for dissolution.

TCMP's proposed position is that a no-fault ground must remain a ground proved under law. Removing a requirement to establish fault should not turn disputed assertions into unreviewable conclusions. That position must confront Cusack honestly, including the breadth of the evidentiary argument the court rejected.

The decision and the correction that governs this analysis

In Cusack v. Cusack, 491 S.W.2d 714 (Tex. Civ. App.—Corpus Christi 1973, writ dism'd), the husband sought divorce under former § 3.01. The wife alleged adultery and offered it both as a defense and to explain motive and allegedly false testimony. The court upheld exclusion. It treated insupportability as an independent ground and dissolution as mandatory once statutory conditions were proved.

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The husband supplied factual testimony; the wife and other witnesses contradicted him. A jury resolved credibility. The court reviewed sufficiency and used older definitions of insupportability. Accordingly, Cusack did not make a petition or the petitioner's testimony conclusive. Its mandatory language was conditional on proof. Its historical evidentiary standard must not be assumed to govern current proceedings. [1]

This correction matters. TCMP should challenge an identified rule or its extension, rather than attribute to the decision an automatic-divorce holding it did not make.

An abolished defense and a disputed fact are different questions

The proposed argument begins with a distinction between two uses of evidence.

A respondent who says, "The petitioner committed adultery, so divorce must be denied even if insupportability is established," invokes the substance of recrimination. A respondent who says, "This authenticated communication contradicts the petitioner's account of a material circumstance offered to establish insupportability," presents a different question.

The same document may have more than one possible use. Its admissibility should therefore depend on the proposition it tends to establish and the applicable evidentiary restrictions. A label such as "adultery evidence" does not complete that analysis.

But the distinction alone does not defeat Cusack. The wife there expressly raised motive and false-testimony purposes. It would be inaccurate to present those purposes as arguments the opinion never encountered. A current challenge must identify a more precise evidentiary connection, explain the present rules, and acknowledge any portion of Cusack's reasoning it asks the reviewing court to limit or reconsider.

TCMP's strongest formulation is therefore a proposed limitation: abolishing a substantive defense should not categorically exclude otherwise admissible evidence offered for a genuinely independent, material purpose. This is an argument requiring adjudication, not a statement that Cusack already adopted that limitation.

The statutory conditions must remain distinct

Section 6.001 connects insupportability to discord or personality conflict, destruction of legitimate marital ends, and prevention of any reasonable expectation of reconciliation. Its structure includes both alternatives and cumulative conditions. [2]

TCMP's interpretation should preserve those connections. "Discord or conflict" should not silently become a requirement to prove both. Conversely, the two consequences should not collapse into a single declaration that a spouse wants a divorce.

The statute does not expressly require misconduct by the respondent, a respondent-caused injury, or anticipated future harm. The absence of those requirements is relevant to TCMP's broader critique, but statutory interpretation cannot simply insert them. The immediate task is to insist on the conditions the Legislature did enact.

This also limits a causation argument based on an affair. Proof that the petitioner had another motive for leaving does not necessarily disprove discord or the consequences of discord. Motives and marital breakdown can coexist. A respondent must show why the particular evidence undermines a required condition or material testimony, rather than merely supplies a competing moral explanation.

How to present an independent evidentiary purpose

The practical presentation should move from the disputed testimony to the offered evidence and then to the statutory issue.

For example, assume a petitioner testifies that all communication concerning reconciliation ended before filing. A dated message proposing counseling might contradict that account. Its significance would depend on authenticity, timing, context, and whether subsequent events superseded it. It would not automatically prove that reconciliation remained reasonably possible at trial.

Similarly, evidence that a petitioner concealed a relationship may supply a motive to misdescribe events. Yet a concealed relationship does not establish that every assertion about the marriage is false. A general attack on moral character cannot replace a specific demonstration of bias or contradiction.

These are hypothetical illustrations. They are not descriptions of evidence verified in Wagner's case.

Texas Rules of Evidence 401 and 402 address relevance; Rule 403 permits specified balancing. Rule 613 concerns prior inconsistent statements and bias or interest, with applicable foundational requirements. Rule 608 limits the use of particular acts to attack character for truthfulness. Authentication, hearsay, and limited-use questions require separate attention. Rules 105 and 901 may therefore matter as much as the general claim of impeachment. [3]

The proposed approach is disciplined: identify the exact statement, explain the contradiction, establish admissibility, and request an appropriate limitation. Calling evidence "impeachment" does not confer automatic admission.

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The significance of may and the reliance on Stecklein

TCMP has questioned the move from permissive statutory wording to a mandatory consequence. That question should distinguish judicial discretion before proof from the legal consequence of established conditions.

A proposed textual objection can ask what authorizes treating permission as an obligation. An opposing argument can respond that statutory discretion does not necessarily allow denial after the legal ground is established. Neither argument should erase the prerequisite of proof.

Stecklein v. Stecklein, 466 S.W.2d 421 (Tex. Civ. App.—San Antonio 1971), supplies a narrower point than an automatic entitlement to judgment. It concerned whether a prior unsuccessful cruelty action barred litigation under the newly available insupportability ground. The court reversed the res judicata ruling and remanded for an opportunity to present evidence. It did not render a divorce upon a mere allegation. [4]

The appropriate criticism is that an authority recognizing an independent ground does not, without further reasoning, resolve every question about mandatory relief. That is more precise than asserting that the cited case had no relevance.

Judicial constructions exist their adequacy remains contestable

Today's vagueness discussion refined an essential distinction. It is unsustainable to say that § 6.001 has received no judicial construction. Courts have addressed its operation, evidence, reconciliation, and constitutional objections. The question is whether those constructions provide adequate substantive guidance for the particular uncertainty TCMP identifies.

The proposed challenge concerns the relationship among the terms. Which lawful marital purposes count? What distinguishes frustration from destruction? How does the required discord cause that destruction? What legal measure allows a respondent to test the petitioner's answer?

Those questions are not answered merely by showing that a witness is sincere. Credibility determines whether an account is believed. A legal standard determines what the believed account must establish.

Still, discretion and subjectivity are not inherently unconstitutional. Grayned v. City of Rockford, 408 U.S. 104, 108–12 (1972), permits reasonable flexibility and rejects a requirement of mathematical certainty. Hoffman Estates v. Flipside, 455 U.S. 489, 498–99 (1982), makes the context and nature of the enactment relevant to the required clarity. A divorce challenge must address its civil setting rather than assume the strictest criminal-law standard applies. [5–6]

TCMP therefore proposes a focused inquiry: after ordinary meaning, statutory context, and applicable constructions are considered, does the legal rule still leave the decisive boundary to insufficiently constrained personal judgment? That is an argument to establish through analysis and application; it is not an existing declaration of invalidity.

Contrary authority must be addressed

In re Nicklas, No. 12-23-00201-CV (Tex. App.—Tyler Sept. 20, 2023, orig. proceeding) (mem. op.), denied mandamus relief from partial summary judgment. The court treated the husband's belief in reconciliation as insufficient to create a dispute about the wife's contrary belief, which he acknowledged. The opinion also recognized the obligation to establish the statutory elements. [7]

TCMP cannot answer that reasoning merely by repeating that one spouse wants reconciliation. Its proposed response must distinguish evidence about personal beliefs from evidence disputing other required conditions. Whether that distinction changes an outcome depends on the record and governing authority.

Waite v. Waite, 64 S.W.3d 217 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), contains a plurality and separate writings addressing religious objections. Its opinions must be distinguished rather than combined into a fictional unanimous rationale. Justice Frost's dissent discusses the statutory conditions and religious purposes; disagreement in a dissent does not establish the court's holding. [8]

The historical reference to "Wellington (1971)" also requires correction before publication. The verified Wellington citation identified in Nicklas is In re Marriage of Wellington, No. 10-07-00181-CV, 2008 WL 3971763 (Tex. App.—Waco Aug. 27, 2008, no pet.) (mem. op.). This article does not attribute a holding to an unverified 1971 Texas Wellington decision. [7]

Precedential force must be identified accurately

Cusack is a Corpus Christi intermediate appellate decision, not a Texas Supreme Court opinion. It should not be described as automatically controlling every appellate district. At the same time, a litigant must examine whether the relevant appellate court has adopted its reasoning or whether another applicable authority supplies the rule.

The same discipline applies to Richards from Amarillo, Nicklas from Tyler, and the verified Wellington citation from Waco. Geographic origin alone does not answer the entire precedent question. The particular proposition, later adoption, superior authority, and procedural setting matter.

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For TCMP, the practical rule is to identify the deciding court and characterize a proposition as binding, persuasive, or proposed only after that inquiry. The research completed for this consolidation is not an exhaustive negative-treatment review.

The appellate issue developed today

The proposed evidentiary issue can be stated as follows:

Whether the trial court abused its discretion by excluding preserved documentary evidence or cross-examination on the ground that § 6.008 barred its use, when the respondent offered it for an independently admissible purpose of contradicting material testimony or disputing § 6.001's statutory conditions, and whether the exclusion probably caused an improper judgment.

This is a model issue. It becomes a case-specific argument only after the record establishes the offer, objection, ruling, admissible purpose, and harm.

A motion in limine alone ordinarily does not complete preservation. The record must disclose the excluded evidence, ordinarily through an offer of proof unless its substance is apparent, and the necessary ruling. Evidence Rule 103 and Appellate Rules 33.1 and 33.2 govern relevant preservation mechanisms. Appellate Rule 44.1 requires the applicable showing of reversible harm; Rule 44.1(b) addresses limits on partial retrial. [3, 9]

The harm analysis should explain what material assertion depended on the challenged testimony, what the excluded evidence would have changed, why admitted evidence did not supply the same information, and why the remaining proof does not make the error immaterial. Those are tasks for record analysis, not blanks that rhetoric can fill.

An evidentiary mistake also does not automatically establish structural error, voidness, or an available attack on a decades-old decree. Each such theory requires its own legal and procedural basis.

Marriage, religion, and children in TCMPs proposed approach

TCMP's child-centered position asks courts to examine the actual interests and burdens involved. Civil dissolution, parental decision-making, possession, support, and religious formation raise related but distinct questions. Establishing one divorce ground should not be treated as factual proof of every requested child-related restriction.

Likewise, the spouses' established religious purposes may be relevant facts without making canon law the governing civil rule. TCMP's argument should identify the specific state action and burden. Identifying a fundamental interest calls for examining the governing doctrine; it does not settle the level of scrutiny in advance.

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TCMP's approved proposed definition expresses its interpretive position:

"A marriage becomes insupportable when continuation of the marital relationship can no longer be supported or justified in relation to its established lawful purposes because discord between the spouses, or conflict of their personalities, has destroyed those purposes and prevents any reasonable expectation of reconciliation."

This is TCMP's formulation, not enacted language or a judicially adopted test. Its use of "supported or justified" should remain distinct from the older judicial synonyms recounted in Cusack.

The resulting position is concrete: require an ascertainable statutory standard, permit a meaningful contest under the evidence rules, and keep the proof of dissolution separate from the proof supporting particular parental orders. Cusack is an important authority to confront accurately. Its limits must be demonstrated through the statutory text, the particular evidentiary purpose, and the record.

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Authorities and editorial status

[1] Cusack v. Cusack, 491 S.W.2d 714 (https://openjurist.org/491/sw2d/714/cusack-v-cusack-1530740), especially 716–20.

[2] Tex. Fam. Code §§ 6.001, 6.008; § 6.001 reproduced in Nicklas (https://law.justia.com/cases/texas/twelfth-court-of-appeals/2023/12-23-00201-cv.html).

[3] Texas Rules of Evidence, current official compilation (https://www.txcourts.gov/media/1463074/texas-rules-of-evidence-updated-with-amendments-effective-07022026.pdf).

[4] Stecklein v. Stecklein, 466 S.W.2d 421 (https://openjurist.org/466/sw2d/421/stecklein-v-stecklein).

[5] Grayned v. City of Rockford, 408 U.S. 104 (https://supreme.justia.com/cases/federal/us/408/104/).

[6] Hoffman Estates v. Flipside, 455 U.S. 489 (https://supreme.justia.com/cases/federal/us/455/489/).

[7] In re Nicklas, No. 12-23-00201-CV (https://law.justia.com/cases/texas/twelfth-court-of-appeals/2023/12-23-00201-cv.html). Wellington is identified here through Nicklas; no independent full-opinion review of Wellington is claimed.

[8] Waite v. Waite, official panel opinions (https://www.txcourts.gov/All_Archived_Documents/14thCOA/Case/Opinions/112101/001330f.pdf).

[9] Texas Rules of Appellate Procedure, current official compilation (https://www.txcourts.gov/media/1463134/texas-rules-of-appellate-procedure-02062026.pdf).

This article consolidates the discussions retrieved for October 14 and the same-day vagueness memorandum. Retrieval did not certify access to every conversation verbatim. Case-specific exhibits, testimony, preservation, and appellate availability remain unverified. No completed comprehensive citator review is represented.

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