

No. 9284

IN THE MATTER OF
THE MARRIAGE OF

AVIAN ANN BIEDERMANN
AND
KENNETH KYLE BIEDERMANN

AND IN THE INTERESTS OF
KYLA RAE BIEDERMANN,
EMILY LAINE BIEDERMANN,
LOREN NOEL BIEDERMANN AND
DANA TRUE BIEDERMANN, MINOR
CHILDREN

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

GILLESPIE COUNTY, T E X A S

216TH JUDICIAL DISTRICT

Petitioner's Third Amended Petition for Divorce

Discovery Level

Discovery in this case is intended to be conducted under Level 2 of Rule 190 of the Texas Rules of Civil Procedure.

Parties

This suit is brought by Avian Anne Biedermann, Petitioner, who is forty (40) years of age and resides at 110 W. Hackberry St., Fredericksburg, Texas and against Kenneth Kyle Biedermann, Respondent, is forty-one (41) years of age and resides at 110 W. Hackberry St., Fredericksburg, Texas and also against BL & H, Inc. d/b/a Biedermann's Ace Hardware. Co-Respondent is a corporation organized under the laws of the State of Texas.

Domicile

Petitioner has been a domiciliary of Texas for the preceding six-month period and a resident of this county for the preceding ninety-day period.

Service

No service is necessary on Kenneth Kyle Biedermann as he has appeared and answered suit.

FILED
At 12:11 O'clock P.M.

No service is necessary on B L & H, Inc. d/b/a Biedermann's Ace Hardware, Co-Respondent, as it has appeared and answered suit.

Protective Order Statement

No protective order under Title 4 of the Texas Family Code is in effect, and no application for a protective order is pending with regard to the parties to this suit.

Dates of Marriage and Separation

The parties were married on or about April 22, 1989 and have ceased to live together as husband and wife.

Grounds for Divorce

The marriage has become insupportable because of discord or conflict of personalities between Petitioner and Respondent that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

Respondent is guilty of cruel treatment toward Petitioner of a nature that renders further living together insupportable.

Children of the Marriage

Petitioner and Respondent are parents of the following children of this marriage who are not under the continuing jurisdiction of any other court:

Name: Kyla Rae Biedermann
Sex: Female
Birthplace: Fredericksburg, Texas
Birth date: January 26, 1992
Present address: 110 W. Hackberry St., Fredericksburg, Texas

Name: Emily Laine Biedermann
Sex: Female
Birthplace: Fredericksburg, Texas
Birth date: July 15, 1993
Present address: 110 W. Hackberry St., Fredericksburg, Texas

Name: Loren Noel Biedermann
Sex: Female
Birthplace: Fredericksburg, Texas
Birth date: December 20, 1994
Present address: 110 W. Hackberry St., Fredericksburg, Texas

Name: Dana True Biedermann
Sex: Female
Birthplace: Fredericksburg, Texas
Birth date: March 22, 1996
Present address: 110 W. Hackberry St., Fredericksburg, Texas

There are no court-ordered conservatorships, court-ordered guardianships, or other court-ordered relationships affecting the children the subject of this suit.

Information required by Section 152.09 of the Texas Family Code has been provided attached to Petitioner's Original Petition for Divorce.

No property of consequence is owned or possessed by the children the subject of this suit.

Petitioner believes that Petitioner and Respondent will enter into a written agreement containing provisions for conservatorship and support of the children. If such an agreement is not made, Petitioner requests the Court to make orders for conservatorship and support of the children.

The appointment of Petitioner and Respondent as joint managing conservators would not be in the best interest of the children. Petitioner, on final hearing, should be appointed sole managing conservator, with all the rights and duties of a parent sole managing conservator, and Respondent should be ordered to make payments for the support of the children in the manner specified by the Court. Petitioner requests that the payments for the support of the children survive the death of Respondent and become the obligation of Respondent's estate.

In the alternative, Petitioner and Respondent, on final hearing, should be appointed joint managing conservators, with all the rights and duties of parent conservators with the following provisions:

Petitioner would be designated as the conservator who has the exclusive right to make decisions concerning the children's education; and the exclusive right to consent to medical, dental, and surgical treatment involving invasive procedures and to consent to psychiatric and psychological treatment of the children.

Petitioner should be designated as the conservator who has the exclusive right to determine the primary residence of the children. Respondent should be ordered to make payments for the support of the children in the manner specified by the Court. Petitioner requests that the payments for the support of the children survive the death of Respondent and become the obligation of the Respondent's estate.

The residence of the children should be restricted to Gillespie County and any county contiguous to it.

Repairs to the House at 110 Hackberry as Child Support

As child support, Petitioner requests the Court to order Respondent to finish the repairs to the family home at 110 Hackberry in Fredericksburg, Texas. Respondent began repairing the home prior to this divorce suit. Respondent failed to finish the repairs he began and has subsequently created a dangerous environment for the children, the subject of this suit. Petitioner requests the Court to order Respondent to finish the repairs prior to the final deposition of the case as child support.

Petitioner asks the Court to take judicial notice of the dangerous condition the house at 110 Hackberry presents to the children, the subject of this suit. Petitioner requests the Court to order Respondent to repair the home for the protection and support of the children, providing the children with the appropriate standard of living accommodations.

Division of Community Property

Petitioner believes Petitioner and Respondent will enter into an agreement for the division of their estate. If such an agreement is made, Petitioner requests the Court to approve the agreement and divide their estate in a manner consistent with the agreement. If such an agreement is not made, Petitioner requests the Court to divide their estate in a manner that the Court deems just and right, as provided by law.

Petitioner should be awarded a disproportionate share of the parties' estate for the following reasons, including but not limited to:

- a. fault in the breakup of the marriage;
- b. fraud on the community;
- c. benefits the innocent spouse may have derived from the continuation of the marriage;
- d. disparity of earning power of the spouses and their ability to support themselves;
- e. the spouse to whom conservatorship of the children is granted;
- f. needs of the children of the marriage;
- g. education and future employability of the spouses;

- h. tax consequences of the division of property;
- i. earning power, business opportunities, capacities, and abilities of the spouses;
- j. need for future support;
- k. nature of the property involved in the division;
- l. increase in value of separate property through community efforts by time, talent, labor, and effort;
- m. reimbursement;
- n. expected inheritance of a spouse;
- o. attorney's fees to be paid;
- p. the size and nature of the separate estates of the spouses;
- q. actual fraud committed by a spouse, individually or in concert with relatives;
- r. constructive fraud committed by a spouse.

Separate Property

Petitioner owns certain separate personal property that is not part of the community estate of the parties, and Petitioner requests the Court to confirm that separate property as Petitioner's separate property and estate.

Reimbursement

Petitioner requests the Court to reimburse the community estate for funds or assets expended by the community estate to benefit or enhance Respondent's separate estate. The community estate has not been adequately compensated for or benefitted from the expenditure of those funds or assets, and a failure by the Court to allow reimbursement to the community estate will result in an unjust enrichment of Respondent's separate estate at the expense of the community estate.

Petitioner requests the Court to reimburse the community estate for the value of community time, talent, toil, and effort expended by Respondent to benefit or enhance Respondent's separate estate. The use by Respondent of community time, talent, toil, and effort was beyond what was reasonably necessary to maintain, manage, and preserve

Respondent's separate estate, and for which the community estate was not adequately compensated. As a result, the failure to allow reimbursement to the community estate will result in the unjust enrichment of Respondent's separate estate.

Economic Contribution

Petitioner requests the Court to award to the community estate an equitable lien on property to secure a claim for economic contribution against the value of Respondent's separate property for financial contribution expended by the community estate to benefit or enhance that separate estate.

Petitioner requests the Court to award to Petitioner's separate estate an equitable lien on property to secure a claim for economic contribution against the value of the community property due to the financial contribution expended by Petitioner's separate estate to benefit or enhance the community estate.

Petitioner requests the Court to award to Petitioner's separate estate an equitable lien on property to secure a claim for economic contribution against the value of Respondent's separate property due to the financial contribution expended by Petitioner's separate estate to benefit or enhance Respondent's separate estate.

Petitioner requests the Court to award to the community estate an equitable lien on property to secure a claim for economic contribution against the value of Respondent's separate property as a result of the use of community property to discharge all or part of a debt on separate property owned by Respondent.

Petitioner requests the Court to award to Petitioner's separate estate an equitable lien on property to secure a claim for economic contribution against the value of the community property to discharge all or part of a debt on property owned by the community.

Petitioner requests the Court to award to Petitioner's separate estate an equitable lien on property to secure a claim for economic contribution against the value of Respondent's separate property as a result of the use of Petitioner's separate property to discharge all or part of a debt on separate property owned by Respondent.

Request for Receiver and Declare Note a Nullity

Petitioner owns an interest in B L & H, Inc., doing business as "Biedermann's Ace Hardware" in Fredericksburg, Texas. Petitioner believes and alleges that Respondent, who also owns an interest in B L & H, Inc., has, over time since 1994, caused or allowed the gross receipts of the business to decline during the most serious period of domestic unrest between Petitioner and Respondent. Only after this issue was raised did the receipts increase. Petitioner will not realize the maximum value of her interest in the business

unless a Receiver is appointed to take control of the business and either bring in new management or rehabilitate the business to its optimum condition and sell it to a bona fide purchaser for value in an arms length transaction.

Additionally, Petitioner and Respondent executed a community property promissory note to Respondent's parents. For purposes of putting a value on the business, Petitioner requests this Court to place a \$0 value on the note as the parents have previously indicated a willingness to forgive the note.

Request for Permanent Injunction

Petitioner requests the Court, after trial on the merits, to grant the following permanent injunctions:

1. Communicating with the other party in person, by telephone, or in writing in vulgar, profane, obscene, or indecent language or in a coarse or offensive manner.
2. Threatening the other party or a family member of either party in person, by telephone, or in writing to take unlawful action against any person.
3. Placing one or more telephone calls, anonymously, at any unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication.
4. Causing bodily injury to the other party or to a family member of either party.
5. Threatening the other party or a family member of either party with imminent bodily injury.
6. Destroying, removing, concealing, encumbering, transferring, or otherwise harming or reducing the value of the property of the other party.
7. Engaging in conduct designed to alienate the children against the other parent or the other parent's family members.
8. Discussing this divorce case, the outcome of this case, or any related issue, including any settlement agreement or future litigation of related issues, with the children except to explain any changes affecting the time they spend with each parent.
9. Discussing this divorce case, the outcome of this case, or any related issue, including any settlement agreement or future litigation of related issues

within the children's spheres of awareness, or allowing the children to remain in the presence of anyone doing the same.

10. Discussing any issue related to the scheduling of possession periods, including any agreement or conflict between the parents with the children or within the children's spheres of awareness, or allowing the children to remain in the presence of anyone doing the same.
11. Discussing financial matters as they pertain to the children, including but not limited to child support issues, and any agreement or conflict between the parents with the children or within the children's spheres of awareness, or allowing the children to remain in the presence of anyone doing the same.

Attorney's Fees and Expenses

It was necessary for Petitioner to secure the services of John Nichols and Pamela K. Bergman, licensed attorneys, to prepare and prosecute this suit. To effect an equitable division of the estate of the parties and as a part of the division, and for services rendered in connection with conservatorship and support of the children, judgment for attorneys' fees and expenses through trial and appeal should be granted against Respondent and in favor of Petitioner for the use and benefit of Petitioner's attorneys; or, in the alternative, Petitioner requests that reasonable attorney's fees and expenses through trial and appeal be taxed as costs and be ordered paid directly to Petitioner's attorneys, who may enforce the order for fees in the attorneys' own name.

Statement on Alternative Dispute Resolution

Petitioner has signed a statement on alternative dispute resolution, has previously been filed and was attached as Exhibit 1 to Petitioner's Original Petition.

Additional Causes of Action

Petitioner alleges additional causes of action against Respondent as follows:

A. Causes of Action for Assault

1. Cause of Action for Intentional, Knowing, or Reckless Bodily Injury
 - On or about February 20, 2001, in Gillespie County, Texas, Respondent intentionally and knowingly or recklessly caused bodily injury to Petitioner by slamming her arm in the front door of the marital residence and thereafter forcefully pushing her away from the same door in an attempt to hold Petitioner in the house against her will.

- On or about February 21, 2001, in Gillespie County, Texas, Respondent intentionally and knowingly or recklessly caused bodily injury to Petitioner by forcefully pushing her into a bathroom in the marital residence, hitting her body with the door and thereafter wedging his foot in the door to keep her from closing the door to get away from him.

2. Cause of Action for Threat of Imminent Bodily Injury

- On or about November 23, 2000, in Gillespie County, Texas, Respondent threatened to cause bodily injury to Petitioner by forcefully throwing a large boot directly at her while screaming, "I can't believe you are so fucking stupid."
- On or about February 20, 2001, in Gillespie County, Texas, Respondent intentionally and knowingly threatened Petitioner with bodily injury by holding her in the home against her will while screaming, "You will stay here and talk to me or else."
- On or about February 21, 2001, Respondent intentionally and knowingly threatened Petitioner with bodily injury by holding her in a room against her will forcing her to experience his temper tantrum and listen to his threats against her.

3. Cause of Action for Offensive or Provocative Physical Contact

- On or about February 20, 2001, in Gillespie County, Texas, Respondent intentionally or knowingly caused physical contact with Petitioner by forcefully pushing her and physically detaining her when Respondent knew or should have reasonably believed that Petitioner would regard such contact as offensive or provocative.
- On or about February 21, 2001, in Gillespie County, Texas, Respondent intentionally and knowingly cause physical contact with Petitioner by forcefully pushing her and physically detaining her when Respondent knew or should have reasonably believed that Petitioner would regard such contact as offensive or provocative.

B. *Cause of Action for Intentional Infliction of Emotional Distress*

In Gillespie County, Texas, in the presence of the parties' four daughters and in public, Respondent has intentionally or recklessly engaged in a pattern of extreme

and outrageous behavior that has caused Petitioner emotional distress and humiliation by repeatedly and continually:

1. Becoming enraged and screaming profanity at Petitioner;
2. Calling Petitioner vile, demeaning and degrading names;
3. Attacking Petitioner's credibility and cursing Petitioner;
4. Demeaning and ridiculing Petitioner's mother and grandmother telling the children they are "white trash;"
5. Criticizing and undermining Petitioner's parental authority;
6. Alienating and brainwashing the children with cruel or untrue statements about Petitioner;
7. Taunting Petitioner that police or legal authorities will not stand in the way or protect her from his conduct.
8. Soliciting the active participation of his family members to alienate the children from Petitioner;
9. Threatening to take Petitioner's children, business, home and vehicle from her unless she remains married to him;
10. Holding Petitioner against her will forcing her to experience his ranting and threats;
11. Forcefully preventing Petitioner from meeting clients in a timely manner, thereby threatening her business and reputation.

C. *Actual Damages for Resulting Personal Injuries (on A & B above).*

As a direct and proximate result of Respondent's wrongful conduct alleged above, Petitioner has suffered certain damages including:

1. Reasonable and necessary medical expenses in the past;
2. Reasonable and necessary medical expenses that in reasonable probability will be incurred in the future;
3. Loss of earnings in the past;

4. Physical pain, suffering, and mental anguish in the past.

Petitioner additionally brings this suit for these damages, which exceed the minimum judicial limits of this Court.

D. *Exemplary Damages (on A & B above).*

The conduct committed by Respondent against Petitioner is the type of conduct evidencing actual malice on Respondent's part that allows the imposition of exemplary damages. Petitioner additionally brings this suit for these damages, which exceeds the minimal jurisdictional limits of this Court.

E. *Cause of Action Alleging Third-Party Corporation to Be Alter Ego of Respondent.*

Petitioner will show that the identity of the corporation and the individual Respondent are in substance one and the same. Co-Respondent corporation is only the alter ego of the individual Respondent, acting solely as a conduit for the performance of the individual Respondent's business through mismanagement of corporate finances and payment of personal expenses with corporate funds, personal use of company automobiles, domination of board of directors by family members, and failure to maintain corporate records or file corporate returns.

F. *Causes of Action For Fraud And Conspiracy.*

Respondent and Respondent's parent, Kenneth P. Biedermann, defrauded Petitioner by conspiring and concocting a story that B. L. & H., Inc. was gifted to Kenneth Kyle Biedermann by his father Kenneth P. Biedermann, partially in 1993 and partially in 1994. This "partial gifting," (it was stated) by Kenneth P. Biedermann, was to avoid gift taxes to Kenneth P. Biedermann since B. L. & H. Inc. had a fair market value that exceeded the \$20,000.00 annual gift tax exclusion (\$10,000.00 from [father] Kenneth P. Biedermann and \$10,000.00 from [mother] Kathryn E. Biedermann). Kenneth P. Biedermann testified to this under oath and that the tax returns would bear this out. What the tax returns for B. L. & H., Inc. actually show is that Kenneth P. Biedermann was 100% owner of B. L. & H., Inc. for 1993 and only a partial [various] per cent owner in 1994, during which time (May 5, 1994) the transfer of ownership to the community estate took place. This story was concocted by Kenneth Kyle Biedermann and Kenneth P. Biedermann to cover the fact that no gift tax returns were filed by Kenneth P. Biedermann in 1993 or 1994; on a supposed gift that, by Kenneth P. Biedermann's admissions under oath, exceeded the annual gift tax exclusion; and thereby triggered a tax to Kenneth P. Biedermann and Kathryn E. Biedermann. One may not affirmatively use their fraud as a basis for asserting or alleging ownership in property, separate or community.

This fraud vitiates all transactions connected to or with it. This fraud is actual, and individual to Avian Ann Biedermann for which she seeks a money judgment for mental anguish and attorneys' expenses against Kenneth Kyle Biedermann and Kenneth P. Biedermann, their conduct produced or proximately caused Avian Ann Biedermann.

Prayer

Petitioner prays that citation and notice issue as required by law and that the Court grant a divorce and all other relief requested in this petition.

Petitioner prays for judgment against Co-Respondent finding Co-Respondent corporation to be the alter ego of Respondent. Petitioner prays that on a finding of alter ego the Court divide the "corporate" assets as the Court deems just and right.

Petitioner prays for judgment against Respondent in a sum within the jurisdictional limits of this Court for her actual damages as alleged, for exemplary damages, for prejudgment and postjudgment interest as allowed by law, for costs of court, and for general relief.

Petitioner prays that the court disregard the corporate veil as to B.L. & H., Inc. d/b/a Biedermann's Ace Hardware and order this business sold or order its assets sold under a court appointed receivership.

Petitioner prays that, on final hearing, the Court enter a permanent injunction enjoining Respondent, in conformity with the allegations of this petition, from the acts set forth above.

Petitioner prays for a tort judgment with pre and post judgment interest against Respondent.

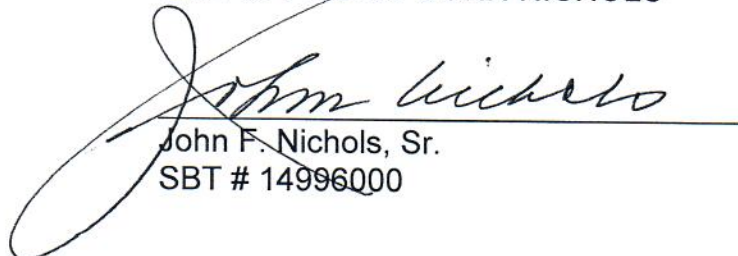
Petitioner prays for the appointment of a Receiver and that the Court declare the note referred to herein a nullity.

Petitioner prays for attorney's fees, expenses, and costs as requested above.

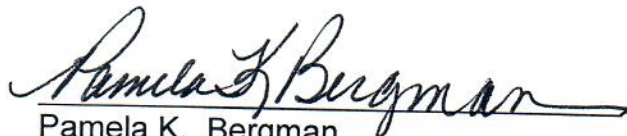
Petitioner prays for general relief.

Respectfully submitted,

LAW OFFICE OF JOHN NICHOLS



John F. Nichols, Sr.
SBT # 14996000



Pamela K. Bergman

SBT #00795804

1301 McKinney, Suite 3636

Houston, Texas 77010

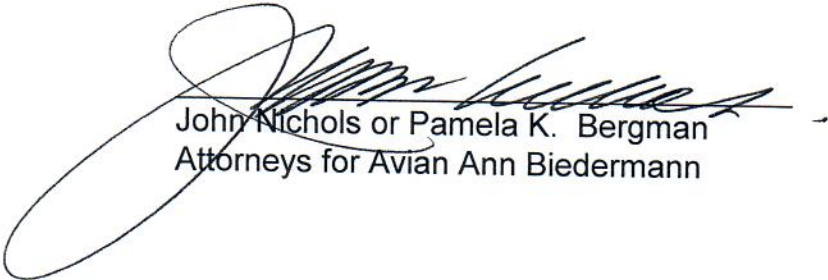
713/654-0708

713/654-0706 FAX

Attorneys for Avian Ann Biedermann

Certificate of Service

I certify that a true copy of the above was served on each attorney or party in accordance with the Texas Rules of Civil Procedure on this the 20 day of November, 2001.



John Nichols or Pamela K. Bergman
Attorneys for Avian Ann Biedermann

BARBARA MEYER
DISTRICT CLERK
JULIESIE CORNELL, TEXAS

0:clock

Chevron Tower
1301 MCKINNEY STREET SUITE 3636
HOUSTON TEXAS 77010
Telephone: (713) 654-0708
Fax: (713) 654-0706

JOHN NICHOLS,

Board Certified-Texas Board of Legal Specialization:
Personal Injury - Civil Trial-Family Law -
National Board of Trial Advocacy-Civil Trial

Writer's Direct Dial:
(713) 654-0708 Ext. 112

December 6, 2001

Mrs. Barbara Meyer
District Clerk
Gillespie County Courthouse
101 W. Main St., Room 204
Fredericksburg, TX 78624-3700

CMRRR 7000 1940 0003 4532 6098

Re: Cause No. 9284; *In The Matter of the Marriage of Avian Ann Biedermann, and in the Interests of Kyle Rae Biedermann, Emily Laine Biedermann, Loren Noel Biedermann and Dana True Biedermann, Minor Children*, In the 216th Judicial District of Gillespie County, Texas

Dear Mrs. Meyer:

Please take the indicated action: **1. Notice of Misnomer**

- (X) File among papers in the above cause.
- (X) File stamp the enclosed copy of same and return to the undersigned in the self-addressed, stamped envelope and/or via our messenger.
- () A filing fee is enclosed in the amount of \$_____.
- () Present to Judge for signature and/or hearing date.
- () Demand for jury.
- (X) By copy hereof, those persons whose names appear below are being notified of this filing.

Very truly yours,


John Nichols
For the Firm

JN:sf

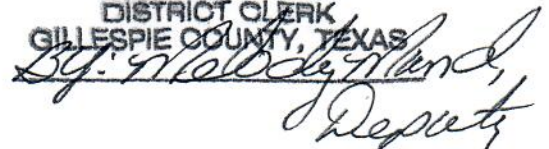
Enclosure

cc. w/encls.: Avian Ann Biedermann
 Scott Monroe
 Kurtis Rudkin

FILED
At 12:57 O'clock P.M

DEC 10 2001

BARBARA MEYER
DISTRICT CLERK
GILLESPIE COUNTY, TEXAS


Deputy

CMRRR 7001 1940 0003 4532 6104
CMRRR 7000 1940 0003 4532 6111

No. 9284

IN THE MATTER OF
THE MARRIAGE OF

AVIAN ANN BIEDERMANN
AND
KENNETH KYLE BIEDERMANN

AND IN THE INTERESTS OF
KYLA RAE BIEDERMANN,
EMILY LAINE BIEDERMANN,
LOREN NOEL BIEDERMANN AND
DANA TRUE BIEDERMANN, MINOR
CHILDREN

§
§
§
§
§
§
§
§
§
§
§

IN THE DISTRICT COURT OF

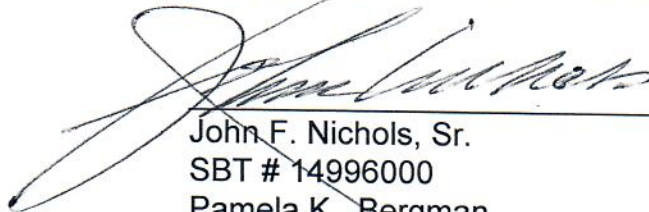
GILLESPIE COUNTY, T E X A S

216TH JUDICIAL DISTRICT

Notice of Misnomer

Notice is hereby given to the Court, that on November 26, 2001, Petitioner filed with this Court a document entitled, "Petitioner's Third Amended Petition for Divorce". Petitioner's document was improperly entitled and should be corrected to reflect the proper heading, which is "Petitioner's Second Amended Petition for Divorce".

LAW OFFICE OF JOHN NICHOLS



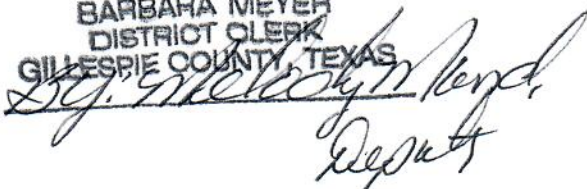
John F. Nichols, Sr.
SBT # 14996000
Pamela K. Bergman
SBT #00795804
1301 McKinney, Suite 3636
Houston, Texas 77010
713/654-0708
713/654-0706 FAX

Attorneys for Avian Ann Biedermann

FILED
At 12:58 O'clock P.M.

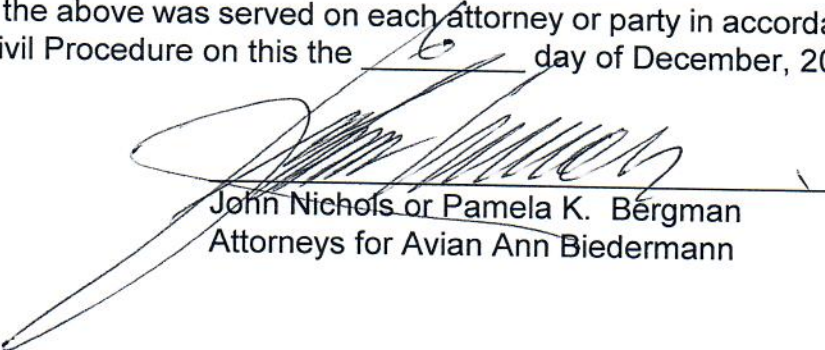
DEC 10 2001

BARBARA MEYER
DISTRICT CLERK
GILLESPIE COUNTY, TEXAS



Certificate of Service

I certify that a true copy of the above was served on each attorney or party in accordance with the Texas Rules of Civil Procedure on this the 6 day of December, 2001.



John Nichols or Pamela K. Bergman
Attorneys for Avian Ann Biedermann

DAVID M. WEYER
DISTRICT CLERK
TARRANT COUNTY, TEXAS