

**UNDERSTANDING
CONSERVATORSHIP, CHILD-
POSSESSION, AND ACCESS ISSUES
IN THE STATE OF TEXAS**

Presented by:

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Honors and Activities:

Baylor Law Review, Notes and Comments Editor

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Baylor Outstanding Law Student, Spring 1990

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Matt Dawson Trial Advocacy Award

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American Jurisprudence Awards for Highest Grade in:

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Torts

Remedies

Criminal Procedure

Business Torts and Intellectual Property

Sales and Consumer Protection

Professional Responsibility

Legal Methods II

Edwin P. Horner Oil and Gas Award

Bankston, Wright and Greenhill Torts Award

John R. Wilson Remedies Award

President, Freshman Class

ABA National Appellate Advocacy Team, 1989

ABA National Appellate Advocacy Team, 1990

Best Brief - John W. Joyce Moot Court Award

Best 1st Year Team - Godwin Carlton and Maxwell Moot Court Award

Semi-Finalist, 1988 Moot Court Competition

U.S. Law Week Award
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Radford Scholar
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MILITARY JUSTICE LEGAL OFFICER'S COURSE

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BAYLOR UNIVERSITY

Degree: Bachelor of Business Administration, 1983
Major: Computer Information Systems/Management

PINE VIEW SCHOOL

With Honors — July, 1979

AMERICAN BLACK BELT ACADEMY

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EXPERIENCE

WORK EXPERIENCE

BEAL LAW FIRM -- 1992-Present
Civil Litigation - Family Law

Baron & Budd, P.C. -- Dallas, Texas, 1991-1992
Civil Litigation

Johnson & Gibbs, P.C. -- Dallas, Texas, 1990-1991
Commercial Litigation

United States Marine Corps -- 1983-1987
Rank: Captain
Legal Officer, Artillery Officer, Platoon Commander
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TEACHING EXPERIENCE

Dallas Baptist University -- Dallas, Texas 1993-2003

Business and Public Law -- Undergraduate Level

Business and Public Law -- Graduate Level

Employment Discrimination -- Graduate Level

Negotiations in Management -- Undergraduate Level

Introduction to Macroeconomics -- Undergraduate Level

Keller Graduate School -- Dallas, Texas 2001

Legal, Political and Ethical Dimensions of Business -- Graduate Level

Southeastern Paralegal Institute -- Dallas, Texas 1993

Family Law

Legal Writing

American Black Belt Academy -- Arlington, Texas, 1996-

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MEMBERSHIPS

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Military Law Section of the State Bar of Texas

Collaborative Section of the State Bar of Texas

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PUBLICATIONS

The Availability of Intentional Infliction of Emotional Distress Claims in an Alienation Setting, The College Bulletin - Spring 2008, College of the State Bar of Texas

Intentional Infliction Claims When Affections Have Been Alienated, State Bar of Texas, Family Law Section Report - Volume 2008-2 (Summer)

The Practitioner's Guide to Dealing with the Pre-Marital Agreement Client, State Bar of Texas, Family Law Section Report - Volume 2009-5 (Fall)

Strategies for Family Law in Texas, Co-Author, Thomson Reuters/Aspatore Books 2010, ISBN 978-0-314-27091-7

Getting a Divorce Case Off on the Right Foot: A Beginners Guide to Beginning a Divorce, National Business Institute Continuing Legal Education, December 2010

Controlling Client Relations and Recognizing Dishonesty, National Business Institute Continuing Legal Education, December 2010

When Withdrawal of Counsel is Appropriate, National Business Institute Continuing Legal Education, December 2010

The End of a Marriage: Marriage Dissolution - Process and Procedure, National Business Institute Continuing Legal Education, October 2011

Family Law Ethics A-Z, National Business Institute Continuing Legal Education, October 2011

Exploring Custody, Visitation and Support Issues, National Business Institute Continuing Legal Education, May 2012

Ethical Perils in Divorce Cases, National Business Institute Continuing Legal Education, May 2012

Strategies for Military Family Law: Leading Lawyers on Navigating Family Law in the Armed Forces, Co-Author, Thomson Reuters/Aspatore Books 2012, ISBN 978-0-314-28580-5

"Family Law: How to Have a Successful Initial Consultation," Texas Divorce and Family Law, Foxmoor Continuing Education, May 2013

"Family Law Ethics," Texas Divorce and Family Law, Foxmoor Continuing Education, May 2013

"Who Gets the Golf Clubs? Five things you need to know about community property," Avid Golfer Magazine, April 2014

"Is it Cheaper to Keep Her? The truth about alimony in the State of Texas," Avid Golfer Magazine, May 2014

"The Custody Conundrum: Understanding the six major components of a custody case," Avid Golfer Magazine, June 2014

"The Pre-Marriage Life Preserver: Signing a prenuptial agreement before you get married can mean a world of difference in the event of divorce," Avid Golfer Magazine, July 2014

"The Life Preserver You Don't Want to Forget (Part 2 of 2)," Avid Golfer Magazine, August 2014

"Child Support: And you thought taxes were fun!" Avid Golfer Magazine, September 2014

"You've been served. What do you do now?" Avid Golfer Magazine, October 2014

SPEAKING ENGAGEMENTS

"Getting a Divorce Case Off on the Right Foot," Handling Divorce Cases from Start to Finish, National Business Institute Continuing Legal Education, December 2010

"Ethical Perils in Divorce Practice," Handling Divorce Cases from Start to Finish, National Business Institute Continuing Legal Education, December 2010

"Marriage Dissolution - Process and Procedure," Family Law from A to Z, National Business Institute Continuing Legal Education, October 2011

"Ethics," Family Law from A to Z, National Business Institute Continuing Legal Education, October 2011

"Exploring Custody, Visitation and Support Issues," Handling Divorce Cases from Start to Finish, National Business Institute Continuing Legal Education, May 2012

"Ethical Perils in Divorce Practice," Handling Divorce Cases from Start to Finish, National Business Institute Continuing Legal Education, May 2012

"Initial Client Relations," TCFLBA 3rd Annual CLE Family Law in Review: More Things You Need to Know, November 2013

REPORTED CASES

Bekins Moving & Storage Company v. Jean Williams, 947 S.W.2d 568 (Tex. App. Texarkana, 1997)

Thomas Carter, et al v. State Farm Mutual Automobile Insurance Company, 33 S.W.3d 369, (Tex. App. Fort Worth, 2000)

Daniel Blumberg and Daniel Blumberg and Associates v. David Bergh, 2005 Tex. App. LEXIS 3459 (Fort Worth, 2005)

In Re: Estate of Leslie Wayne Wilson, Deceased, 252 S.W.3d 708 (Tex. App. Texarkana, 2008)

In Re: Cindy Lynn Rhodes, Relator, 293 S.W.3d 342 (Tex. App. Fort Worth, 2009)

In Re: Cindy Lynn Rhodes, Relator, 2010 Tex. App. LEXIS 305 (Fort Worth, 2010)

In re Richardson, 2012 Tex. App. LEXIS 1518 (Tex. App. 2012)

In the Interest of C.M.J., 2012 Tex. App. LEXIS 10601 (Tex. App. 2012)

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EDUCATION

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Dean's List

Student Relations Committee, Member at Large

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EXPERIENCE

Beal Law Firm, Southlake, Texas

Associate Attorney, April 2013–Present

The Office of the Attorney General—Consumer Protection Division, Dallas, Texas

Law Clerk, July 2012–August 2012

Collin County District Attorney's Office, McKinney, Texas

Intern, December 2009–April 2010

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UNDERSTANDING CONSERVATORSHIP, CHILD-POSSESSION, AND ACCESS ISSUES IN THE STATE OF TEXAS

Introduction

The purpose of this article is to provide a comprehensive overview and analysis of issues involving conservatorship and possession of and access to children, with a focus on providing information geared for the practicing attorney. When a litigant files a case to address these matters, the case is a suit affecting the parent-child relationship (SAPCR).¹ The Texas Family Code specifically states that “[t]he best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.” See Tex. Fam. Code § 153.002.

While the family-law attorney must be fully versed in the Family Code, the advocate must simultaneously keep in mind this broad, open-ended standard and recognize that it may open the door for more creative, effective advocacy.

This article will address the following issues in the order set forth below:

- (1) Understanding the Pros and Cons of Joint Custody -- Managing and Possessory Conservatorship

¹ A SAPCR is “a suit filed . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested.” See Tex. Fam. Code § 101.032.

The Texas Family Code defines “‘child’ or ‘minor’ as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes.” See Tex. Fam. Code § 101.003(a).

When a divorce is pending between the parents of the child who is the subject of the SAPCR, and both parties reside in Texas, then the SAPCR court “shall” transfer the SAPCR to the divorce court. See Tex. Fam. Code § 103.002. In SAPCRs involving multiple states, attorneys must review the procedures for transfer when a party or child resides outside of Texas, as well as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). See Tex. Fam. Code §§ 103.003, 152.101–152.317.

- (2) Handling Visitation Issues for Non-Custodial Parents -- Possession Issues Involving Parents
- (3) Dealing With Third-Party Visitation Rights -- Possession Issues Involving Non-Parents
- (4) Establishing and Challenging Paternity -- Establishing the Father-Child Relationship
- (5) Termination of Parental Rights -- Terminating the Father-Child Relationship
- (6) Custody Hearings -- SAPCR Hearings
- (7) Modification of Custody and Visitation Agreements -- Modification of Orders for Conservatorship or Possession of and Access to a Child

A. Understanding the Pros and Cons of Joint Managing Conservatorship

First and foremost, we must use the correct terminology to accurately inform our clients as to their legal rights, duties, and options and to properly plead for judicial relief. Potential clients frequently contact attorneys and declare that they want “sole custody”.

Step one is often informing a potential client that Texas does not recognize sole or joint custody, at least not in those terms. The Texas Family Code provides for joint or sole managing conservatorship and possessory conservatorship.

It is imperative that attorneys clarify this popular misconception and explain to their clients that the real issues to be addressed are the appointment of conservators, the allocation of parental rights and duties, and the parameters of a parent’s possession of and access to a child. Failure to do so will limit an attorney’s ability to adequately manage the client’s expectations.

Before delving into the pros and cons of joint-managing conservatorship and sole managing conservatorship, we must first understand what these terms means.

i. **The Appointment of a Party as a Managing or Possessory Conservator**

If a child's parents "are or will be separated, then a court shall appoint at least one managing conservator" who may be a parent, a competent adult, an authorized agency, or a licensed child-placing agency. See Tex. Fam. Code § 153.005.

The public policy of the State of Texas encourages courts to appoint both parents as joint managing conservators of their child. See Tex. Fam. Code § 153.001(a).

Texas Family Code Section 153.001(a) clearly states that "[t]he public policy of this state is to: (1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; (2) provide a safe, stable, and nonviolent environment for the child; and (3) encourage parents to share in the rights and duties of raising their child" See *id.* Accordingly, "[i]t is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. . . ." See Tex. Fam. Code § 153.131(b).

When a court appoints the parents as joint managing conservators, they ostensibly share parental rights and duties, however, given that "the exclusive

right to make certain decisions may be awarded to one party,” the “jointness” of the conservatorship is often illusory. See Tex. Fam. Code § 101.016

When a JMC is established, the court will enter orders “specify[ing] the rights and duties of a parent that are to be exercised: (1) by each parent independently; (2) by the joint agreement of the parents; [or] (3) exclusively by one parent.” See Tex. Fam. Code § 153.071; see *also* Tex. Fam. Code § 153.072 (requiring a court that limits the rights and duties of a parent conservator to make a written finding that such a limitation is in the child’s best interest).

This allocation of rights and duties enables parents to share parental responsibility while also taking into consideration that it may not be appropriate for both parents to make certain decisions involving the child.

If the presumption that JMC is in the best interest of the child is overcome, a court may appoint one party as the sole managing conservator of the child and that conservator will have all rights and duties of a parent. See Tex. Fam. Code §§ 153.005, 153.132.

A court may, if certain statutory prerequisites are met, determine that appointment of a parent as a parent managing conservator is not in the child’s best interest. See Tex. Fam. Code § 153.131; see *also* Tex. Fam. Code § 153.004 (addressing cases involving a history of domestic violence or sexual abuse).

To determine if appointing a parent as a managing conservatorship is in

the child's best interest, courts consider the following factors: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the child and the other parent; (4) whether both parents participated in child rearing before the filing of the suit; (5) the geographical proximity of the parents' residences; (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and (7) any other relevant factor. See Tex. Fam. Code § 153.134(a).

To rebut the presumption that appointment of a parent as a managing conservator would be in the child's best interest, the party opposing the same must "affirmatively prove by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child, either physically or emotionally . . . [by offering] evidence of specific actions or omissions[.]" See *Lewelling v. Lewelling*, 796 S.W.2d 164, 166–68 (Tex. 1990) (finding that a litigant cannot prove significant impairment by showing only that the non-parent would be a better managing conservator and that the grandparents seeking appointment as managing conservators did not offer evidence of significant impairment of the child's physical or emotional well-being).

Should a court determine that appointment of a parent as managing

conservator will significantly impair the child's physical or emotional development, the court "shall appoint" that parent a possessory conservator "unless it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child." See Tex. Fam. Code § 153.191.

Conservatorship addresses a party's rights and duties but does not determine that party's periods of possession of and access to a child. See, e.g., Tex. Fam. Code § 153.135 (Equal Possession Not Required).

A court may also appoint one or more possessory conservators in addition to managing conservators and if it does so, it must make orders addressing what rights and duties that possessory conservator has and specify the times and conditions of the possessory conservator's possession of or access to the child. See Tex. Fam. Code § 153.006. A parent appointed as a possessory conservator shall have some periods of possession of or access to the child, albeit it possible that any and all periods of possession of or access to the child shall be supervised. See *In re Walters*, 39 S.W.3d 280, 286–87 (Tex. App.—Texarkana 2001, no pet.) (concluding that a possessory conservator may only be denied all possession of and access to the child upon a finding that parental access will endanger the child, and is not in the child's best interest).

ii. **Rights and Duties of a Parent**

Absent a court-order, affidavit of relinquishment of parental rights, and/or an affidavit by the parent designating another to act as a managing conservator,

parents have the following rights and duties to their children at all times:

- (1) the right to have physical possession, to direct the moral and religious training, and to designate the residence of the child;
- (2) the duty of care, control, protection, and reasonable discipline of the child;
- (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;
- (4) the duty, except when a guardian of the child's estate has been appointed, to manage the estate of the child, including the right as an agent of the child to act in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
- (5) except as provided by Section 264.0111, the right to the services and earnings of the child;
- (6) the right to consent to the child's marriage, enlistment in the armed forces of the United States, medical and dental care, and psychiatric, psychological, and surgical treatment;
- (7) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (8) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
- (9) the right to inherit from and through the child;
- (10) the right to make decisions concerning the child's education; and
- (11) any other right or duty existing between a parent and child by virtue of law.

See Tex. Fam. Code § 151.001.

iii. Rights and Duties of a Managing Conservator

Absent a court order to the contrary, a managing conservator of a child has, at all times, the right to:

- (1) receive information from any other conservator of the child concerning the health, education, and welfare of the child;
- (2) confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;

- (3) access medical, dental, psychological, and educational records of the child;
- (4) consult with a physician, dentist, or psychologist of the child;
- (5) consult with school officials concerning the child's welfare and educational status, including school activities;
- (6) attend school activities;
- (7) be designated on the child's records as a person to be notified in case of an emergency;
- (8) consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and
- (9) manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

See Tex. Fam. Code §§ 153.073, 153.372(a).

Lastly, a parent managing or possessory conservator has the following rights and duties during his or her periods of possession of and access to the child:

- (1) the duty of care, control, protection, and reasonable discipline of the child;
- (2) the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;
- (3) the right to consent for the child to medical and dental care not involving an invasive procedure; and
- (4) the right to direct the moral and religious training of the child.

See Tex. Fam. Code §§ 153.074, 153.192.

A sole parent managing conservator will, absent a court order to the contrary, have the following rights and duties, in addition to the rights that parents have at all times and the rights and duties that parents have during their respective periods of possession:

- (1) the right to designate the primary residence of the child;
- (2) the right to consent to medical, dental, and surgical treatment involving invasive procedures;
- (3) the right to consent to psychiatric and psychological treatment;
- (4) the right to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child;
- (5) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (6) the right to consent to marriage and to enlistment in the armed forces of the United States;
- (7) the right to make decisions concerning the child's education;
- (8) the right to the services and earnings of the child; and
- (9) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government.

See Tex. Fam. Code § 153.132.

iv. Rights and Duties of a Non-Parent Conservator

A non-parent appointed as the sole managing conservator of the child has the following rights and duties:

- (1) the right to have physical possession and to direct the moral and religious training of the child;
- (2) the duty of care, control, protection, and reasonable discipline of the child;
- (3) the duty to provide the child with clothing, food, shelter, education, and medical, psychological, and dental care;
- (4) the right to consent for the child to medical, psychiatric, psychological, dental, and surgical treatment and to have access to the child's medical records;
- (5) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;

- (6) the right to the services and earnings of the child;
- (7) the right to consent to marriage and to enlistment in the armed forces of the United States;
- (8) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (9) except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;
- (10) the right to designate the primary residence of the child and to make decisions regarding the child's education; and
- (11) if the parent-child relationship has been terminated with respect to the parents, or only living parent, or if there is no living parent, the right to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

See Tex. Fam. Code § 153.371.

Conversely, a non-parent appointed as a possessory conservator of a child has the following rights and duties:

- (a) Unless limited by court order or other provisions of this chapter, a nonparent, licensed child-placing agency, or authorized agency appointed as a possessory conservator has the following rights and duties during the period of possession:
 - (1) the duty of care, control, protection, and reasonable discipline of the child;
 - (2) the duty to provide the child with clothing, food, and shelter; and
 - (3) the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child.
- (b) A nonparent possessory conservator has any other right or duty specified in the order.

See Tex. Fam. Code § 153.376.

v. Pros of Joint Managing Conservatorship

Joint managing conservatorship theoretically enables parents to share decision-making responsibility for matters involving their child, depending on the specific allocation of rights and duties set forth in a court order, thereby encouraging parties to co-parent and be active participants in their child's life.

If the child's parents are able to co-parent and communicate with one another, then theoretically the child is positively impacted by the relationship between his or her parents, despite separation.

Creating an environment in which both parents have the right to make decisions involving the child may not necessarily lead to effective co-parenting, but it does enable parents to work together to discuss their child and make the best decisions for the child. This also helps parents share the responsibility for raising their child and may likely reduce the stress that comes with raising a child. Appointment of parents as joint managing conservators may also lead to a smoother transition for the child if both parents were previously involved and can, after their separation, continue to co-parent.

vi. Cons of Joint Managing Conservatorship

The pros of appointing both of the child's parents as joint managing conservators may not exist when the parents are incapable of co-parenting and therefore cannot benefit from the opportunities that joint managing conservatorship offers. Additionally, unfortunately, there are certain parents who have shown that they are incapable of providing for their children and/or making

decisions in the child's best interest.

When parents cannot work together to make decisions that are best for their child, the child is necessarily negatively affected and this situation may increase the likelihood that one or both of the parents is engaging in parental alienation against the other.

Not only may no decisions be made when decisions need to be made, but objectively bad decisions may be made by parents who do not prioritize their children above their own needs, and attempts to reach an agreement or discuss the child may lead to more arguments and further expose the child to discord between his or her parents.

B. Handling Visitation Issues for Parents

Subchapter E of Chapter 153 of the Texas Family Code sets forth the guidelines that the courts shall use in establishing possession orders for conservators. Additionally, it makes clear that the standard possession schedule is rebuttably presumed to be the the minimum amount of time that a JMC parent should have with his or her child. See Tex. Fam. Code §§ 153.251 and 153.252.

Subchapter F of Chapter 153 of the Texas Family Code contains the provisions for the Texas Standard Possession Order. This subchapter contains a standard order for parents that reside within 100 miles of each other, and parents that don't. See Texas Fam. Code §§ 153.312 and 153.313.

In addition to detailing a Standard Possession Schedule, the Code provides for an "expanded" or "extended" possession schedule. See Tex. Fam.

Code § 153.317.

When drafting the possession schedule, one of the most important sections to consider is that entitled “General Terms and Conditions.” See Tex. Fam. Code § 153.316. This section details what is commonly referred to as the “pick-up and drop-off” provisions. These sections often cause a great many problems post-decree/order, and are often misunderstood by clients.

Common issues involve one parent’s allegations that the other parent is violating the underlying order and/or that the underlying order is not in the child’s best interest.³ At the outset, an aggrieved parent must understand the terms of the underlying order. As communication may very likely be terse and possibly non-existent between parents experiencing these problems, attorneys must draft unambiguous orders so both parents can fully understand and implement the court orders. Doing this is crucial to avoid the disagreements that arise when the order can be legitimately read in conflicting ways.

To seek judicial redress, a parent may file an enforcement and/or modification action. The movant-parent may file a modification if he or she believes that the underlying order is no longer in the child’s best interest and the provisions for possession of or access to the child must be changed. Oftentimes, the movant-parent files both an enforcement and modification suit. Modification proceedings are addressed in greater detail below. The movant-parent may also file an enforcement action if he or she wants to hold the other parent accountable

³ A parent seeking a court order for the return of his or her child needs to file a habeas corpus petition. See Tex. Fam. Code §§ 157.371–157.376.

for violating the underlying order, to obtain judicial redress for past injury, and/or to prevent future violations.

A parent may file suit “to enforce a final order for conservatorship . . . [and] possession of or access to a child” See Tex. Fam. Code § 157.001(a). An enforcement action seeking contempt must be filed “not later than the sixth month after the date: (1) the child becomes an adult; or (2) on which the right of possession and access terminates under the order or by operation of law. See Tex. Fam. Code § 157.004.

The Texas Family Code sets forth the required contents of a motion for enforcement as well as the requirements for proper service of the motion and notice of hearing. A motion for enforcement of conservatorship or possession of or access to a child must, in “ordinary and concise language”: (1) identify the provision of the order allegedly violated and sought to be enforced; (2) state the manner of the respondent's alleged noncompliance; (3) state the relief requested by the movant; (4) contain the signature of the movant or the movant's attorney; and (5) include the date, place, and, if applicable, the time of each occasion of the respondent's failure to comply with the underlying order. See Tex. Fam. Code § 157.002.

Upon filing the enforcement, ensure that the motion is set for hearing. See Texas Fam. Code § 157.061; see *also* Tex. Fam. Code § 157.062 (stating the requirements of the notice of hearing).

After filing the motion and setting the hearing, the respondent must be

personally served with the motion and notice “not later than the 10th day before the date of the hearing.” See Tex. Fam. Code § 157.062.

If the enforcement action is joined with a separate claim, e.g., a modification action, then the enforcement hearing cannot be held until 10:00 a.m. on the Monday next after the 20th day after the date of service. See Tex. Fam. Code § 157.062. In other words, a party cannot short-circuit an opposing party’s right to due process by mislabeling a modification action, calling it an enforcement action, and having a modification trial within 10 days of service. A respondent in a modification action is entitled to all of the protections provided by the Texas Rules of Civil Procedure with respect to issues such as the answer day, notice of trial, discovery, etc. See Tex. Fam. Code § 157.062(d)(2).

However, “[i]f a party has been ordered . . . to provide the court and the state case registry with the party’s current mailing address, [the clerk of the court, the movant’s attorney, or any person entitled to the address information may send] notice of a hearing on a motion for enforcement . . . by mailing a copy of the notice to the respondent, together with a copy of the motion, by first class mail to the last mailing address of the respondent on file with the court and the registry. See Tex. Fam. Code § 157.065. Upon sending notice via mail, the sender must file a certificate of service showing the date of mailing and the sender’s name. See *id.*

If, and only if, the Respondent has been personally served with the motion and notice of the hearing, and the respondent does not appear at the hearing,

the court may “on proper proof, grant a default judgment for the relief sought and issue a writ of habeas corpus for the arrest of the respondent.” See Tex. Fam. Code § 157.066; see also Tex. Fam. Code § 157.115. The court may not, however, hold the respondent in contempt. See Tex. Fam. Code § 157.115.

At the enforcement hearing, the aggrieved conservator may seek to incarcerate or fine the respondent for criminal contempt or incarcerate the respondent for civil contempt, as well as obtain an order for the respondent to pay the movant’s reasonable attorney’s fees and all court costs. See Tex. Fam. Code § 157.001(b); Tex. Fam. Code §§ 157.166(b)–(c), 157.167(b); see also Tex. Fam. Code §§ 157.421, 157.423 (stating that a court can clarify an ambiguous order so it is specific enough to be enforced by contempt, but cannot make substantive changes).

When the movant seeks redress because the other parent allegedly denied the movant possession of the child, the movant may request that the court order additional periods of possession to the child. See Tex. Fam. Code § 157.168 (stating that “[t]he additional periods of possession or access: (1) must be of the same type and duration of the possession or access that was denied; (2) may include weekend, holiday, and summer possession or access; and (3) must occur on or before the second anniversary of the date the court finds that court-ordered possession or access has been denied.”). Accordingly, should a parent be denied his or her right to possession of the child, that parent should act promptly.

Unfortunately, even if the court grants all relief requested by the movant, the outcome may not provide actual or complete redress and by no means guarantees that the opposing party will stop violating the underlying order. See Tex. Fam. Code § 157.166 (stating the required contents of an enforcement order). So, understanding what a client actually wants and what possible relief a court may grant must inform attorney-client discussions regarding whether or not to file an enforcement action; doing so is crucial to manage client expectations, manage the use of client funds, and find the best solution possible to achieve the client's ultimate needs and goals.

C. Dealing with a Third Party's Right to Possession of or Access to a Child

In most cases, in order for a third party to obtain the right to possession of, access to a child, or court-ordered periods of access to a child, that third party must have standing to file or intervene.⁴

“An original suit may be filed at any time by:

- (1) a parent of the child;
- (2) the child through a representative authorized by the court;
- (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
- (4) a guardian of the person or of the estate of the child;
- (5) a governmental entity;

⁴ Additionally, while a non-parent cannot file suit for possessory conservatorship, “the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person [with standing] if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. See Tex. Fam. Code § 102.004(b).

- (6) an authorized agency;
- (7) a licensed child placing agency;
- (8) a man alleging himself to be the father of a child . . .;
- (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
- (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;
- (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
- (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or
- (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born.”⁵

See Tex. Fam. Code § 102.003.

“In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and

⁵ Note that Section 102.006 “Limitations on Standing” sets forth a list of persons who may not file an original suit. Prior to filing an original suit in a case where “the parent-child relationship between the child and every living parent of the child has been terminated,” it is imperative to consult these limitations to determine and advise your client as to his or her standing to file suit.

uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit." See Tex. Fam. Code § 102.003(b).

Additionally, a relative, often a child's grandparent, may want court-ordered rights to his or her grandchild and may establish standing under an alternate standing provision. A grandparent or other relative of the child related within the third degree of consanguinity may file an original suit for managing conservatorship. See Tex. Fam. Code § 102.004(a). To establish standing to do so, the grandparent or other relative within the third degree of consanguinity must provide to the court satisfactory proof that: (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. See Tex. Fam. Code § 102.004(a).

If a grandparent has standing and only wants the right to possession of and access to the grandchild, then the grandparent can file a suit for grandparent possession or access as follows:

- (a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:
 - (1) an original suit; or
 - (2) a suit for modification as provided by Chapter 156. . .
- (c) In a suit described by Subsection (a), the person filing the suit must execute and attach an affidavit on knowledge or belief that contains, along with supporting facts, the allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-

being. The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433.

See Tex. Fam. Code § 153.432(a)–(c).⁶

In addition to complying with the procedural requirements for filing a suit for grandparent possession or access, the statutory requirements for a court to order the same must be met. A court may order reasonable grandparent possession of or access to a grandchild if all of the following criteria are met:

- (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
- (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and
- (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
 - (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
 - (B) has been found by a court to be incompetent;
 - (C) is dead; or
 - (D) does not have actual or court-ordered possession of or access to the child.⁷

See Tex. Fam. Code § 153.433.

⁶ Note that Section 153.434 of the Texas Family Code sets forth limitations on a grandparent's right to request possession or access thereby preventing grandparents in certain circumstances from obtaining court-ordered periods of possession of or access to the grandchild. See Tex. Fam. Code § 153.434.

⁷ Section 153.433(b) sets forth the requirements of a court-order granting grandparent possession or access when a parent objects to the same. See Tex. Fam. Code § 153.433(b).

Lastly, a child's sibling who is at least 18 years of age may file an original suit for access. See Tex. Fam. Code §§ 102.0045, 153.551 (stating that a “sibling of a child who is separated from the child because of an action taken by the Department of Family and Protective Services may request access to the child by filing . . . an original suit[] or . . . a suit for modification . . .”).

D. Establishing and Challenging Paternity

The Texas Family Code has statutorily prescribed how Texas courts establish paternity and subsequently, how men may challenge their status as to the child. When a judicial determination of parentage is desired to establish the father-child relationship, a suit to adjudicate parentage must be filed under Chapter 160, the Uniform Parentage Act.⁸

The term ‘parent-child relationship’ refers to the “legal relationship between a child and the child’s parents . . . includ[ing] the mother and child relationship and the father and child relationship” See Tex. Fam. Code § 101.025. The father-child relationship can be established in the following ways:

- (1) an un rebutted presumption of the man's paternity of the child;
- (2) an effective acknowledgment of paternity by the man, unless the acknowledgment has been rescinded or successfully challenged;
- (3) an adjudication of the man's paternity;
- (4) the adoption of the child by the man; or
- (5) the man's consenting to assisted reproduction by his wife, which resulted in the birth of the child.

⁸ The provisions in the Uniform Parentage Act relating to the determination of paternity also apply to the determination of maternity. See Tex. Fam. Code § 160.106.

See Tex. Fam. Code § 160.201(b)

a. **Establishing the Father-Child Relationship of a Presumed Father**

A “presumed father” is “a man who . . . is recognized as the father of a child until that status is rebutted or confirmed in a judicial proceeding.” See Tex. Fam. Code § 160.102(13). The law recognizes a man as the child’s presumed father in the following circumstances:

- (1) he is married to the mother of the child and the child is born during the marriage;
- (2) he is married to the mother of the child and the child is born before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (3) he married the mother of the child before the birth of the child in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or before the 301st day after the date the marriage is terminated by death, annulment, declaration of invalidity, or divorce;
- (4) he married the mother of the child after the birth of the child in apparent compliance with law, regardless of whether the marriage is or could be declared invalid, he voluntarily asserted his paternity of the child, and:
 - (A) the assertion is in a record filed with the bureau of vital statistics;
 - (B) he is voluntarily named as the child's father on the child's birth certificate; or
 - (C) he promised in a record to support the child as his own; or
- (5) during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.

See Tex. Fam. Code § 160.204.

If a man is a presumed father of a child, that presumption may be rebutted only in one of two ways: (1) an adjudication of parentage or (2) the filing of a valid denial of paternity by the presumed father in conjunction with another man's filing of an acknowledgment of paternity. See Tex. Fam. Code §§ 160.204, 160.303, 160.304; see *also* Tex. Fam. Code § 160.307 (stating the requirements for a man to rescind his acknowledgment or denial of paternity); see *also* Tex. Fam. Code §§ 160.308–160.309 (addressing a man's ability to challenge an acknowledgment or denial of paternity after the time period to rescind the same expires). Upon the filing a valid denial of paternity along with a valid acknowledgment of paternity, the presumed father is discharged of all parental rights and duties. See Tex. Fam. Code § 160.305(b).

b. Establishing the Father-Child Relationship via a Man's Acknowledgment that He Is the Child's Father

A man is the child's acknowledged father if the "mother . . . and a man claiming to be the biological father . . . sign an acknowledgment of paternity with the intent to establish the man's paternity." See Tex. Fam. Code §§ 101.0010, 160.301. The acknowledgment must satisfy the statutory requirements. See Tex. Fam. Code § 160.302. Upon the filing of an acknowledgement of paternity, the acknowledged father will have all rights and duties of a parent. See Tex. Fam. Code § 160.305(a).

c. Establishing the Father-Child Relationship via Adjudication of a Man as the Child's Father

An "adjudicated father" is "a man who has been adjudicated by a court to

be the father of a child.” See Tex. Fam. Code § 160.102(a). The adjudication of paternity shall be determined without a jury. See Tex. Fam. Code § 160.632. Generally, a suit to adjudicate parentage may be brought by the child, the child’s mother, a man whose paternity is to be adjudicated, certain agencies, representatives, or relatives, or an intended parent. See Tex. Fam. Code § 160.602(a); *see also* Tex. Fam. Code § 160.604 (discussing personal jurisdiction in suits to adjudicate parentage); Tex. Fam. Code § 160.605 (discussing venue). After the child becomes an adult, only that child has standing to file a proceeding to adjudicate that child’s parentage. See Tex. Fam. Code § 160.602(b). The deadline to file a suit to adjudicate parentage depends on whether the child has a presumed father, acknowledged father, or adjudicated father.

A suit to adjudicate parentage of a child that has no presumed father may be brought at any time. See Tex. Fam. Code § 160.606. Conversely, if a child has a presumed father, then the suit must be brought no later than the child’s fourth birthday, subject to certain exceptions. See Tex. Fam. Code § 160.607(b). Additionally, if a child has an acknowledged or adjudicated father, an individual other than the child who did not sign the acknowledgment, was not a party to the adjudication, and wants to adjudicate the child’s paternity must file suit by the fourth anniversary of the effective date of the acknowledgement or adjudication. See Tex. Fam. Code § 160.609(b). When a suit to adjudicate parentage is filed, then the child’s mother and the man whose paternity is to be adjudicated are

necessary parties. See Tex. Fam. Code § 160.603.

The court's goal in a suit to adjudicate parentage is to determine the child's biological father and establish the parent-child relationship between that man and the child the subject of the suit. During the pendency of the suit, a court may enter temporary orders, including orders for a possible father to have the right to possession of or access to the child. See Tex. Fam. Code § 160.624(b). An "alleged father" is "a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of a child, but whose paternity has not been determined. . . . The term does not include: (1) a presumed father; (2) a man whose parental rights have been terminated or declared to not exist; or (3) a male donor." See Tex. Fam. Code § 101.0015. Accordingly, the court shall order a child and alleged fathers to submit to genetic testing. See Tex. Fam. Code § 160.502; see *also* Tex. Fam. Code § 160.503 (setting forth the requirements for genetic testing); Tex. Fam. Code § 160.631 (stating rules for the adjudication of paternity). However, in a suit to determine parentage of a presumed father, a court may deny a motion for genetic testing. See Tex. Fam. Code § 160.608. In addition to genetic-testing results, the respondent may also become the adjudicated father if he admits paternity via a filed pleading or under penalty of perjury while appearing before the court or during a hearing. See Tex. Fam. Code § 160.623. Upon the final adjudication of a man as the child's father, that man will have the rights and duties of a parent, subject to any limitations imposed by the court.

d. **Establishing the Father-Child Relationship Based on that Man's Adoption of the Child**

If an adult has standing to sue under Chapter 102, discussed above, then that adult may file a petition for adoption. See Tex. Fam. Code §§ 162.001(a), 162.002. Chapter 162 Subchapter A "Adoption of a Child" sets forth the statutory requirements to adopt a child. See Tex. Fam. Code § 162.001–162.025. Under Texas law, a child can only have one mother and one father. Accordingly, if a man wants to adopt a child who has a father, then he may file an original suit for termination of the parent-child relationship joined with a petition for adoption. See Tex. Fam. Code § 102.005. Such a termination suit may be filed by the following: (1) A stepparent of the child; (2) An adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition; (3) An adult who has had actual possession and control of the child for not less than two months during the three month period preceding the filing of the petition; (4) An adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or (5) Another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so. See Tex. Fam. Code § 102.005. When a court enters a termination order in a suit also requesting adoption, the court must make separate findings that both the termination and the adoption is in the child's best interest. See Tex. Fam. Code § 162.016. Upon entry of an order of adoption, "the parent-child relationship between the adoptive parent and the child [is created] for all purposes." See Tex.

Fam. Code § 162.017.

e. **Establishing the Father-Child Relationship Based on that Man's Consent to Assisted Reproduction**

The Texas Family Code sets forth the statutorily-mandated requirements to establish paternity based on a man's consent to assisted reproduction or provision of sperm for assisted reproduction by his wife. See Tex. Fam. Code §§ 160.701–160.707; see also Tex. Fam. Code § 160.7031 (addressing an unmarried man's paternity of a child of assisted reproduction); Tex. Fam. Code § 160.706 (addressing divorce). Additionally, a man whose wife gives birth to a child by means of assisted reproduction may not challenge paternity unless certain statutory requirements are met. See Tex. Fam. Code § 160.705.

f. **Challenging Paternity**

The most basic way to challenge paternity is to not be a presumed father, under Tex. Fam. Code § 160.204 and to not execute an acknowledgment of paternity under Tex. Fam. Code §§ 160.301, et. Seq.

At that point, the matter is a question of fact. The reality is, however, that in this day and age of DNA testing, if a man is the father of a child and either the mother or anyone else with standing under Tex. Fam. Code § 160.602 wants to pursue the adjudication of parentage, he's going to be determined to be the father.

The real question is what to do if a man **is** a presumed father, but not in fact the father, or if the man has acknowledged paternity and now realizes he is not the father.

If a man is the presumed father of a child, that presumption can only be rebutted by an adjudication of paternity in his favor or by the filing of a denial of paternity “in conjunction with the filing by another person of a valid acknowledgment of paternity.” See Tex. Fam. Code § 160.204(b).

Once a man has signed an acknowledgment of paternity, the situation becomes tricky and time-sensitive.

An acknowledgment of paternity may be rescinded, but the rescission must be filed before the earlier of the 60th day after the effective date of the acknowledgment of paternity or the date a proceeding to which the signatory is a party is initiated. See Tex. Fam. Code § 160.307.

If a man has executed an acknowledgment of paternity, and the rescission period has passed, then the only option is to “challenge” the acknowledgment under Tex. Fam. Code §§ 160.308 & 160.309, based upon “fraud, duress, or material mistake of fact.” Note that a DNA test showing that a man is “not rebuttably identified as the father” constitutes a “material mistake of fact.” Tex. Fam. Code § 160.308(d).

E. Termination of Parental Rights

A court may terminate the parent-child relationship on clear and convincing evidence that (1) termination is in the child’s best interest; and (2) at least one statutory ground for termination has been met. See Tex. Fam. Code §§ 161.001–161.007.

Grounds for termination involve voluntarily relinquishing the child, failing to

support the child, endangering the child's physical or emotional well-being, being convicted of certain criminal offenses, engaging in substance abuse, or signing an affidavit of relinquishment of parental rights.⁹ See Tex. Fam. Code § 161.001; see also Tex. Fam. Code § 161.003 (stating the requirements to terminate the parent-child relationship in a suit filed by the Department of Protective and Regulatory Services).

Note that the presence of the "best interest" standard prevents even the most egregious conduct under § 161.001 from giving rise to a mandatory termination. Courts have held that the "best interest" standard must be met by non-conclusory testimony that amounts to clear and convincing evidence that the termination is in the child's best interest. See *In the Interest of A.H.*, 414 S.W.3d 802, (Tex. App.—San Antonio 2013, no pet.)("Thus, conclusory testimony, such as the caseworker's, even if uncontradicted does not amount to more than a scintilla of evidence."); *In the Interest of A.J.L.*, 2014 Tex. App. LEXIS 10599 (Tex. App.—San Antonio Sept. 24, 2014)("Other than this conclusory testimony by Jones, no other evidence was offered..."). Given that the Respondent in a termination case is entitled to a jury trial, the reality is that it is possible that even horrible facts can be overcome by convincing the jurors that the petitioner has failed to meet the burden on best interest, under a clear and convincing standard. See Tex. Fam. Code § 105.002.

F. Custody Hearings

⁹ Section 161.103 of the Texas Family Code sets forth the requirements of an affidavit of voluntarily relinquishment of parental rights.

Not only must a family-law attorney be willing and fully equipped to present a client's case before a trier of fact, before arriving at the courthouse on the day of the hearing, the attorney must assess the advantages and disadvantages of going to court and ensure that his or her client understands not only what he or she could possibly gain, but also the risks of an unfavorable ruling so that the client can make an informed decision as to how to proceed.¹⁰ Additionally, an attorney must understand the client's objectives to determine if ex parte orders¹¹ or temporary orders¹² are necessary pending the court's final ruling.

i. Ascertaining the Truth in Contested Custody Cases

In SAPCR hearings, it can often be difficult to determine the truth; our clients may or may not truly have their child's best interests at heart and they may not realistically and reasonably assess their situation because of the inherently emotional nature of the litigation. Fortunately, there are a plethora of tools available to help. The attorney should consider requesting these

¹⁰ Courts encourage parties to reach an agreement to resolve contested issues. See Tex. Fam. Code § 153.007. For example, if a client does not want the opposing party to have a standard possession order, the opposing party wants a standard possession order, and the client has no reasons rebutting the presumption that the standard possession order is in a child's best interest, the attorney may very well need to be extremely clear and firm with the client as to what that client can reasonably expect to happen at the hearing. See Tex. Fam. Code § 105.001(g); see also Tex. Fam. Code § 153.312–153.316 (setting forth the standard possession schedule). Additionally, a parent may consider participating in alternate dispute resolution, such as mediation. See Tex. Fam. Code § 153.0071; see also Tex. Fam. Code §§ 153.601, 153.605–153.611 (addressing parenting coordinators and parenting facilitators in SAPCR litigation).

¹¹ Section 105.001(b) clarifies requirements for obtaining temporary restraining orders and temporary injunctions. See Tex. Fam. Code § 105.001(b–d).

¹² A litigant may seek relief during the pendency of the case by filing a motion for temporary orders. A court may make and modify temporary orders if it finds by a preponderance of the evidence that such orders are necessary for the safety and welfare of the child. See Tex. Fam. Code §§ 105.001, 105.005.

mechanisms to help the parties resolve these issues as it may be necessary to get a court order if the opposing party will not agree.

Courts commonly order the preparation of a social study to investigate the circumstances of the child and the conservators and to make recommendations to resolve the contested issues. See Tex. Fam. Code § 107.0501(a) (defining “social study”); Tex. Fam. Code § 107.051 (setting forth the scope of a social-study order); Tex. Fam. Code § 107.0514 (setting forth the elements of social study). This tool is particularly useful when one or both parties have concerns regarding the ability of the other party to provide for and care for the child as it allows a third party to make a thorough investigation to assess the validity of these concerns and then provide an impartial report to the court as to what orders for conservatorship and possession of and access the social worker believes to be in the child’s best interest.

Additionally, a party can request that the court interview the child to determine the child’s wishes as to conservatorship, the party who shall have the exclusive right to designate the child’s primary residence, possession, access, and or any other pending issue. See Tex. Fam. Code § 153.009(a)–(b). So, the interview may help the court gain insight into the circumstances of the child and the parties by providing the court with another way to obtain relevant information and therefore help the court make important findings to help guide its orders as to conservatorship of the child. The purpose of these interviews is to help the court determine what is in a child’s best interest, but not to conclusively decide

the same. See Tex. Fam. Code § 153.009 (stating that “[i]nterviewing a child does not diminish the discretion of the court in determining the best interest of the child.”). Attorneys may be present during the interview and a record of the same may be taken. See Tex. Fam. Code § 153.009(e)–(f). If your client wants the court to interview the child, determine the court’s policy as to when it conducts interviews and calendar when to request the interview. In some situations, a court may conduct the interview and in others, the court must conduct, upon request, the interview. See Tex. Fam. Code § 153.009. “In a nonjury trial or at a hearing, on the application of a party . . . [,] the court shall interview in chambers a child 12 years of age or older and may interview in chambers a child under 12 years of age The court may also interview a child in chambers on the court’s own motion” See Tex. Fam. Code § 153.009(a)–(b). However, as mentioned above, “[i]n a jury trial, the court may not interview the child in chambers regarding an issue on which a party is entitled to a jury verdict.” See Tex. Fam. Code § 153.009(c). Thus, a child interview may be a very helpful tool, but both attorney and client should seriously consider the pros and cons of doing so prior to making the request.

ii. Presenting Your Case

When you and your client determine that a hearing or final trial is necessary and begin preparing the case for hearing, the attorney must keep in mind how he or she can admit favorable evidence, exclude unfavorable evidence, and, as necessary, obtain an adverse ruling to preserve error. As a

general rule, “the Texas Rules of Evidence apply as in other civil cases” and “proceedings shall be as in civil cases generally.” See Tex. Fam. Code §§ 104.001, 105.003. Invariably, because the ultimate goal of the court is to enter orders that are in the child’s best interest, the court may make rulings that conflict with the rules of evidence and procedure if strict adherence to the rules of court would negatively affect the court’s ability to determine what is in a child’s best interest. Furthermore, the manner in which you present your client’s case to the trier of fact may very well, and probably should, depend on whether or not the final hearing is a bench or jury trial. Accordingly, an attorney must work with his or her client to determine if a jury trial is in the client’s best interest and if so, make a timely jury demand. In a SAPCR, a jury may only decide certain issues. See Tex. Fam. Code § 105.002. If the client may be benefitted by an in-chambers interview of the child, attorneys must consider that “in a jury trial, the court may not interview the child in chambers regarding an issue on which a party is entitled to a jury verdict.” See Tex. Fam. Code § 153.009(d). When preparing for a hearing or final trial, there are standard exhibits that an attorney should prepare and, depending on the local rules, may even be required.

Attorneys preparing for a hearing or final trial should work with their clients to prepare, at a minimum, the following exhibits: (1) a relief requested that sets forth all orders that your client is requesting the court to make; (2) a packet of their client’s paystubs for the preceding three months; (3) their tax returns for the preceding two years; (4) a financial information statement showing the client’s

income, expenses, and disposable income; and (5) a possession calendar showing the dates and times during which each party to the suit saw the children, as well as detailing any violations of any existing orders.

Behind the scenes, ask your client for a proposed witness list that includes a summary of what each potential witness would testify to. Before calling any witness to the stand, ensure that you have already talked to the witness and know the answers to every question you will ask on direct and the answers to every question you anticipate the opposing side will ask on cross. To help ensure that you present to the court all relevant information as well as all information that the client believes to be important for the court to know, instruct your client to prepare and continuously update a timeline/ chronology of the important events in his or her case as this is the most efficient way for a client to communicate these things to the attorney.

iii. Entry of the Order

An attorney's work is not over at the conclusion of the hearing.¹³ An attorney must ensure that formal orders in conformity with the court's ruling are

¹³ Note that if an associate court heard the temporary-orders hearing and rendered an unfavorable ruling, the attorney should promptly discuss the client's right to a de novo hearing before the district court. See Tex. Fam. Code § 201.015 (stating that the party requesting a de novo hearing must file the request "not later than the third working day after the date the party receives notice of the substance of the associate judge's report . . ."). If a party requests a de novo hearing, that party has the right to have the district court hold the de novo hearing no later than the 30th day after the date the request was filed. See Tex. Fam. Code § 201.015(f). However, you may encounter difficulty getting the hearing set within this time frame due to the court's availability, as well as opposing counsel's availability so it is crucial that you work diligently to preserve this right and get the de novo hearing set as soon as possible.

entered.¹⁴ A motion to enter may be necessary.

G. Modification of Conservatorship and Visitation Agreements

After the entry of a final order, the order may be modified in a subsequent modification action. Permitting litigants to request that the court modify existing SAPCR orders is necessary as what is in a child's best interest at the time of rendition of the underlying order may no longer be in that child's best interest.

Accordingly, a suit to modify may be brought by the following:

- (a) A party affected by an order;
- (b) A person or entity who, at the time of filing, has standing to sue under Chapter 102; or
- (c) The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services.

See Texas Family Code § 156.002.

Notice by service of citation of a petition to modify must be given to “[a] party whose rights and duties may be affected by a suit for modification.” See Texas Family Code § 156.003. A suit to modify must be brought in the court of continuing, exclusive jurisdiction. See Texas Family Code § 156.002.

i. Determining Which Court to File a Suit for Modification

Subject to limited scenarios wherein a final SAPCR order does not create continuing, exclusive jurisdiction in a court, “a court acquires continuing, exclusive jurisdiction over the matters provided for . . . in connection with a child on the rendition of a final order.” See Tex. Fam. Code §§ 155.001(a)–(b). Once a court acquires continuing, exclusive jurisdiction, it “may exercise its jurisdiction to

¹⁴ Section 105.006 “Contents of Final Order” specify the required contents of a final order. See Tex. Fam. Code § 105.006.

modify its order regarding managing conservatorship, possessory conservatorship, possession of and access to the child, and support of the child.” See *id.* at 155.003(a). So, the court that entered the underlying order sought to be modified retains exclusive jurisdiction to do so, absent a proper transfer or emergency. See Tex. Fam. Code § 155.002; see *also* Tex. Fam. Code § 155.005 (setting forth the circumstances in which a Texas court loses continuing, exclusive jurisdiction); Tex. Fam. Code § 155.005 (addressing jurisdictional issues that arise pending transfer from the court with continuing, exclusive jurisdiction); Tex. Fam. Code § 155.201 (stating the requirements for mandatory transfer from the court with continuing, exclusive jurisdiction); *id.* at 155.202 (setting forth the requirements for discretionary transfers). Special attention must be paid when the parties and/or the child reside outside of Texas. A Texas court with continuing, exclusive jurisdiction cannot modify a final order for managing conservatorship if the child’s home state is not Texas and cannot modify possessory conservatorship or possession of or access to the child if the child’s home state is not Texas and all parties’ principal residences are outside of Texas. See Tex. Fam. Code § 155.003(b)–(c). Also, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) may be implicated. See Tex. Fam. Code §§ 152.101–152.317. Upon determining that the modification action should be filed in Texas, review the pleading requirements to ensure proper pleading.

ii. Obtaining Temporary Orders

While the preceding section regarding SAPCR hearings applies to

modifications, Section 156.006 specifically sets forth the scope of temporary orders a court may enter in a modification case. “While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child under the final order unless the temporary order is in the best interest of the child and: (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months, unless such relinquishment was temporary during the conservator's military deployment, military mobilization, or temporary military duty; or (3) the child is 12 years of age or older and has expressed to the court in chambers . . . the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.” See Texas Family Code § 156.006.

iii. Obtaining a Final Order

The party seeking to modify conservatorship and possession of and access to a child must prove to the court that certain statutory prerequisites to modification exist. “The court may modify an order . . . if modification would be in the best interest of the child and: (1) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the earlier of: (A) the date of the rendition of the order, or (B) the

date of the signing of a mediated or collaborative law settlement agreement on which the order is based; (2) the child is at least 12 years of age and has expressed to the court in chambers . . . the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child; or (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months and that conservator did not [do so] during the conservator's military deployment, military mobilization, or temporary military duty.” See Tex. Fam. Code § 156.101.

As discussed above, courts value continuity in a child’s life and strive to “promote stability in the conservatorship of the children by preventing the relitigation of custodial issues within a short period of time after the custody order is entered.” See *In re A.S.M.*, 172 S.W.3d at 715 (quoting *In re R.C.S.*, 167 S.W.3d 145, 148 (Tex. App—Dallas 2005, pet. denied). To further this state interest, the law imposes a greater hurdle for litigants seeking to modify the designation of the person with the exclusive right to designate the primary residence of the child when the modification is filed within one year of the underlying order or the signing of the mediated or collaborative law settlement agreement on which the order is based. See Tex. Fam. Code § 156.701. In this situation, “the person filing the suit shall execute and attach an affidavit . . . [that] contains, along with supporting facts, at least one of the following allegations: (1) that the child's present environment may endanger the child's physical health or

significantly impair the child's emotional development; (2) that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or (3) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child.” See Tex. Fam. Code § 153.701. This raises the question as to what happens when the original petition to modify is filed within this one-year period and the petitioner subsequently files an amended petition to modify after this one-year period.

In *In re C.L.L.*, the Twelfth Court of Appeals addressed this situation; the petitioner-father originally filed a modification suit within one year of the parties' divorce and then, more than one year after the divorce filed his third amended petition. See *In re C.L.L.*, No. 12-06-00007-CV, 2007 Tex. App. LEXIS 5614 (Tex. App.—Tyler July 18, 2007, no pet.) (mem. op.). The Court concluded that because the father filed his amended petition after the one-year period had elapsed, Section 156.102 did not apply and the father did not have to meet the heightened burden of proof for modifications contained therein. See *id.* at *8 (applying Texas Rule of Civil Procedure 6); see also Tex. R. Civ. P. 65 (stating that “[u]nless the substituted instrument shall be set aside on exceptions, the instrument for which it is substituted shall no longer be regarded as a part of the pleading in the record of the cause . . .”). Ultimately, a litigant seeking to modify

a court's final order must be aware of the applicable burden of proof and pleading requirements and be prepared to present sufficient evidence to the court as these issues are invariable extremely fact intensive.

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