# Current Issues Related to Child Custody

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**CURRICULUM VITAE OF RICHARD R. ORSINGER**

**Education:** Washington & Lee University, Lexington, Virginia (1968-70)
University of Texas (B.A., with Honors, 1972)
University of Texas School of Law (J.D., 1975)

**Licensed:** Texas Supreme Court (1975); U.S. District Court, Western District of Texas (1977-1992; 2000-present); U.S. District Court, Southern District of Texas (1979); U.S. Court of Appeals, Fifth Circuit (1979); U.S. Supreme Court (1981)

**Certified:** Board Certified by the Texas Board of Legal Specialization Family Law (1980), Civil Appellate Law (1987)

**Organizations and Committees:**

Chair, Family Law Section, State Bar of Texas (1999-2000)
Chair, Appellate Practice & Advocacy Section, State Bar of Texas (1996-97)
Chair, Continuing Legal Education Committee, State Bar of Texas (2000-02)
Vice-Chair, Continuing Legal Education Committee, State Bar of Texas (2002-03)
Member, Supreme Court Advisory Committee on Rules of Civil Procedure (1994-2015 and appointed through 2018); Chair, Subcommittee on Rules 16-165a
Member, Pattern Jury Charge Committee (Family Law), State Bar of Texas (1987-2000)
Supreme Court Liaison, Texas Judicial Committee on Information Technology (2001-2004)
Tx. Bd. of Legal Specialization, Civil Appellate Law Advisory Commission (Member and Civil Appellate Law Exam Committee (1990-2006; Chair 1991-1995); Family Law Advisory Commission (1987-1993)
Member, Supreme Court Task Force on Jury Charges (1992-93)
Member, Supreme Court Advisory Committee on Child Support and Visitation Guidelines (1989, 1991; Co-Chair 1992-93; Chair 1994-98)
Member, Board of Directors, Texas Legal Resource Center on Child Abuse & Neglect, Inc. (1991-93)
President, Texas Academy of Family Law Specialists (1990-91)
President, San Antonio Family Lawyers Association (1989-90)
Associate, American Board of Trial Advocates
Fellow, American Academy of Matrimonial Lawyers
Director, San Antonio Bar Association (1997-1998)
Member, San Antonio, Dallas and Houston Bar Associations

**Honors Received:**

Texas Center for the Judiciary, Exemplary Non-Judicial Faculty Award (2014)
Texas Bar Foundation *Dan Rugeley Price Award* for "an unreserved commitment to clients and to the practice of our profession" (2014)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2013)
State Bar of Texas Family Law Section Best Family Law CLE Article (2009)
Recipient of the Franklin Jones, Jr. CLE Article Award for Outstanding Achievement in CLE (2009)
State Bar of Texas *Certificate of Merit*, June 2004
Texas Academy of Family Law Specialists' *Sam Emison Award* (2003)
Association for Continuing Legal Education's Award for Best Program (*Enron, The Legal Issues*) (Co-director, March, 2002)
State Bar of Texas *Presidential Citation* "for innovative leadership and relentless pursuit of excellence for continuing legal education" (June, 2001)
State Bar of Texas Family Law Section's *Dan R. Price Award* for outstanding contributions to family law (2001)
State Bar of Texas *Certificate of Merit*, June 1997
State Bar of Texas *Gene Cavin Award for Excellence in Continuing Legal Education* (1996)
State Bar of Texas *Certificate of Merit*, June 1996
State Bar of Texas *Certificate of Merit*, June 1995

**Professional Recognition:**

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2018)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2018)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2013)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2012)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2010 - 3rd Top Point Getter)

Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2017); Appellate Law (2007-2017)

**Books and Journal Articles:**

—Editor-in-Chief of the State Bar of Texas' TEXAS SUPREME COURT PRACTICE MANUAL (2005)
—Chief Editor of the State Bar of Texas Family Law Section's EXPERT WITNESS MANUAL (Vols. II & III) (1999)
— Author of Vol. 6 of McDonald Texas Civil Practice, on Texas Civil Appellate Practice, published by Bancroft-Whitney Co. (1992) (900 + pages)
—*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)
—*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)
—*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)
—Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)
—*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)
—*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

Magazines:

*A New Day: Same Sex Marriages: Emerging Gender Identity Issues*; IN CHAMBERS Fall 2015; Texas Center for the Judiciary, p 10.

*Error Preservation for Evidentiary Rulings*; THE ADVOCATE Fall 2016; State Bar of Texas, p __.

**Continuing Legal Education Administration:**

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, and 2017)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

**SELECTED CLE SPEECHES AND ARTICLES**

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Discovery Issues Facing Associate Judges and Title IV-D Masters (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007); The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation (2008); Effect of Choice of Entities: How Organizational Law, Accounting, and Tax Law for Entities Affect Marital Property Law (2008); Practicing Family Law in a Depressed Economy, Parts I & II (2009); Troubling Issues of

Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018)

**UT School of Law**: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997); Evidence Grab Bag (1998); Making and Meeting Objections (1998-99); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000); Predicates and Objections (2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003); Court-Imposed Sanctions in Texas (2012)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007); Judicial Review of Arbitration Rulings: Problems and Possible Alternatives (2008); The Role of Reasoning and Persuasion in the Legal Process (2010); Sanctions on Review (Appeal and Mandamus) (2012); Sanctions in Texas Courts: Trial and Appeal (2018)

**Other CLE**: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); SBOT New Frontiers in Marital Property Law: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); New Frontiers in Marital Property Law: A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements, 2014 Judicial Conference, Texas Center for the Judiciary (2014); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); Texas Center for the Judiciary, Same-Sex Marriage and Gender Identity Issues (2015); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); New Frontiers In Marital Property Law, Distributions from Business Entities: Six Possible Approaches to Characterization (2015); Selective Fiduciary Issues in Family Law, 10th Annual Fiduciary Litigation Course (2015); Same-Sex Marriage and Gender Identity Issues, Texas Center for the Judiciary (2016); Dividing the Estate Upon Divorce, Texas Center for the Judiciary (2017); 20 Rules for Characterizing Marital Property in Texas, Texas Center for the Judiciary (2017)

**Continuing Legal Education Webinars:** *Troubling Issues of Characterization, Reimbursement, Valuation, and Division Upon Divorce*; Texas Bar CLE, Live Webcast, April 20, 2012, MCLE No. 901244559 (2012); *Family Law Update - 2013*, Texas Center for the Judiciary Video

Table of Contents

# Current Issues Related to Child Custody

by

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**I. INTRODUCTION.** This paper discusses current issues related to child custody litigation. "Current" does not mean just "recently decided." It includes "old" issues that persistently resurface in custody litigation.

Acknowledgments. I would like to acknowledge the assistance of Georganna Simpson of Dallas, who shared with me the reports of significant family law cases that she submits for the State Bar of Texas Family Law Section report; and Sallee Smyth of Houston, who shared with me her monthly email reports of significant family law appellate court decisions over the past twelve months. To get Goerganna's analysis, you can join the Family Law Section and access the report. To get Sallee's analysis, you can email her and ask to be added to her email list: Sallee Smyth <smyth.sallee@gmail.com>.

Abbreviations. The term "TFC" is used for the Texas Family Code. The "§" sign is used for "section." The term "TRCP" is used for Texas Rule of Civil Procedure. The terms "TRE" is used for the Texas Rules of Evidence. The term "SAPCR" is used for suit affecting the parent-child relationship. The term "DFPS" stands for the Department of Family and Protective Services. The terms "MC" stands for managing conservator and "JMC" stands for joint managing conservators.

**II. STANDING.** The starting point for all cases is the "standing" of the plaintiff or petitioner to bring the lawsuit. Standing is extremely complicated in connection with SAPCRs.

**A. JUSTICIABLE INTEREST; SUBJECT MATTER JURISDICTION.** Standing is the right of a party to bring a claim in court. In *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018), the Supreme Court wrote:

> Generally, standing involves a threshold determination of whether a plaintiff has a sufficient "justiciable interest" in the suit's outcome to be entitled to a judicial determination. *Austin Nursing Ctr. v. Lovato*, 171 S.W.3d 845, 848–49 (Tex. 2005). "Without standing, a court lacks subject matter jurisdiction" over the case, and the merits of the plaintiff's claims thus cannot be litigated or decided. *Id.* at 849. *See also Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) ("The standing doctrine identifies those suits appropriate for judicial resolution.").

**1. Not Conferred by Waiver or Consent.** "Jurisdiction of the subject matter exists by operation of law only, and cannot be conferred upon any court by consent or waiver." *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (1943). This view was reiterated in *Tex. Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993) ("*T.A.B.*"), which has become the primary cited

authority since it was decided. Because the justiciable interest requirement of standing affects subject matter jurisdiction, lack of standing can be raised at any time in the litigation process, including for the first time on appeal, by any party, or by the court. *T.A.B.*, 852 S.W.2d 440, 445-46 (Tex. 1993). A determination regarding standing is subject to de novo review on appeal. *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). If the plaintiff lacks standing, all actions of the trial court are void. *T.A.B.*, 852 S.W.2d 440, 443 (Tex. 1993).

**2. Raised by Plea, Motion to Dismiss, Summary Judgment.** Lack of standing can be raised by plea to the jurisdiction, motion to dismiss, summary judgment, or other procedural vehicle. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (motion to dismiss); *In re C.M.C.*, 192 S.W.3d 866, 869 (Tex. App.--Texarkana 2006, no pet.) (motion to dismiss or summary judgment). "Whether a determination of subject-matter jurisdiction can be made in a preliminary hearing or should await a fuller development of the merits of the case must be left largely to the trial court's sound exercise of discretion." *Blue*, 34 S.W.3d at 554.

**3. Pleading and Proof.** "[P]leading a proper basis for standing is sufficient to show standing, unless a party challenges standing and submits evidence showing the non-existence of a fact necessary for standing." *In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.--Houston [14th Dist.] 2014, no pet.) (involving grandparent standing to bring a SAPCR). The Supreme Court explained:

> When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent.... If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court's jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend. .... If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend.
>
> However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *See Bland*, 34 S.W.3d at 555 (confining the evidentiary review to evidence that is relevant to the jurisdictional issue). When the consideration of a trial court's subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable. Then, in a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists.... If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law.

*Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004) (citations omitted).

The Court went on to say:

> We acknowledge that this standard generally mirrors that of a summary judgment.... By requiring the state to meet the summary judgment standard of proof in cases like this one, we protect the plaintiffs from having to "put on their case simply to establish jurisdiction." *Bland*, 34 S.W.3d at 554. Instead, after the state asserts and supports with evidence that the trial court lacks subject matter jurisdiction, we simply require the plaintiffs, when the facts underlying the merits and subject matter jurisdiction are intertwined, to show that there is a disputed material fact regarding the jurisdictional issue.

*Id.* at 228.

The Supreme Court, in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 378 (Tex. 2009), said:

> "When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. We construe the pleadings liberally in favor of the plaintiffs and look to the pleaders' intent." ... This is not the end of our analysis, however: "if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." If there is no question of fact as to the jurisdictional issue, the trial court must rule on the plea to the jurisdiction as a matter of law. If, however, the jurisdictional evidence creates a fact question, then the trial court cannot grant the plea to the jurisdiction, and the issue must be resolved by the fact finder. This standard mirrors our review of summary judgments, and we therefore take as true all evidence favorable to Heinrich, indulging every reasonable inference and resolving any doubts in her favor. [Citations omitted.]

**4. Court Cannot Weigh the Merits of Claims.** In *Blue*, 34 S.W.3d at 554, the Court said that "[a] plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat the alleged claims, without regard to whether they have merit." The Court went on to say:

> In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry.

*Id.* at 554-55.

**B. STANDING TO COMPLAIN ABOUT INJURY TO OTHERS.** Apart from standing to bring suit, another standing principle says that a litigant does not have standing to complain on appeal about "errors that do not injuriously affect it or merely affect the rights of others." *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 843 (Tex. 2000). A number of courts have applied this principle in SAPCRs and held that "a parent does not have standing to complain about alleged deficiencies in the representation of his children or his spouse." *J.R. v. Texas Dep't of Family & Protective Servs.*, No. 03-15-00108-CV, *3 (Tex. App.--Austin July 30, 2015, pet. denied) (mem. op.) (see cases cited therein); *accord*, *In Interest of D.W.G.K.*, 558 S.W.3d 671, 677 (Tex. App.--Texarkana 2018, pet. denied). In *In Interest of I.A.B.*, No. 05-17-00497-CV, *4 (Tex. App.--Dallas Nov. 10, 2017, no pet.) (mem. op.), the court held that the grandmother lacked standing to claim reversible error in

terminating the unknown father. This conception of standing is different from standing to bring suit. In *In re K.L.*, 553 S.W.3d 703, 704-05 (Tex. App.--Houston [14th Dist.] 2018, no pet.), the court held that grandparents did not have standing to challenge the constitutionality of Tex. Gov't Code ch. 37, requiring that each court establish and maintain a list of attorneys or persons qualified to serve as attorneys ad litem, guardians ad litem, mediators, and guardians, where any injury would be suffered by the alleged father who was served with citation by publication. The court wrote: "To establish standing to challenge the constitutionality of a statute, a party must have suffered some actual or threatened injury under the statute that unconstitutionally restricts its own rights." *Id.* at 707.

**C. STATUTORY STANDING TO BRING SUIT.** In *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000), the Supreme Court overturned precedent and held that a plaintiff's failure to establish a statutory prerequisite to bringing suit was *not* jurisdictional. This distinction suggests that, where the constitutional requirement for justiciable interest has been met, the legislative scheme governing the right to sue is a different kind of standing, that is not jurisdictional. The Texas Legislature "has provided a comprehensive statutory framework for standing in the context of suits involving the parent-child relationship." *In re H.G.*, 267 S.W.3d 120 (Tex. App--San Antonio 2008, pet. denied). This framework of statutes exists apart from the justiciable interest concept of standing, because even a party with a justiciable interest may be prohibited by statute from participating in a SAPCR.

**1. Constitutional Standing Versus Statutory Standing.** Because the standing associated with a justiciable interest is founded on separation of powers in the U.S. and Texas Constitutions, while the standing statutes in the TFC are based on the Texas Legislature's view of public policy, some courts have distinguished between "constitutional" and "statutory" standing. In this view, a party can have a justiciable interest but still not have statutory standing due to the failure to meet the specific requirements of the TFC regarding who can bring or intervene in a SAPCR. *See In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.--Houston [14th Dist.] 2016, pet. denied) (child's grandmother had standing to bring a SAPCR because grandparents as a matter of law have a justiciable interest in their grandchildren, but the grandparent must still plead and prove statutory standing); *but see In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007) (step-grandparent does not have a justiciable interest in seeking possession or access sufficient to overcome the statute restricting suits for possession or access to biological and adoptive grandparents).

The courts that distinguish constitutional from statutory standing say that, where the party has a justiciable interest (so that "constitutional standing" exists), the lack of statutory standing does not affect the court's subject matter jurisdiction. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000) (explaining that a statutory prerequisite to maintaining suit affects a plaintiff's right to relief rather than court's jurisdiction). These cases hold that, where constitutional standing exists, statutory standing can be bestowed by consent, and the right to complain about lack of statutory standing must be preserved in the trial court in order to be raised on appeal, and lack of statutory standing does not make all actions of the trial court void. *In Interest of J.W.G.*, No. 14-17-00389-CV, *6 (Tex. App.--Houston [14th Dist.] Nov. 9, 2017, pet. den.) (mem. op); *In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.--Houston [14th Dist.] April 16, 2016, pet. den.) (mem. op).

The distinction between constitutional and statutory standing affects not only the question of whether a standing complaint must be raised in the trial court as a condition to raising it on appeal. It also affects the question of whether the parties can agree to statutory standing. Parties cannot agree to

confer standing on a party who has no justiciable interest. However, in one instance the TFC itself allows statutory standing to be conferred by consent. TFC § 102.004(a)(2) permits a grandparent or other relative within the third degree of consanguinity to file an original SAPCR seeking managing conservatorship if both parents, the surviving parent, or the managing conservator or custodian, consent to the suit, even if standing would not otherwise exist. A constitutional challenge to TFC § 102.004(a)(2) was rejected in *In re A.M.S.*, 227 S.W.3d 92, 97-98 (Tex. App.--Texarkana 2009, no pet.). The appellate court said that permitting standing by consent was permissible with statutory standing, not constitutional standing. In *Johnson v. Hardy*, No. 01-17-00640-CV, *1 (Tex. App.--Houston [1st Dist.] August 9, 2018; no pet.) (per curiam mem. op.), the appellate court dismissed an appeal as moot when the parties entered into a mediated settlement agreement on appeal that a grandmother had standing under TFC § 102.004(a)(9) (relating to proof of significant impairment of physical health and emotional development).

*In re A.M.S.*, 227 S.W.3d 92, 97-99 (Tex. App.--Texarkana 2009, no pet.) is a hybrid. That case held that the Legislature can constitutionally permit statutory standing to be conferred by consent, while at the same time holding that an agreed order appointing a step-grandparent as joint managing conservator was void, and that the parties could not waive the step-grandparent's lack of standing.

Many appellate opinions (most often in dictum) equate constitutional to statutory standing. *In re J.M.G.*, 553 S.W.3d 137, 142 (Tex. App.--El Paso 2018, no pet.) (saying that standing of grandparents to intervene can be attacked for the first time on appeal); *In re Tinker*, 549 S.W.3d 747, 750 (Tex. App.--Waco 2017, orig. proceeding) (lack of standing under the TFC deprives the court of subject matter jurisdiction, and all subsequent trial court actions are void); *In re A.C.F.H.*, 373 S.W.3d 148, 150 (Tex. App.--San Antonio 2012, no pet.) (not dictum, mother allowed to raise lack of standing under TFC § 102.003(a)(9) for the first time on appeal); *In re M.K.S.-V.*, 301 S.W.3d 460, 463 (Tex. App.--Dallas 2009, no pet.) (in dictum). In *In the Interest of H.S.*, 550 S.W.3d 151, 155 (Tex. 2018), Justice Lehrmann's Majority Opinion commented that the question of whether grandparents had standing to file a SAPCR under TFC § 102.003(a)(9) implicated subject matter jurisdiction. However, the case did not involve a question of waiver or whether standing was conferred by consent, so the reference to subject matter jurisdiction was dictum. Justice Guzman's separate Dissenting Opinion refers to the facts of the case as "jurisdictional facts." *Id.* at 165 (Guzman, J., dissenting). The remainder of Justice Guzman's Opinion does not address a possible distinction between constitutional and statutory standing. Justice Blacklock's Dissenting Opinion does not mention subject matter jurisdiction or make statements that address a possible distinction between constitutional and statutory standing.

Several points should be noted about standing:

1. The claimant must plead facts that affirmatively demonstrate the court's jurisdiction to hear the case. *T.A.B.*, 852 S.W.2d at 446. Where standing is challenged for the first time on appeal, the appellate court "must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing." *T.A.B.*, 852 S.W. 2d at 446. At the trial level, however, standing is determined not just by the pleadings, but also the evidence offered by the parties for or against standing. *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). In a SAPCR, "[t]he party seeking relief must allege and establish standing within the parameters of the language used in the statute." *In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.--Houston

[14th Dist.] 2016, pet. denied) (involving grandparent standing in a SAPCR). "The petitioner must also show the facts establishing standing existed at the time suit was filed in the trial court." *Id.* at 423.

2. Where the factual disputes regarding standing implicate or involve the merits of the underlying claim, the trial court is not empowered to resolve those merits-related fact issues in deciding standing, and the trial court and appellate court must consider that portion of the evidence in the light most favorable to standing. Where the factual disputes regarding standing do not implicate the merits of the underlying claim, the trial court must decide based on a preponderance of the evidence and the appellate court must apply sufficiency of the evidence review. *See In re H.S.*, 550 S.W.3d 151, 165-66 (Tex. 2018) (Guzman, J., dissenting); *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

3. Standing must be measured as of the time that the lawsuit is filed. *Mauldin v. Clements*, 428 S.W.3d 247, 263 (Tex. App.--Houston [1st Dist.] 2014, no pet.). Where the claimant files an intervention, standing must be proved as of the time the intervention was filed. *In re Chester*, 398 S.W.3d 795, 800 (Tex. App.--San Antonio 2011, orig. proceeding); *accord*, *In re Schick*, No. 04-18-00839-CV, *4 (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding).

4. The United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), is the preeminent source of standards in the area of limiting the standing of non-parents to participate in parent-child litigation. In *Troxel*, a majority of the Court voted to reverse a state court's award of visitation to the grandparents of the children of their deceased son. However, there were six Opinions in that case, and none garnered a majority vote. The plurality Opinion written by Justice Sandra Day O'Connor garnered the most votes (four), and is therefore the "lead" Opinion. Justices Souter and Thomas each wrote concurring Opinions that no other Justice joined. Justices Stevens, Scalia, and Kennedy each wrote dissenting Opinions that no other Justice joined. The Court was therefore very fractured on the subject of the constitutional dimensions of standing in parent-child litigation. Because Justice O'Connor's plurality Opinion was not supported by a majority of the Justices, it is not stare decisis or binding precedent. A case with no majority opinion could be confined to its holding, but some argue that the various Opinions issued by the Justices should be compared to see if there are overlapping statements that suggest a theoretical majority on one or more points of law.[1] Other courts should have considered Justice O'Connor's Opinion as instructive, or perhaps even persuasive, but not as binding authority. However, the Texas Supreme Court adopted into Texas law Justice O'Connor's view that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family." *In re Mays–Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (quoting *Troxel*, at 68; *see also Troxel*, 530 U.S. at 72–73, noting that the constitution "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better decision' could be made"). So Justice O'Connor's non-precedential Opinion has become binding precedent in Texas. *Troxel* also motivated the Texas Legislature to adopt statutes governing (micro-managing?) standing in SAPCRs, resulting in a high degree of complexity and much confusion.

[1] *Marks v. United States*, 30 U.S. 188 (1977); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419 (1992).

**D. GENERAL STANDING TO FILE A SAPCR.** The statute setting out the general conditions that give a party standing to bring a SAPCR is TFC § 102.003. TFC § 102.003 sets out fourteen categories of persons who can file an original SAPCR:

(1) a parent of the child;

(2) the child, through a representative authorized by the court (like a guardian ad litem or attorney ad litem);

(3) a custodian or person with a right of possession of or access to the child under an order from a court of another state or country;

(4) a court-appointed guardian of the person or of the estate of the child;

(5) a governmental entity;

(6) the DFPS;

(7) a licensed child placing agency;

(8) a man claiming to be the father of a child filing in accordance with Chapter 160 (the Uniform Parentage Act), subject to the limitations of that chapter, but not otherwise;

(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 (Termination of the Parent-Child Relationship);

(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 DFPS 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,[2] as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or

[2] "Within the third degree of consanguinity" are parent, child, sibling, grandparent, grandchild, aunt, uncle, niece, nephew, great grandparent, and great grandchild, who must be related by blood, not marriage.

(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,[3] regardless of whether the child has been born.

Several points should be noted regarding TFC § 102.003:

1. Section 102.003 applies to a SAPCR relating to any issue, whether it be managing or possessory conservatorship, geographical restriction, parental rights and responsibilities, child support, possessory periods, court-ordered access to the child, establishing or terminating the parent-child relationship, or adoption. See the definition of a SAPCR in TFC § 101.032.

2. Section 102.003(9), (11), and (12) relate to standing based on practical day-to-day involvement with the child over a sufficient period of time, which entails difficulties in calculating time periods. To reduce uncertainty, the Legislature adopted Section 102.003(b) which says that "[i]n computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."

3. Section 102.003(11) applies to the spouse of a parent who dies, and suit is filed within 90 days of death or the end of residency, which ever is first.

4. In addition to this general standard of standing in Section 102.003, the Legislature has adopted a number of Code provisions stating other grounds for standing, as well as Code provisions establishing limitations on standing. There is also a Code provision for standing to file a SAPCR to modify a prior SAPCR decree, and a Code provision for standing to seek termination and adoption, discussed below.

5. The San Antonio Court of Appeals summarized the law regarding dismissal for lack of standing in SAPCRs *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.--San Antonio 2009, pet. denied):

> Whether a court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). The plaintiff has the burden to allege facts demonstrating jurisdiction and we construe the pleadings liberally in its favor. *Id.* When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court reviews the relevant evidence to determine whether a fact issue exists. *See id.* at 227. If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea and the issue must be resolved by the trier of fact. *Id*. at 227–28. If the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id.* at 228. We review the trial court's ruling de novo. *Id.* We take as true all evidence favorable to the nonmovant and indulge every reasonable inference in its favor. *Id.* When the trial court makes and files findings of fact and conclusions of law, as in this case, we review the trial court's findings under the sufficiency of the evidence standard, and the trial court's conclusions of law are reviewed de novo. *Lonza*

[3] The requirements for a valid statement to confer standing are set out in TFC § 102.0035.

*AG v. Blum*, 70 S.W.3d 184, 189 (Tex. App.--San Antonio 2001, pet. denied).

**1. Actual Care, Control, and Possession for at Least Six Months.** TFC § 102.003(a)(9) grants standing to file a SAPCR to "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." TFC § 102.003(b) provides that in computing the time under subsection (9), the trial court "may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."

The Texas Supreme Court addressed TFC § 102.003(a)(9) in the recent case of *In re H.S.*, 550 S.W.3d 151 (Tex. 2018). In that case, the Supreme Court divided 5-to-4 in holding that a child's maternal grandparents met the standing requirement of TFC § 102.003(a)(9), when they acted in a parental capacity while the father visited only occasionally and the mother was in a full-time substance abuse treatment facility. The Majority Opinion, written by Justice Lehrmann, noted that TFC § 102.003(a)(9) was available only to persons who "share a principal residence with the child" for the six-month period, regardless of how extensive their involvement with the child might otherwise have been. *Id.* at 156. (Editorial note: co-residency is not explicitly required by TFC § 102.003(a)(9), while it is explicitly required by TFC § 102.003(a) (11) & (12)). Justice Lehrmann's Majority Opinion described two conflicting lines of authority among the courts of appeals, one holding that de facto control is what counts, and the other holding that de jure control (pursuant to court order) is what counts. *Id.* at 156-57. (The Opinion distinguishes "actual" from "legal" control.) *Id.* at 158. The Majority Opinion sided with the first line of authority, that actual control is what counts. *Id.* The Court held that "[t]he statute does not require the nonparent to have ultimate legal authority to control the child, nor does it require the parents to have wholly ceded or relinquished their own parental rights and responsibilities."

A subsequent decision on SAPCR standing, *In the Interest of Y.Z.C.T.*, No. 05-17-00530-CV, 2018 WL 3599108, *3 (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.), said that a determination of whether the requirements of TFC § 102.003(a)(9) had been met was "necessarily fact specific and resolved on an ad hoc basis." The appellate court in that case applied a sufficiency of the evidence standard of appellate review.

Earlier on, several courts of appeals had concluded that TFC § 102.003(a)(9) does not require that a party asserting standing to demonstrate exclusive control of the child. *In Interest of K.S.*, 492 S.W.3d 419, 424 (Tex. App.--Houston [14th Dist.] 2016, pet. denied); *In re Crumbley*, 404 S.W.3d 156, 160 (Tex. App.--Texarkana 2013, no pet.); *In re J.J.J.*, No. 14–08–1015–CV, *2 (Tex. App.--Houston [14th Dist.] Dec. 8, 2009, no pet.) (mem. op.); *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.--Dallas 2008, no pet.). These case were vindicated in *In re H.S.*

Points to be noted regarding TFC § 102.003(a)(9):

1. It does not apply to foster parents. Standing for foster parents with a DPFS placement is governed by TFC § 102.003(a)(12), based on the passage of 12 months, without regard to degree of control (but as a practical matter control is comprehensive).

2. The actual care, control, and possession need not be continuous; the courts must look at the child's primary residence during the relevant time period.

3. The proponent is not required to prove legal authority to control the child during the relevant time period;

4. The actual care, control, and possession by the person seeking standing need not be to the exclusion of parental care, control and possession.

5. TFC § 102.003(a)(9)'s standard of "actual care, control, and possession" could apply to a step-parent or female spouse or unmarried partner of a biological mother.

**E. GRANDPARENTS/OTHER RELATIVES SEEKING CUSTODY.** The Legislature has enacted a special standing provision for a child's grandparents and other relatives within the third degree of consanguinity who file an original SAPCR. There are a number of Texas appellate cases decided under this Section. TFC § 102.004, Standing for Grandparent or Other Person, provides:

Sec. 102.004. STANDING FOR GRANDPARENT OR OTHER PERSON.

(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court 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.

(b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter 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.

(b-1) A foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).

(c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153.

Several things should be noted about TFC § 102.004:

1. Section 102.004(a) exists apart from the general standing statute (Section 102.003), so it is an

alternative basis for determining standing that applies to persons within the third degree of consanguinity. Relatives within the third degree of consanguinity can establish standing under either Section 102.003 or Section 102.004(a).

2. Section 102.004(b) is couched in terms of standing to intervene in a pending SAPCR. One court has held that this Code provision cannot bestow standing for a grandparent to file an original proceeding where there was no pending proceeding in which to intervene. *See In re R.M.*, No. 02-17-00234-CV, *5 (Tex. App.--Fort Worth Nov. 16, 2017, no pet.) (mem. op.).

3. The term "grandparent" under TFC § 102.004 means a consanguinious grandparent (related by blood, not marriage), ruling out step-grandparents. *In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007); *In re R.M.*, No. 02-17-00234-CV, *4 (Tex. App.--Fort Worth Nov. 16, 2017, orig. proceeding) (mem. op.); *In re E.C.*, No. 02-13-00413-CV, *3 (Tex. App.--Fort Worth Aug. 7, 2014, no pet.) (mem. op.); *In re Russell*, 321 S.W.3d 846, 859 (Tex. App.--Fort Worth 2010, orig. proceeding [mand. denied]); *In re A.M.S.*, 227 S.W.3d 92, 97-98 (Tex. App.--Texarkana 2009, no pet.). A child's great-uncle by marriage is excluded, as well. *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.).

4. A step-grandparent does not have standing as a grandparent under Section 102.004(a) to initiate a suit for managing conservatorship, but the step-grandparent may have standing as an "other person" under Section 102.004(b) to intervene in a suit brought by his or her spouse, the true grandparent, if the step-grandparent can establish that s/he had substantial past contact with the child and shows significant impairment.

5. The terms "substantial past contact" used in TFC § 102.004(b) is not defined by statute or case law. The question is determined on a case-by-case basis. *In re L.S.B.*, No. 05-17-00929-CV, *1 (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.). In evaluating a grandparent intervention in a SAPCR, the appellate court in *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), reverted to the dictionary definition of substantial as meaning "of ample or considerable amount, quantity, sized, etc." *Id.* at *4. (The same dictionary definition was used in *In re Tinker*, 549 S.W.3d 747, 751 (Tex. App.--Waco 2017, orig. proceeding)). The *Schick* court engaged in a "fact-intensive" inquiry focused on the amount of actual contact the child had with the adult. The court listed examples of substantial past contact in other cases, including *Chavez v. Chavez*, 148 S.W.3d 449, 456 (Tex. App.--El Paso 2004, no pet.) (grandparents had standing to intervene when children lived with them for over a year); *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.--Houston [1st Dist.] 2001, no pet.) (foster parents had standing when seventeen-month-old child resided with them for fourteen months); *In re M.T.*, 21 S.W.3d 925, 927 (Tex. App.--Beaumont 2000, no pet.) (foster parents had standing to intervene after children lived with them for fourteen months); *In re Hidalgo*, 938 S.W.2d 492, 495 (Tex. App.--Texarkana 1996, no writ) (step-grandmother had standing to file petition for managing conservator when she and the child were close since child's birth and child resided with her). Considering the circumstances of the case at bar, the appellate court in *Schick* ruled that the grandparents failed to show substantial past contact. *Id.* at *6.

6. The court in *In re K.D.H.*, 426 S.W.3d 879, 886 (Tex. App.--Houston [14th Dist.] 2014, no pet.), examined the "satisfactory proof to the court" component of TFC § 102.004(b). The term

"satisfactory proof to the court" is not defined in the statute and has no technical meaning. *Id.* at 886-86. The proof required to establish standing is that "the child's present circumstances would significantly impair the child's physical health or emotional development." TFC § 102.004(b). This is similar to the proof required at trial, that appointment of the parent or parents as managing conservators "would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development." TFC § 153.131(a) (the parental presumption). The Court in *K.D.H.* went on:

> Thus, for the Grandmother to have standing, the record must contain satisfactory proof as to part of what the Grandmother has to establish to prevail on the merits of her suit. See Tex. Fam. Code Ann. §§ 102.004(a)(1), 153.131(a). This is a case in which the jurisdictional standing challenge implicates the merits of the petitioner's case and the plea to the jurisdiction involves evidence. The Supreme Court of Texas has held that in this situation the trial court is to review the relevant evidence to determine if a fact issue exists. *See Miranda*, 133 S.W.3d at 227; *Sewell v. Hardriders, Inc.*, No. 14--12-00541-CV, 2013 WL 3326798, *3–4 (Tex. App.--Houston [14th Dist.] June 27, 2013, no pet.) (mem. op.). If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder (in today's case, the jury). *See Miranda*, 133 S.W.3d at 227–28; *Sewell*, 2013 WL 3326798, *3–4. But, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court is to rule on the plea to the jurisdiction as a matter of law.

A contrary view has been taken by the First Court of Appeals, in three cases that held that the "satisfactory proof to the court" component of TFC § 102.004(b) means a preponderance of the evidence. *Rolle v. Hardy*, 527 S.W.3d 405, 417 (Tex. App.--Houston [1st Dist.] 2017, no pet.); *Compton v. Pfannenstiel*, 428 S.W.3d 881, 885 (Tex. App.--Houston [1st Dist.] 2014, no pet.); *Mauldin v. Clements*, 428 S.W.3d 247, 263 (Tex. App.--Houston [1st Dist.] 2014, no pet.). And the Texarkana court dismissed this concern in *In re C.M.C.*, 192 S.W.3d 866, 870 (Tex. App.--Texarkana 2006, no pet.), on the basis that a decision to dismiss a case for lack of standing is not a decision on the merits.

Important point: The difference between these two positions is key: under the 14th Court of Appeals's approach, the trial court determines standing based on whether the intervenor could win; under the 1st Court of Appeals' approach, the trial court determines standing based on whether the intervenor does win (in the mind of the court, before trial).

This review shows that there is confusion on the courts of appeals about (i) whether TFC statutory standing is jurisdictional; and (ii) how to handle standing requirements that match the burden of proof at trial.

7. Since standing under TFC § 102.004(a) to initiate a suit for MC requires satisfactory proof that the order requested is necessary because "*the child's present circumstances would significantly impair the child's physical health or emotional development*" (emphasis added), and since standing to intervene under TFC § 102.004(b) requires satisfactory proof 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*" (emphasis added), and since TFC § 1153.131 requires the non-parent to prove at trial that it would not be in the best interest of the child to appoint one or both parents as managing conservators "because the appointment would *significantly impair the child's physical health or emotional development*," how is the showing for standing any different from the merits of the case?

8. Courts have declined to use equitable estoppel to boost limited past contact into significant past contact just because the lack of contact is attributable to difficult circumstances, or lack of cooperation by the party opposing standing. Several courts have called this "equitable standing." *In re Schick*, *supra* at *6; *In re S.L.M.*, 04-07-00566-CV, 2008 WL 2434160, *2 (Tex. App.--San Antonio June 18, 2008, orig. proceeding) (mem. op.) (court of appeals disagreed with appellants' argument that "the actions by [the adoptive parents] in preventing them from having substantial past contact with [the child] establishes equitable standing"). The Court in *In re H.G.*, 267 S.W.3d 120, 124 (Tex. App.--San Antonio 2008, pet. denied) said: "[O]ur inquiry should be focused on the amount of actual contact which occurred, rather than the difficulties encountered in maintaining contact."

9. It is often a mistake for a grandparent to seek temporary manging conservatorship early in the case, because that forces a merits-related determination of whether the grandparent can overcome the parental presumption by proving significant impairment before the facts can be thoroughly developed. A more prudent approach would be to file the suit, use discovery to develop the facts, bring in an expert and ask the court's permission to for the expert to examine the parents and children, perhaps ask for the appointment of a guardian ad litem or an attorney ad litem or amicus attorney, and to develop a robust case for significant impairment that can be presented in the context of a multi-day trial rather than an hours-long temporary hearing.

**F. GRANDPARENT POSSESSION OR ACCESS.** TFC § 153.432 gives biological or adoptive grandparents standing to file an original suit for court-ordered possession or access to a child, or to seek modification of a SAPCR order to allow court-ordered possession or access. The statute does not afford standing to step-grandparents. *In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007). The suit can be asserted by itself, without regard to litigating primary custody.

TFC § 153.432(1) requires the grandparent to attach an affidavit (presumably to the petition), based on knowledge or belief, along with supporting facts, alleging that the denial of possession or access to the petitioner would significantly impair the child's physical health or emotional well-being. The court must dismiss the suit "unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support" possession or access. The Code section thus requires only a prima facie showing by affidavit of the facts supporting standing.

TFC § 153.433 sets out certain conditions for a court to award possession or access to a grandparent or adoptive grandparent. Under Subsection (a)(1), at the time relief is requested, at least one parent must not have had parental rights terminated. Under Subsection (a)(2), the grandparent must "overcome[] 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." Under Subsection (a)(3), that grandparent's child, who is parent of the child in question, must be in jail or prison during the

three-month period preceding the filing of the petition; or must have been been found by a court to be incompetent; or be dead; or does not have actual or court-ordered possession of or access to the child. Because Section 153.433 is a merits-related provision, it should not be addressed by motion to dismiss for lack of standing. The proper vehicle would be by motion for summary judgment, or trial on the merits.

In *Derzapf*, the Supreme Court said that a grandparent seeking possession or access could not rely on general standing under TFC § 102.003(a)(9) to sustain a suit for possession or access under Section 153.433.

Regarding the merits of the claim for possession or access, in *Derzapf*, the Supreme Court said that "Section 153.433(2) requires that a grandparent seeking court-ordered access overcome the presumption that a parent acts in his or her child's best interest by proving by a preponderance of the evidence that 'denial ... of access to the child would significantly impair the child's physical health or emotional well-being.'" *Id.* at 333. The Court went on to say: "The Legislature set a high threshold for a grandparent to overcome the presumption that a fit parent acts in his children's best interest: the grandparent must prove that denial of access would '*significantly impair*' the children's physical health or emotional well-being. Tex. Fam. Code § 153.433(2) (emphasis added)." *Id.* at 334. In *Derzapf*, the Supreme Court closely examined the expert's testimony and noted that the expert did not say that denying the grandmother access would significantly impair the children's physical or emotional health. The Court also pointed out that the expert's testimony was couched in terms involving both the grandmother and the step-grandfather, the latter being disqualified from standing due to lack of consanguinity. The Supreme Court granted mandamus to set aside temporary orders granting grandparent access in *In re Mays-Hooper*, 189 S.W.3d 777(Tex. 2006), and in *In re Scheller*, 325 S.W.3d 640, 643 (Tex. 2010).

Note that the grandparent must show that the denial of possession or access would significantly impair the child's physical health or emotional well-being, both to establish standing and to win at trial. The court is not supposed to resolve fact issues on a motion to dismiss for lack of standing that go to the merits of the case. However, in this instance standing under TFC § 153.432 is measured by an affidavit, or prima facie proof, meaning that the court must assume that the facts in the affidavit are true and see if they make a believable case. So the proscription against weighing jurisdictional facts pre-trial is not violated.

Points to note about grandparent possession and access:

1. Standing to seek grandparent possession or access is not directly founded on substantial involvement, but rather significant impairment. For example, in *In re J.M.G.*, 553 S.W.3d 137, 143 (Tex. App.--El Paso 2018, no pet.), the grandmother's affidavit saying that the children's father resided with their grandmother for a period of seven years, and the children came to her home whenever they visited their father, including 30 days each summer, and that she attended many school activities and events of the grandchildren, and attended church with the children, and the father was incarcerated in jail, and the kids had been texting and telephoning the grandmother to visit them, was held on appeal, to be insufficient to establish standing, because "the affidavit does not allege any facts pertaining either directly or indirectly to the grandchildren's physical or emotional well-being and there is nothing to show that the children

are suffering any impairment much less significant impairment." (It appears that the affidavit was oriented toward showing substantial involvement but not serious impairment.)

2. The fact that standing for grandparent possession or access is established by affidavit and not a hearing by necessity means that only a prima facie showing is required to establish standing.

3. The party opposing standing can file a motion to dismiss, or summary judgment, to bring the standing issue to the fore. If that happens, the grandparent can move to continue the hearing to allow discovery, the hiring or appointment of an expert, the appointment of a guardian ad litem or an attorney ad litem or amicus attorney, etc. *See In the Interest of A.E.*, No. 09-16-00019-CV, *5 (Tex. App.--Beaumont April 27, 2017, pet. pending) ("When the trial court must examine evidence in making a determination regarding standing, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable"). In that instance, the court must weigh the cost to the party opposing standing of incurring the expense of discovery against the risk of having to decide standing without having more complete knowledge of the actual circumstances.

**G. STANDING FOR SIBLING ACCESS.** TFC § 102.0045 contains a special rule giving standing to siblings who are at least 18 years of age to the file a SAPCR for court-ordered access to a minor sibling. If the siblings are separated by DFPS, there is no minimum age for filing the suit, and the disposition of the suit must be expedited by the court.

**H. STANDING FOR TERMINATION AND ADOPTION.** Standing to pursue a termination and adoption proceeding is addressed by TFC § 102.005:

§ 102.005. Standing to Request Termination and Adoption

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

(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.

In *In re C.M.C.*, 192 S.W.3d 866, 872 (Tex. App.--Texarkana 2006, no pet.), the court looked to Random House Dictionary for the definition of "substantial," and found that the facts alleged by the maternal grandparents were insufficient to establish substantial past contact with the child sufficient to warrant standing to adopt.

TFC § 162.010(a) provides:

> § 162.010. Consent Required
>
> (a) Unless the managing conservator is the petitioner, the written consent of a managing conservator to the adoption must be filed. The court may waive the requirement of consent by the managing conservator if the court finds that the consent is being refused or has been revoked without good cause. A hearing on the issue of consent shall be conducted by the court without a jury.

In *In re M.K.S.-V.*, 301 S.W.3d 460, 464 (Tex. App.--Dallas 2009, pet. denied), a same-sex former partner tried to sustain a SAPCR based on standing under TFC § 102.003(a)(9), "actual care, control, and possession." The trial court dismissed the custody suit, but held that the partner had standing to seek to adopt based on "substantial past contact with the child sufficient to warrant standing," but later changed its mind and dismissed all claims. The appellate court reversed as to standing to seek managing conservatorship, saying that the evidence established "the six month period of actual care, custody, and control requisite to establish her standing to file an original SAPCR petition." *Id.* at 465. The dismissal of the adoption claims was affirmed, because consent of the parent is required for adoption and consent did not exist in the case. [Author's comment: In making this decision regarding standing to seek adoption, the appellate court mixed the standing inquiry with the merits of the claim. The appellate court should have upheld standing to adopt, because meeting the "actual care, control, and possession" requirement of TFC § 102.003(a)(9) also constitutes a prima facie showing of "substantial past contact with the child sufficient to warrant standing to" seek adoption under §102.005. Lack of consent is part of the merits of an adoption case, and lack of consent is not automatically determinative because the court may waive the requirement if consent to adopt is being withheld without good cause. That analysis should not have been conducted at the time of the motion to dismiss. It should have been conducted at trial.]

**I. LIMITATIONS ON STANDING.** TFC § 102.006, Limitations on Standing, provides that, where the parent-child relationship has been terminated as to every living parent, an original SAPCR cannot be filed by a former terminated parent, the father of the child, or a family member or relative related by blood, adoption, or marriage of a terminated parent or the father of the child. This exclusion does not apply to a person who has a continuing right of possession or access under an existing court order, of has the consent of the managing conservator, guardian, or legal custodian to bring suit.

## J. INTERVENTION.

**1. The Rule.** TRCP 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." "An intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793

S.W.2d 652, 657 (Tex. 1990). "[A] person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." *Id.* at 657.

**2. Intervention by Grandparent or Other Person in a SAPCR.** As noted above, the Legislature has enacted TFC § 102.004(b) which provides:

> (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter 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.
>
> (B-1) A foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).

**3. Will General Standing Support Intervention?** Thus, the Legislature has given trial courts discretion over whether to allow non-parents to intervene in SAPCRs if impairment is satisfactorily proven. In *In the Interest of A.T.G.*, No. 04-18-00208-CV (Tex. App.--San Antonio Sept. 26, 2018, no pet.) (mem. op.), the appellate court found that since the foster parents had standing to initiate a SAPCR under TFC § 102.003(a)(12), it follows that the foster parents had standing to intervene in a pending SAPCR. *Id*. at *2. *Accord*, *In re Shifflet*, 462 S.W.3d 528, 537 (Tex. App.--Houston [1st Dist.] 2015, no pet.); *In Interest of A.T.*, No. 14-14-00071-CV, *10 (Tex. App.--Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.); *In re S.B.*, No. 02–11–00081–CV, *2–3 (Tex. App.--Fort Worth Mar. 11, 2011, orig. proceeding) (mem. op.) (grandparents who satisfied TFC § 102.004(a)'s requirements for filing an original SAPCR also have the right to intervene); *but see In re A.G.*, No. 05-18-00725-CV, *3 (Tex. App.--Dallas Dec. 12, 2018 n.p.h.) (standing under TFC § 102.004(a) not relevant to standing under TFC § 102.004(b)); *In Interest of E.C.*, No. 05-17-00723-CV,*4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.) (analyzing cases pro and con and deciding that standing to intervene must be shown without regard to standing under TFC § 102.003(a)). In *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), the same Court of Appeals confined its analysis of standing to the standing to intervene under TRC § 102.004(b), and did not consider standing under § 102.004(a) for filing an original SAPCR. The court also held that "satisfactory proof" under § 102.004(b) means a preponderance of the evidence. In *In the Interest of A.G.*, No. 05-18-00725-CV, *3-4 (Tex. App.-- Dallas Dec. 12, 2018, n. p.h.), the court held that an intervenor must meet the standing requirements of TFC § 102.004(b) even if she had standing to bring an original suit under TFC § 102.004(a)(2). Apart from the foregoing, in *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012), the Supreme Court allowed a grandparent to intervene in a custody case based on standing under TFC § 102.003(a)(9). This decision by the Supreme Court should be enough to settle the issue.

**4. Leave of Court.** In *In Interest of A.T.*, No. 14-14-00071-CV, *8 (Tex. App.--Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.), the court held that a person is required to ask the trial court for

leave in order to intervene under TFC § 102.004(b), notwithstanding the language in TRCP 60 suggesting that you file first, subject to being stricken later.

**5. Procedural Grounds for Denial of Intervention.** The Court in *In the Interest of E.C.*, No. 05-17-00723-CV, *4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.), held that a trial court may deny leave to intervene under TRC § 102.004(b) where the intervention occurs late in the case, or for other procedural reasons. "[T]rial courts [may] weigh the benefits of such interventions against the potential for disruption in a pending suit." *Id*. at *4.

**K. STANDING TO SEEK MODIFICATION.** TFC § 156.002 sets out statutory standing to file a suit to modify a SAPCR order:

> Sec. 156.002. WHO CAN FILE.
>
> (a) A party affected by an order may file a suit for modification in the court with continuing, exclusive jurisdiction.
>
> (b) A person or entity who, at the time of filing, has standing to sue under Chapter 102 may file a suit for modification in the court with continuing, exclusive jurisdiction.
>
> (c) The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction.

The limitation on statutory standing to file a modification proceeding reflects a view that the courts should not be open to just "any person" who desires to change managing conservatorship. *Pratt v. Texas Dept. of Human Resources*, 614 S.W.2d 490, 495 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.). Rather, the person filing the suit must have been a "party affected by" the original order, or someone who otherwise meets the statutory standing requirements.

The plain meaning of the word "party" requires that the person have been a party to the order that the person seeks to modify. *In re S.A.M.*, 321 S.W.3d 785, 790 (Tex. App.--Houston [14th Dist.] 2010, no pet.). In this context, "party" does not necessarily mean "conservator." *Id*. Rather, a party is someone "by or against whom a lawsuit is brought." *Id.* at 789. A person who merely filed an amicus curiae brief in a case is not considered to have been a party. *In re A.J.L.*, 108 S.W.3d 414, 419-20 (Tex. App.--Fort Worth 2003, pet. denied).

The term "affected by an order" in the statute does not require that the party have been appointed a conservator of the child. Rather, a party is "affected by an order" if s/he is given important rights, or burdened with duties, regarding the children. *In re S.A.M.*, 321 S.W.3d 785, 791 (Tex. App.--Houston [14th Dist.] 2010, no pet.) (rejecting the contention that "party" means someone merely mentioned in a previous decree in the context of conservatorship, but applying a definition of "producing an effect on" the person, which was met by being awarded telephone access); *Moreno v. Perez*, 363 S.W.3d 725 (Tex. App.--Houston [1st Dist.] 2011, no pet.) (party who received visitation rights had standing).

Under TFC § 156.002(b), a modification proceeding can be filed by anyone meeting any of the

standing requirements of TFC ch. 102.

## III. MODIFICATION OF CHILD CUSTODY.

**A. HISTORICAL BACKGROUND.** Texas public policy encourages promoting stability for children and discourages constant litigation in child custody cases. *Bates v. Tesar*, 81 S.W.3d 411, 421 (Tex. App.--El Paso 2002, no pet.); *accord*, *In re A.N.O.*, 332 S.W.3d 673, 679 (Tex. App.--Eastland 2010, no pet.). "A final judgment in a custody proceeding is res judicata of the best interests of a minor child as to conditions then existing.... There must be a showing of materially changed conditions to authorize a change of custody.... As a matter of public policy, there should be a high degree of stability in the home and surroundings of a young child, and, in the absence of materially changed conditions, the disturbing influence of re-litigation should be discouraged." *Knowles v. Grimes*, 437 S.W.2d 816, 817 (Tex. 1969). When the Legislature adopted the parent-child portion of the TFC in 1973, the Legislature articulated a standard for modifying prior SAPCR orders. A brief history of the subject was set out by Justice Ann McClure in *Bates v. Tesar*, *supra* at 426-27:

> Historically, Texas law has tried to ensure stability and continuity for children by imposing significant hurdles to modifications of managing conservatorship. *Jenkins*, 16 S.W.3d at 478. When the Family Code was enacted in 1973, modification of sole managing conservatorship was measured by the now familiar test of a material and substantial change in circumstances, coupled with a best interest test. *Id.* In 1975, an additional prong was added, requiring a finding that retention of the existing managing conservator would be injurious to the welfare of the child. *Id*. Twenty years later, the "injurious retention" element, as it had come to be known, was abandoned. *Id.* Until recently, Section 156.101 provided that a court could replace one sole managing conservator with another if the circumstances of the child, sole managing conservator, or possessory conservator had materially and substantially changed, and the appointment of a new sole managing conservator would be a positive improvement for the child. *Id.* A sole managing conservatorship could be replaced with a joint conservatorship upon a showing that the circumstances of the child or sole managing conservator had materially and substantially changed since the rendition of the order; retention of the sole managing conservatorship would be detrimental to the welfare of the child; and appointment of the parents as joint managing conservators would be a positive improvement for and in the best interest of the child. See [TFC] § 156.104 .... The terms of a joint managing conservatorship could be modified upon a showing of changed circumstances or a showing that the order had become unworkable or inappropriate provided the modification would be a positive improvement for and in the best interest of the child. [TFC] § 156.202. Finally, a joint managing conservatorship could be replaced with a sole managing conservatorship if the child's present living environment posed a danger to the child's physical health or significantly impaired the child's emotional development; there had been a substantial and unexcused violation of the existing order; or the circumstances of the child or one or both of the joint managing conservators had so materially and substantially changed that the order had become unworkable or inappropriate; and the appointment of a sole managing conservator would be a positive improvement for and in the best interest of the child. [TFC] § 156.203.
>
> ... The legislative amendments to Chapter 156 during the 2001 legislative session are

> significant. Effective September 1, 2001, Chapter 156 provides a set of uniform standards for the modification of conservatorship.... Under the new statute, most modifications will be based upon a showing that (1) modification would be in the best interest of the child and (2) the circumstances of the child, a conservator, or any other party affected by the order have materially and substantially changed since the date of the rendition of the order. See [TFC] § 156.101(1).... This two-prong test applies to modifications of sole managing conservatorship, joint managing conservatorship, and possessory conservatorship. *Id*. Noteworthy is the fact that both the long-standing "positive improvement" prong and the "detrimental retention" prong necessary to replace a sole managing conservatorship with joint managing conservatorship have been deleted....

At the present time, the TFC has different statutes pertaining to modification of conservatorship/possession versus support. The custody/possession modification rule is TRC § 156.101:

> § 156.101. Grounds for Modification of Order Establishing Conservatorship or Possession and Access
>
> (a) The court may modify an order that provides for the appointment of a conservator of a child, that provides the terms and conditions of conservatorship, or that provides for the possession of or access to a child 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 as provided by Section 153.009 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.
>
> (b) Subsection (a)(3) does not apply to a conservator who has the exclusive right to designate the primary residence of the child and who has temporarily relinquished the primary care and possession of the child to another person during the conservator's military deployment, military mobilization, or temporary military duty, as those terms are defined by Section 153.701.

**B. THE REQUIRED SHOWING.** The conditions for modifying child custody arrangements are governed by TFC ch. 156, which also governs modification of other aspects of the parent-child

relationship. To modify managing conservatorship, the right to establish the primary residence, the presence or absence of a geographical restriction on the child's residence, or the terms and conditions of conservatorship or possession and access, two things must be shown: a material substantial change and best interest. The change must be in the circumstances of the child, a conservator, or a party affected by the order to be modified, and the change must be material and substantial. TFC § 156.101(a). The change must be from the date the order is rendered, or the date of the mediated settlement agreement (MSA) if the order was based on an MSA. *Id.* As an alternative to proving changed circumstances, it suffices if the child is at least 12 years of age and has expressed to the court in chambers the name of the person who the child wants to be primary custodian. TFC § 156.101(a)(2). As an alternative to proving changed circumstances, the proponent can prove that the primary conservator temporarily relinquished primary care and possession of the child to another person for at least six months (not including a parent assigned elsewhere on military duty). TFC § 156.101(a)(3). Any modification must be in the best interest of the child. TFC § 156.101(a).

**C. MODIFICATION WITHIN ONE YEAR.** If suit to modify is brought within one year of the order to be modified (or the signing of the MSA), and is brought to change primary custody, the petition to modify must be supported by an affidavit alleging: (i) that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development; or (ii) 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 (iii) that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished (other than for active duty military) the primary care and possession of the child for at least six months and the modification is in the best interest of the child. TFC § 156.102(b). The court must review the affidavit, and deny a hearing unless the court determines that facts exist that are adequate to support one or more of the required allegations. TFC § 156.102(c).

**D. TEMPORARY ORDERS MODIFYING CUSTODY.** In a modification proceeding, the court can issue temporary orders modifying primary custody, or imposing or removing a geographical restriction, only if the temporary order is in the child's best interest and (i) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or (ii) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or (iii) 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. TFC § 156.006(b).

**E. WHAT CONSTITUTES A MATERIAL AND SUBSTANTIAL CHANGE?** "A fact finder is not confined to rigid or definite guidelines in deciding whether a material and substantial change of circumstances has occurred. *In the Interest of ALE,* 279 S.W.3d 424, 428 (Tex. App.--San Antonio Nov. 2, 2009, no pet.) (mem. op.). Instead, the determination is fact-specific and must be made according to the circumstances as they arise. *Id.*" *In Interest of A.L.H.*, 515 S.W.3d 60, 79 (Tex. App. --Houston [14th Dist.] 2017, pet. den.).

"To prove that a material change in circumstances has occurred, the petitioner must demonstrate what conditions existed at the time of the entry of the prior order as compared to the circumstances existing at the time of the hearing on the motion to modify." *Zeifman v. Michels*, 212 S.W.3d 582, 589 (Tex.

App.--Austin 2006, pet. denied). "The controlling considerations are those changes of conditions affecting the welfare of the child. The desires, acts and claims of the respective parents are secondary considerations and material only as they bear upon the question of the best interest of the child." *Bukovich v. Bukovich*, 399 S.W.2d 528, 529 (Tex. 1966); *In re Marriage of Chandler*, 914 S.W.2d 252, 254 (Tex. App--Amarillo 1996, no writ). The Court in *In re N.T.P.*, 402 S.W.3d 13, 19-20 (Tex. App.--San Antonio 2012, no pet.), said that "[i]f a circumstance was contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but is instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances ....").

**F. BUILDING-IN FUTURE CHANGES.** A trial court is sometimes asked to build into the decree a future change in circumstances and to provide for a self-executing modification of the decree at that future time. This is a doubtful proposition. Future changes to a court order pertaining to children must be based on proof of circumstances existing at the time of the modification trial. *In Interest of J.M. & G.M.*, 585 S.W.2d 854, 857 (Tex. Civ. App.--San Antonio 1979, no writ) ("there must be a material change in conditions to warrant an increase in child support payments, and it is not in the trial court's power to anticipate such changes and provide for them prior to their occurrence"); *accord*, *Attorney Gen. of Texas, On Behalf of Menefee v. Menefee*, No. 01-90-00324-CV, *3 (Tex. App.--Houston [1st Dist.] Sept. 26, 1991, no pet.) (mem. op.). A court cannot build into a SAPCR decree automatic changes based on anticipated future circumstances. *Barlow v. Barlow*, 282 S.W.2d 429 (Tex. Civ. App.--El Paso 1955, no writ) ("The facts of this case, as in every case involving child support, require the exercise of a sound discretion by the trial judge, and not the arbitrary application of any formula").

Things to consider in connection with custody modifications:

1. The changes proved must be material and substantial.

2. The changes in the court's order must relate to the changed circumstances. *Smith v. Karanja*, ___ S.W.3d ___, No. 01-16-01004-CV (Tex. App.--Houston [1st Dist.] Feb. 8, 2018, no pet.).

**IV. RELAXED RULES OF PLEADINGS IN SAPCRs.** The Texas Rules of Civil Procedure apply to SAPCRs. TFC § 1015.003(a) ("Except as otherwise provided by this title, proceedings shall be as in civil cases generally"). However, it is sometimes said that "in matters concerning support and custody of children the paramount concern is the best interest of the children and the technical rules of pleading and practice are not of controlling importance." *See Barrow v. Durham*, 574 S.W.2d 857, 861 (Tex. Civ. App.--Corpus Christi 1978), *aff'd*, 600 S.W.2d 756 (Tex. 1980). The Supreme Court said, in *Leithold v. Plass*, 413 S.W.2d 698, 701 (Tex. 1967):

> [W]e are of the view that a suit properly invoking the jurisdiction of a court with respect to custody and control of a minor child vests that court with decretal powers in all relevant custody, control, possession and visitation matters involving the child. The courts are given wide discretion in such proceedings.... Technical rules of practice and pleadings are of little importance in determining issues concerning the custody of children.

Nonetheless, in *Flowers v. Flowers*, 407 S.W.3d 452 (Tex. App.--Houston [14th Dist.] 2013, no. pet.), the appellate court reversed a trial court for removing a geographic restriction on the mother's right to determine the children's primary residence because the mother had not pled for that relief,

and the issue was not tried by consent. The appellate court also reversed the trial court's reallocation of five specific parental rights for failure to plead for those changes.

In the case of *In re A.B.H.*, 266 S.W.3d 596, 600-01 (Tex. App.--Fort Worth 2008, no pet.), a divided court reversed a trial court for appointing a parent a sole managing conservator when he had pled only to be appointed the joint managing conservator with the exclusive right to establish the child's primary residence, and the issue of sole managing conservator was not tried by consent. The dissenting Justice said: "Because Cheryll and Scott both put the workability of the existing conservatorship arrangement at issue in their pleadings, I would hold that those pleadings were sufficient to support the trial court's order designating Scott as the sole managing conservator of the children." *Id.* at 602.

In the case of *King v. Lyons*, 457 S.W.3d 122, 126 (Tex. App.--Houston [1st Dist.] 2014, no pet.), the trial court included an injunctive order in an order modifying a prior SAPCR order. The appellate court posed the following questions:

> 1. "[M]ay a court impose an injunction in the absence of pleadings requesting that relief?"
>
> 2. "[M]ay injunctive relief in such a case be based solely on the best interest of the child or must there be a showing of the usual elements needed to prove entitlement to a permanent injunction, i.e., a wrongful act, imminent harm, irreparable injury, and the absence of an adequate remedy at law?"

*Id.* at 127. After thoughtful analysis of cases discussing the importance of pleadings in SAPCRs, and in injunction cases, the appellate court ruled: "Considering the aforementioned authorities, we conclude that in suits affecting the parent-child relationship, a trial court may not grant injunctive relief against a party unless that party had notice by way of the pleadings or the issue was tried by consent." *Id.* at 130-31. [Author's note: The pleading requirement for injunctive orders may be more stringent than rulings on custody, visitation and the rights and duties of parents.]

**V. COURT-APPOINTED PARTICIPANTS.** The TFC has a number of provisions authorizing the court to appoint persons to participate in the litigation process.

**A. FAMILY COUNSELOR.** TFC § 153.010 authorizes a court to order a party to participate in counseling with a mental health professional who (i) has a background in family therapy; (ii) has a mental health license that requires as a minimum a master's degree; and (iii) has training in domestic violence if the court determines that the training is relevant to the type of counseling needed. If no one in the county can meet the foregoing criteria, the court can appoint a person whom the court believes is qualified to conduct the counseling. A referral to counseling must be predicated on a determination that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child.

**B. GUARDIAN AD LITEM.** A "guardian ad litem" is defined in TFC §107.001(5) as "a person appointed to represent the best interests of a child. The term includes:

> (A) a volunteer advocate from a charitable organization described by Subchapter C who

is appointed by the court as the child's guardian ad litem;

(B) a professional, other than an attorney, who holds a relevant professional license and whose training relates to the determination of a child's best interests;

(C) an adult having the competence, training, and expertise determined by the court to be sufficient to represent the best interests of the child; or

(D) an attorney ad litem appointed to serve in the dual role."

The powers and duties of a guardian ad litem are described in TFC § 107.006. They include the duty to interview the child if age 4 or older, to interview each person with significant knowledge of the child's history and condition, to interview the parties to the suit, and to consider the child's desires without being bound by them. The guardian is not bound to advocate the desires of the child. The guardian ad litem is not allowed to call or question witnesses, unless the guardian ad litem is an attorney appointed in a dual role. TFC § 107.002(c)(4). The guardian ad litem can be called as a witness. TFC § 107.002(d) & (e). The guardian ad litem can submit a report, but the disclosure of the contents to the jury is subject to the Texas Rules of Evidence. See Section VI.C.9. "A guardian ad litem's representation is limited to matters related to the suit for which he was appointed." *Durham v. Barrow,* 600 S.W.2d 756, 761 (Tex. 1980).

**C. ATTORNEY AD LITEM.** "The role of an attorney ad litem is, like every attorney, to pursue, protect, and defend the interests of his or her client." *Harris Cty. Children's Protective Servs. v. Olvera*, 77 S.W.3d 336, 341 (Tex. App.--Houston [14th Dist.] 2002, pet. denied). An "attorney ad litem" is defined in TFC §107.001(2) as "an attorney who provides legal services to a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation." The duties of an attorney ad litem are set out in TFC § 107.003. These duties include interviewing the child if age 4 or older, interviewing "each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. The attorney ad litem "must be trained in child advocacy or have experience determined by the court to be equivalent to that training." TFC § 107.003(a)(2). Additionally, the attorney ad litem must investigate the medical care for the child, and if the child is age 16 or older, be sure the child has a birth certificate, social security card, driver's license, and other document determined by DFPS to be appropriate. TFC § 107.003(b). Additionally, the attorney ad litem must advise the child, represent the child's "expressed objectives of representation," and be familiar with the American Bar Association's standards of practice for attorneys representing children. TFC § 107.004. The attorney ad litem must complete at least three hours of continuing legal education in representing children in child protection. TFC § 107.004(b). Additional responsibilities are spelled out in TFC §107.004.

**D. AMICUS ATTORNEY.** An "amicus attorney" is defined in TFC §107.001(1) as "an attorney appointed by the court in a suit, other than a suit filed by a governmental entity, whose role is to provide legal services necessary to assist the court in protecting a child's best interests rather than to provide legal services to the child." The duties of an amicus attorney are set out in TFC § 107.003, and overlap those of an attorney ad litem as to interviewing the child if age 4 or older, interviewing

"each person who has significant knowledge of the child's history and condition," interviewing the parties to the suit, seeking the child's objectives, considering the impact on the child of the attorney's advocacy, investigating facts, obtaining records, and participating fully in litigation. Additional duties are spelled out in TFC § 107.005.

**E. PHYSICAL OR MENTAL EXAMINER.** TRCP 204 permits a court, upon motion and notice, to order a party (or a person in a party's custody or control) to submit to a physical or mental examination by a physician or psychologist. Good cause must be shown, meaning either the mental or physical condition is in controversy, or where the party in question has designated a psychologist as a testifying expert or disclosed a psychologists's records for possible use at trial. TRCP 204.1 (a) & (c). The party examined can require the evaluator to prepare a report. TRCP 204.2. TRCP 204.3 permits the court, in a SAPCR, to order one or more psychologists or psychiatrists to examine the children or other parties.

**F. CHILD CUSTODY EVALUATOR.** Under TFC ch. 107, subch. D, the court can order a child custody evaluation. TFC § 107.113 requires that the evaluator prepare a report which must be filed with the court and served on the parties. TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence."

TFC § 107.109 sets out the "basic elements" of a child custody evaluation. They include (i) a personal interview with the parties seeking court-ordered relationship with the child; (ii) interviews with the children; (iii) observation of the children with each party; (iv) observation and interview with another child who lives on a full-time basis in the home but is not subject to the suit; (v) information from collateral sources; (vi) criminal history of residents of the household; and (vii) an assessment of the relationship between each child and each party seeking a court-ordered relationship. If any of these basic elements is missing, the evaluator must disclose what and why, and discuss the effect of its omission. TFC § 107.109(b). The Court can order psychometric testing. TFC § 107.110.

**G. PARENTING COORDINATOR.** A "parenting coordinator" is an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described by Section 153.606 in a suit; and (B) who: (i) is appointed under this subchapter by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through confidential procedures; and (ii) is not appointed under another statute or a rule of civil procedure. TFC § 153.601(3). The court cannot appoint a parenting coordinator except upon a finding that the case is a "high-conflict case" or there is good cause and the appointment would be in the child's best interest. TFC § 153.605(b). The parenting coordinator cannot act as amicus attorney, guardian ad litem, or child custody evaluator, friend of the court, or parenting facilitator. There is a list of duties of parenting coordinators in TFC § 153.606, such as identifying disputed issues, reducing misunderstandings, clarifying priorities, exploring possibilities for problem solving, etc. The parenting coordinator "shall" submit a written report to the court and parties as often as the court orders. However, the report is limited to a statement of whether the parenting coordinator should continue. TFC § 153.608.

**H. PARENTING FACILITATOR.** A "parenting facilitator" is "an impartial third party: (A) who, regardless of the title by which the person is designated by the court, performs any function described

by Section 153.6061 in a suit; and (B) who: (i) is appointed under this subchapter by the court on its own motion or on a motion or agreement of the parties to assist parties in resolving parenting issues through procedures that are not confidential; and (ii) is not appointed under another statute or a rule of civil procedure." TFC § 153.601(4). The parenting facilitator has the same duties as listed for parenting coordinators, plus monitoring compliance with court orders. TFC § 153.6061. The parenting facilitator "shall" submit a written report to the court and parties as often as the court orders. The report may contain a recommendation of settlement, and other matters specified by the court, but may not include recommendations as to conservatorship, possession, or access. TFC § 153.6081.

**I. REPORT OF JOINT PROPOSAL OR JOINT STATEMENT.** If the court orders parties to work with a parenting coordinator or parenting facilitator to settle parenting issues, the coordinator or facilitator "shall" submit a written report describing a joint proposal or statement of the parties. This written report does not constitute an agreement unless it is prepared by the parties' attorneys in the form of a Rule 11 agreement, an MSA, a collaborative law agreement, or a settlement agreement under Tex. Civ. Prac. & Rem. Code § 154.071. TFC § 153.6082.

**VI. EVIDENCE ISSUES IN CUSTODY CASES.** There are some recurrent evidentiary issues in SAPCR proceedings.

**A. PRESUMPTIONS.** There are several presumptions unique to SAPCRs.

**1. The Parental Presumption.** "The presumption that the best interest of a child is served by awarding custody to a natural parent is deeply embedded in Texas law." *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990). "The parental presumption is based upon the natural affection usually flowing between parent and child." *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). TFC § 153.131 says:

> § 153.131. Presumption That Parent to be Appointed Managing Conservator
>
> (a) Subject to the prohibition in Section 153.004,[4] unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It 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. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Things to note about the parental presumption.

1. TFC §153.131 not only casts the burden of producing evidence and the burden of persuasion

[4] TFC § 153.004 prohibits appointing as JMC a parent who has exhibited "a history or pattern of past or present child neglect, or physical or sexual abuse ... directed against the other parent, a spouse, or a child ...." The Section also denies access to a parent who has a history or pattern of family violence or sexual crimes.

on the party seeking to keep a parent from being appointed managing conservator; it also alters the burden of persuasion from best interest to proving that the appointment of the parent as a managing conservator would significantly impair the child's physical health or emotional development. Several courts have called this a "heavy burden." *In re K.R.B.*, No. 02-10-00021-CV, *4 (Tex. App.--Houston [14th Dist.] Oct. 7, 2010, no pet.) (mem. op.); *Critz v. Critz*, 297 S.W.3d 464, 474-75 (Tex. App.--Ft. Worth 2009, no pet.). The court in *Critz* said: "Impairment must be proved by a preponderance of the evidence indicating that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions of the parent, will probably cause that harm. This is a heavy burden that is not satisfied by merely showing that the non-parent would be a better custodian of the child. 'Close calls' should be decided in favor of the parent." *Id.* at 474-75. [Footnotes omitted.] In *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.), the court said that the "evidence must support a logical inference that the parent's specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. This link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm."

2. Under TFC § 153.373, the parental presumption vanishes where "the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, a licensed child-placing agency, or the [DFPS] for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit," and the appointment of the non-parent, agency, etc. is in the best interest of the child.

3. The parental presumption does not apply in suits to modify a prior SAPCR order. *In re V.L.K.*, 24 S.W.3d 338, 343 (Tex. 2000).

**2. Family Code Prohibitions/Presumptions Based on Violence or Sexual Crimes.** TFC §153.004, entitled "History of Domestic Violence or Sexual Abuse," contains significant (if confusing) terms. Subsection (a) says: "In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit." It is doubtful that a court would not consider such evidence even without the statute. *See generally Lewelling v. Lewelling*, 796 S.W.2d 164, 167-169 (Tex. 1990).

Subsection (b) says that the court "may not" appoint a party as joint managing conservator if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent against the other parent, a spouse, or a child. How to implement this directive is somewhat unclear, because the prohibition appears to be triggered by a mere prima facie showing with credible evidence, which is a lower burden than actually convincing the fact finder that such behavior occurred. Does the language of the statute mean that instead of determining from a preponderance of the evidence whether violence or sexual crimes occurred, the court should instead determine whether the evidence presented was credible? If so, what does a court do if it finds that evidence credible but finds that contrary evidence outweighs it?

Subsection (b) also introduces a "rebuttable presumption" that it would not be in the best interest of a child for the court to appoint a parent as sole managing conservator or to give that parent the exclusive right to determine a child's primary residence, when "credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child." This language presents the same uncertainty regarding the difference between presenting credible evidence and convincing the finder of fact. Things are further complicated by providing a "rebuttable presumption," which is weaker than the outright prohibition ("may not appoint") that is contained in the previous term of Subsection (b). Also, if the presumption falls away in the face of contrary evidence (as suggested first by Professor Thayer and later by Professors Wigmore and McCormick, sometimes called the "bursting bubble" view of presumptions), then the rebuttable presumption can vanish as easily as it arose, and in a swearing match there would be no presumption. So it remains to be determined whether the statutory presumption merely shifts the burden of producing evidence to the alleged perpetrator, or whether it shifts the burden of persuasion as well, so that the alleged perpetrator must prove by a preponderance of the evidence that s/he did not do those things.

Subsection (c) says that the court "shall consider the commission of family violence or sexual abuse in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator." There is no outright prohibition ("the court may not"), nor is there a rebuttable presumption. Instead, there is just a requirement to consider certain evidence (which courts would almost certainly do even without the statute).

Subsection (d) prohibits a court from ordering access by a parent to a child for whom a preponderance of the evidence shows a history of family violence within two years, or criminal sexual conduct toward the child. This is a prohibition triggered by a finding upon a preponderance of the evidence–a burden of persuasion consistent with the rest of civil litigation.

Having said all that, Subsection (d-1) creates an exception to subsection (d) when the courts finds that access would not endanger the child's physical health or emotional welfare and would be in the child's best interest, and the court renders an order the protects the child and others who were victims of violence. These protections include supervised access, exchanges of possession in protective circumstances, abstaining from drugs and alcohol, and attending violence preventions programs.

Subsection (e) gives us another rebuttable presumption that unsupervised visitation is not in the best interest if "credible evidence is presented" of a history or pattern of child neglect, abuse, or family violence. The court is directed to consider as possible "credible evidence" a protective order.

In *Watts v. Watts*, 396 S.W.3d 19, 22 (Tex. App.--San Antonio 2012, no pet.), the evidence showed that both spouses had engaged in family violence toward the other. The appellate court said that one or the other parent, but not both, had to be appointed sole managing conservator.

**a. The Pattern Jury Charge Instructions on Violence and Sex Crimes.** The State Bar of Texas Pattern Jury Charges PJC 215.3 suggests that the instruction to the jury that a parent who has committed family violence or sex crimes cannot be appointed as joint managing conservator should be given only if "credible evidence" is admitted on the subject. The PJC Committee is thus expecting the trial court to make a preliminary determination whether evidence is credible. An argument can

be made that the credibility determination should be made by the jury and not the judge. In that event, the instruction should go to the jury whenever *any* evidence is admitted showing violence or sex crimes. The poor wording of the statute causes this uncertainty, but when a jury is the fact finder it seems that the jury and not the judge should decide not only whether evidence of violence or sex crimes is credible, but more importantly whether it actually occurred. The PJC Committee advises that the instructions in PJC 215.2 (Evidence of Abusive Physical Force or Sexual Abuse) and PJC 215.4 (History or Pattern of Family Violence, History or Pattern of Child Abuse or Neglect, or Protective Order), are not properly submitted if there is no evidence of such behavior. It would be better to say that the instruction should be submitted if there is any evidence (legally sufficient, or more than a scintilla) that the behavior occurred. Note that these two instructions, coupled with the preponderance of the evidence burden in answering the custody questions, removes the issue from the realm of whether evidence is credible to the realm of whether the behavior actually occurred, thus curing the uncertainty created by the statutory language as to the burden of persuasion.

**b. Protecting Personal Information.** In connection with this discussion about violence, it should be noted that TFC § 153.012 permits the court to order the custodian of records to delete all references in the records to the place of residence of either party appointed as a conservator of the child before the release of the records to another party appointed as a conservator.

**c. False Report of Child Abuse.** TFC § 153.013 creates a sanction for a false report of child abuse. If a party who makes report of child abuse in a pending SAPCR knows that it lacks a factual foundation, the court "shall" deem is a knowingly false report. Evidence of the knowingly false report is admissible with regard to the *terms of conservatorship*. Note that the *determination of* managing conservatorship is not mentioned. Since the terms and conditions of conservatorship are not a jury question, query whether this rule of admissibility allows the information to go to the jury. In the event that the court finds a knowingly false report, the court "shall" impose a civil penalty not to exceed $500.

**B. AUTHENTICATION.** TRE 901, Requirement of Authentication or Identification, provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." TRE 901(a). [This standard is a prima facie showing.] The rule goes on to set out examples of authentication.

**1. Authenticating Communications.** TRE 901(b)(5) provides that a voice can be identified "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker." TRE 901(b)(6) provides guidance for authenticating telephone conversations "by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

> (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or
> (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone."

Communications media have evolved considerably since TRE 901(b)(6) was promulgated, and courts are now faced with authenticating voice messages, emails, text messages, social network postings, and digitally recorded voices and images. Since technology and communication practices are continuing to evolve, and "spoofing" is endemic, it is wise to revert to the general principal that a communication should be admitted if the evidence is sufficient to support a finding that the communication is from the person it is purported to be from, allowing the fact finder to determine from a preponderance of the evidence whether the communication is really attributable to the alleged source. Such evidence could include the apparent source of the communication, the content of the message, etc.

**C. HEARSAY.** Under TRE 802, hearsay is not admissible unless provided otherwise by statute, the Rules of Evidence, or other rule issued under statutory authority. There are a number of exceptions to the hearsay rule of exclusion, many of which are set out in TRE 803. The exceptions frequently encountered in custody litigation are discussed below.

**1. State of Mind Exception.** Under TRE 803(3), an exception to the hearsay rule exists for "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will." Many statements by children could meet the state of mind exception to the hearsay rule, and it is often offered as an exception in custody litigation to permit the admission of out-of-court statements by children. *In Huber v. Buder*, 434 S.W.2d 177 (Tex. Civ. App.--Fort Worth 1968, writ ref'd n.r.e.), a witness was permitted to relate what three children said about which parent they wanted to live with. *Accord*, *Melton v. Dallas County Child Welfare Unit*, 602 S.W.2d 119, 121 (Tex. App.--Dallas 1980, no writ), which held that a child's preference on custody fits the state-of-mind exception to the hearsay rule. In *Ochs v. Martinez*, 789 S.W.2d 949, 959 (Tex. App.--San Antonio 1990, writ denied), out-of-court statements by a girl regarding sexual abuse by her step-father were held inadmissible since they related to past external facts or conditions rather than present state of mind. In *Posner v. Dallas County Child Welfare Unit*, 784 S.W.2d 585 (Tex. App.--Eastland 1990, writ denied), an adult was permitted to relate a comment she overheard a child make regarding sexual abuse. In *Baxter v. Texas Dep't. of Human Resources*, 678 S.W.2d 265 (Tex. App.--Austin 1984, no writ), a witness was permitted to relate a child's statements that he had been beaten and was afraid of more beatings, and further that he had seen his parents' pornographic materials. In *James v. Tex. Dep't Hum. Resources*, 836 S.W.2d 236, 243 (Tex. App.--Texarkana 1992, no writ), statements by the children indicating that they had been sexually abused did not meet the state of mind exception. Similarly, in *Couchman v. State*, 3 S.W.3d 155 (Tex. App.--Fort Worth, 1999, pet. ref'd), statements of a 5-year old girl, that a man had molested her, were inadmissible under the state of mind exception, but were admissible under the TRE 803(2) excited utterance exception. In this case, the excitement causing the utterance was the child's burning sensation when taking a bath after the fact, rather than the alleged incident itself. In *In re G.B.*, No. 07-01-0210-CV, *5 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.), a psychologist was permitted under the state-of-mind exception to tell the jury that a child said "her mother's urinalysis was dirty and that this had ruined her birthday party. Apparently she was to go home and celebrate her birthday with her mother and because of the drug screen coming back, that she was unable to, and she was very angry, very hurt." *See generally Lehman v. Corpus Christi Nat. Bank*, 668 S.W.2d 687, 689 (Tex. 1987) (witness can not testify as to the state of mind of another person).

**2. Statement Made for Medical Diagnosis or Treatment.** TRE 803(4) excludes from the hearsay bar a statement that (i) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and (ii) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

**3. Recorded Recollection.** TRE 803(5) excludes from the hearsay bar a recorded recollection, described as being a record that (i) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (ii) was made or adopted by the witness when the matter was fresh in the witness's memory; and (iii) accurately reflects the witness's knowledge, unless the circumstances of the record's preparation cast doubt on its trustworthiness. If the record is admitted, it may be read into evidence but cannot be admitted as an exhibit unless it is offered by an adverse party. In child custody litigation, many times parties will keep a written record of visitations and other recurrent activities, which would qualify for admission under this rule. This hearsay exception does not apply where the witnesses' memory is refreshed by looking at a writing.

**4. Records of a Regularly Conducted Activity.** The TRE 803(6) business record exception to the hearsay rule is used to admit financial records, medical records, school records, police records, and many other kinds of information that can be offered in a SAPCR. Most often the business records are authenticated and the hearsay exception is met with a business record affidavit or deposition on written questions of the custodian of the records. However, the necessary predicate can be laid by the custodian of the records testifying live in court. The hearsay exception admits the records to prove an act, event, condition, opinion or diagnoses, including medical diagnoses. To meet this exception, the proponent must show that (i) the record was made at or near the time by--or from information transmitted by--someone with knowledge; (ii) the record was kept in the course of a regularly conducted business activity; and (iii) making the record was a regular practice of that activity. This must be proven by the testimony (or affidavit) of the custodian of the records or other qualified witness. The exception can be negated by a showing that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. In most instances, a document prepared for the current litigation would not be admissible under this hearsay exception.

**5. Public Records.** Under TRE 803(8), government records are an exception to the hearsay rule to the extent they are "records, reports, statements, or data compilations of public offices or agencies," which set forth "(A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or (C) factual findings resulting from an investigation made pursuant to authority granted by law."

*See Cowan v. State*, 840 S.W.2d 435 (Tex. Crim. App. 1992) (the requirements for admissibility under "public records and reports" exception to the hearsay rule may be met by circumstantial evidence from the face of the offered document); *Wright v. Lewis*, 777 S.W.2d 520, 524 (Tex. App.--Corpus Christi 1989, writ denied) (letter from assistant U.S. attorney to Podiatry Board was not government record of U.S. Attorney's office, because it was not generated as a document pursuant to the attorney's duties as an assistant U.S. attorney; it was not a record of the State Podiatry Board because is was a third party communication that happened to appear in the records of the Podiatry Board); *Texas v. Williams*, 932 S.W.2d 546 (Tex. App.--Tyler 1995), *writ denied*, 940 S.W.2d 583 (Tex. 1996) (disapproving lower court opinion on other grounds), held that a certified copy of a DPS trooper's accident report was properly admitted under the TRE 803(8) exception to the hearsay rule.

**6. Statements in Learned Treatises, Periodicals, or Pamphlets.** TRE 803(18) is the hearsay exception for statements in learned treatises, periodicals, or pamphlets. Such a statement is admissible if it is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice. If admitted, the statement may be read into evidence but not received as an exhibit. This hearsay exception can be used with descriptions of mental disorders in the DSM-5, or peer-reviewed scientific articles on psychology, or encyclopedias or medical text books on human psychology and child development, or even Psychology Today magazine.

**7. Hearsay Within Hearsay.** TRE 805 provides that hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. In *Almarez v. Burke*, 827 S.W.2d 80, 82-83 (Tex. App.--Fort Worth 1992, writ denied), the court admitted an excited utterance within an excited utterance. Another example would be medical records, proved up by the hospital's custodian of the records under TRE 803(6). The medical records may meet the business-record exception to the hearsay rule, but hearsay contained in the medical records must meet an exception to the hearsay rule, or that hearsay must be redacted from the records. An example would be statements contained in medical records that were made for purposes of medical diagnosis or treatment, which is an exception to the hearsay rule under TRE 803(4).

**8. Expert's Use of Hearsay.** Lay witnesses can express opinions, but they cannot rely upon hearsay in formulating those opinions. TRE 701. Experts, on the other hand, can rely upon hearsay in formulating opinions, as long as the hearsay is of a type reasonably relied upon by experts in the particular field. TRE 703.

TRE 705(a) provides that an expert "may... disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data" on which his/her opinion is based. A question arises as to what extent an expert can relate to the jury hearsay upon which his/her opinion is based.

TRE 705(d) addresses the admission of hearsay (and other inadmissible evidence) through an expert's testimony.

> TRE 705(d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

**9. Court-Ordered Child Custody Evaluation Report.** The admissibility of what used to be called "social studies" and are now called "child custody evaluation reports" is problematic. One court of appeals case said simply that "[court-ordered social studies] are generally inadmissible hearsay." *Rossen v. Rossen*, 792 S.W.2d 277, 278 (Tex. App.--Houston [1st Dist.] 1990, no writ). The issue is more complicated than that.

**Current Issues Related to Child Custody**

TFC § 107.114 provides that "[d]isclosure to the court or the jury of the contents of a child custody evaluation report prepared under Section 107.113 is subject to the rules of evidence." The reference to "disclosure to the court" is somewhat odd, since the court must judge which portions of the report are admissible into evidence and which portions are not, and in the process of doing so the court will by necessity look at all portions of the report. In *Green v. Remling*, 608 S.W.2d 905 608 S.W.2d 905, 907-8 (Tex. 1980), the Supreme Court ruled it was proper for a trial court to consider a social study in an adoption proceeding, even though the social study was not introduced into evidence. The version of the Texas Family Code then in effect, Section 11.12(c), provided that where a social study has been prepared as part of a SAPCR "[t]he report shall be made a part of the record; however, the disclosure of its contents to the jury is subject to the rules of evidence." The Supreme Court concluded that "only those portions of the study which are admissible under the rules of evidence may be disclosed to the jury." *Id*. at 909-910.

Turning then to a jury trial, we should consider what rules of evidence apply to the admission of a child custody evaluation report.

Many child custody evaluation reports consist of three parts: (i) the general description of the parties and the situation; (ii) specific findings and recommendations of the investigator; (iii) selective recitations of what various collateral contacts said to the investigator. A trial court could logically justify letting in category (ii) findings and recommendations, but not (i) or (iii). A trial court could logically justify letting in category (i) and (ii), but not category (iii). What about the admission of category (iii), reports of collateral witnesses?

To begin with, one should ask whether a custody valuation report constitutes a public record under TRE 803(8), because it is filed with the court clerk and contain factual findings resulting from an investigation made pursuant to authority granted by law. A court-ordered report, filed with the clerk of the court, would seem to fit this description, making the factual findings contained in the report admissible under the government record exception to the hearsay rule.

Other parts of the custody evaluation report could meet an exception to the hearsay rule, such as the state-of-mind exception, or statements made for medical diagnosis or treatment, or reputation concerning character, or statements against interest. Or they could be excluded from the hearsay rule as an admission of a party opponent under TRE 801(e)(2).

*See All Saints Episcopal Hosp. v. M.S.*, 791 S.W.2d 321, 322 (Tex. App.--Fort Worth 1990) (although report by DHS social worker met the public records hearsay exception of TRE 803(8), parts of report containing third party hearsay was not admissible), *vacated pursuant to settlement*, 801 S.W.2d 528 (Tex. 1991); *Bounds v. Scurlock Oil Co.*, 730 S.W.2d 68, 71 (Tex. App.--Corpus Christi 1987, writ ref'd n.r.e.) (portions of officer's accident report not admissible since they were hearsay descriptions of the accident by occupants of two vehicles involved in the accident).

Even where hearsay in a child custody report does not meet an exception to the hearsay rule, the evidence may be admissible under TRE 705(d), if the information constitutes fact or data underlying the expert's opinion and their probative value is not outweighed by their prejudicial effect. See Section VI.C.8 above.

The same issues arise in connection with a report by a guardian ad litem, the disclosure of which to the jury is subject to the Texas Rules of Evidence. TFC § 107.002(h).

**D. LAY OPINIONS.** A non-expert witnesses can testify only to facts that are based upon personal knowledge. TRE 602, Lack of Personal Knowledge, provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

To say that a fact witness must testify based only upon personal knowledge does not prohibit the witness from giving opinion testimony. Lay opinion testimony is perfectly permissible within limits. TRE 701 says:

> Rule 701. Opinion Testimony by Lay Witnesses
>
> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

It should be noted that even an expert may give a lay opinion under TRE 701, where the opinion is not based on scientific, technical, or other specialized knowledge that are properly the province of TRE 702.

**E. EXPERT TESTIMONY.** In this day and time, it is a rare custody case that does not involved a mental health expert. It should be noted that an expert can testify as a lay witness, when s/he is relating facts personally observed. The expert also can testify to a lay opinion, where the opinion is rationally based on the witness's perception. Or the expert could be testifying to expert opinions, under TRE 702. This was explained by Dean Sutton back when the Texas Rules of Evidence were first adopted:

> A witness who is qualified as an expert may testify in three different ways: he may testify to his personal knowledge of the facts in issue, in which case he testifies to opinions under Rule 701; he may provide the factfinder with general back-ground information regarding the theory and principles relative to his field of expertise; and he may evaluate specific data and facts in issue in light of his experience in a particular specialized field, in which case he testifies to opinions under Rule 702. A witness with specialized training or experience is not limited to giving opinion testimony as a Rule 702 "expert." If his opinion rests on firsthand knowledge-that is, if it is rationally based on his own perceptions--then testimony under Rule 701 is also permissible. The greater his experiential capacity, the more likely his opinions will "help" the trier of fact under Rule 701, and the greater the likelihood that his testimony will "assist" the jury under Rule 702.... An arbitrary and artificial distinction between lay and expert witnesses should not prompt exclusion of relevant, helpful information from witnesses with adequate experiential qualifications. [Footnotes omitted]

Sutton, John F., Jr., *Article VII: Opinions And Expert Testimony*, 30 HOUS. L. REV. 797, 819-20 (1993).

**1. Qualifications.** TRE 702 governs expert testimony.

> Rule 702. Testimony by Experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Whether an expert is qualified to testify under Rule 702 involves two factors: (1) whether the expert has knowledge, skill, etc.; and (2) whether that expertise will assist the trier of fact to decide an issue in the case.

Courts sometimes evaluate the first prong, of adequate knowledge, skill, etc., by asking whether the expert possesses knowledge and skill not possessed by people generally. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990) ("The use of expert testimony must be limited to situations in which the issues are beyond that of an average juror"); John F. Sutton, Jr., *Article VII: Opinions and Expert Testimony*, 30 HOUS. L.REV. 797, 818 (1993).

The second prong, assisting the trier of fact, requires that the witness's expertise go to the very matter on which the expert is to give an opinion. *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), citing *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1112-1113 (5th Cir.), *cert. denied*, 503 U.S. 912 (1992). The test then for whether an expert is qualified to testify in a custody case is whether the expert has knowledge, skill, experience, training or education regarding the specific issue before the court, that would assist the jury in deciding custody. *See Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996).

TFC § 107.104, Child Custody Evaluator: Minimum Standards, gives criteria for judging the qualifications of an expert who is to perform a child custody evaluation. The requirements include: a master's degree; license as a social worker, professional counselor, marriage and family therapist, psychologist, or board certified MD psychiatrist; 2 years of supervised experience evaluating physical, intellectual, social, and psychological functioning and needs; at least 10 court-ordered child custody evaluations made under the supervision; or a doctoral degree licensed in a human services field with course work and practical experience in child custody evaluations; plus 8 hours of family violence training. Compliance with these standards is mandatory. TFC § 107.105 adds that the evaluator "must demonstrate, if requested, appropriate knowledge and competence in custody evaluation services consistent with the professional models, standards and guidelines." This is the same principle discussed in *Kuhmo Tire Co. v. Charmicael*, 526 U.S. 137 (1992), also reflected in *Gammill v. Jack Williams Chervrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998), that the expert opinion must have "a reliable basis in the knowledge and experience of [the relevant] discipline." A statutory exception to these minimum standards is allowed for counties with population under 500,000. TFC

§ 107.106.

The Texas Administrative Code is a guide for determining the qualifications of a psychologist to testify about child custody and related matters. Title 22, Tex. Admin. Code § 465.18, sets out the minimum qualifications of child custody evaluator who is licensed as a psychologist. The Board of Psychological Examiners has determined:

> Notwithstanding any other grounds for qualification, the Board has determined that a licensed psychologist is qualified to conduct child custody evaluations if the licensee:
>
> (i) has obtained a minimum of 8 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and is board certified in forensic psychology by the American Board of Professional Psychology (ABPP); or
>
> (ii) has obtained a minimum of 40 professional development hours directly related to the performance of child custody evaluations since becoming a licensed psychologist, and has conducted at least three child custody evaluations under the supervision of a qualified licensee.

Title 22, Tex. Admin. Code § 465.18.

**2. Assisting the Trier of Fact.** Rule 702 requires that the expert's testimony "assist the trier of fact." There are some issues where the jury is capable of making its own determination, without the assistance of expert testimony. In those instances, expert testimony is not admissible. *K-Mart Corp. v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000) ("When the jury is equally competent to form an opinion about the ultimate fact issues or the expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony").

**3. Reliability of Underlying Data.** Unlike witnesses relating lay opinions, experts are permitted to rely on information that is not within their personal knowledge in arriving at expert opinions. This usually means hearsay. TRE 703 says:

> Rule 703. Bases of Opinion Testimony by Experts
>
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by, reviewed by, or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

TRE 705(b) provides in part:

> (c) Admissibility of opinion. If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible.

Thus, the trial court must perform a gate-keeping function by evaluating the sufficiency of the expert's data in deciding whether to admit expert testimony.

The Texas Family Code provides the basic elements that are required of an evaluator providing a child custody evaluation. TFC §§ 107.108 & 107.109. The court can add more elements, including interviews, observations, psychometric testing, joint interviews, or the review of other information the court determines is relevant. TRC § 107.109(d). The Family Code provisions are guidelines for what constitutes an essential information base for an expert to testify to child custody opinions.

**4. Reliability of Methodology.** In the case of *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 509 U.S. 579 (1993), the U.S. Supreme Court held that Federal Rule of Evidence 702 overturned earlier case law requiring that expert scientific testimony must be based upon principles which have "general acceptance" in the field to which they belong. *See Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923) (establishing the "general acceptance" test for scientific expert testimony). Under Federal Rule of Evidence 702, the expert's opinion must be based on "scientific knowledge," which requires that it be derived by the scientific method, meaning the formulation of hypotheses which are verified by experimentation or observation. The Court used the word "reliability" to describe this necessary quality. The U.S. Supreme Court's opinion in *Daubert* applies in all federal court proceedings.

In *Daubert*, the Supreme Court gave a non-exclusive list of factors to consider on the admissibility of expert testimony in the scientific realm: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. These standards are oriented toward science-based opinions.

In *Kumho Tire Co. v. Carmichael*, 526 U.S.137 (1999), the Supreme Court said that the reliability and relevancy principles of *Daubert* apply to all experts, not just scientists, and where objection is made the court must determine whether the expert's opinion has "a reliable basis in the knowledge and experience of [the relevant] discipline." The trial court has broad discretion in determining how to test the expert's reliability. *Id. Kuhmo Tire* acknowledged that the list of factors in *Daubert* did not apply well to certain types of expertise, and that other factors would have to be considered by the court in such instances.

The Texas Supreme Court adopted the *Daubert* analysis for TRE 702, requiring that the expert's underlying scientific technique or principle be reliable, in *E.I. du Pont de Nemours v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Texas Supreme Court listed slightly different factors for the trial court to consider: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson*, 923 S.W.2d at 557. In *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725-26 (Tex. 1998), the Texas Supreme Court extended the reliability and relevance requirements of *Robinson* to all types of expert testimony:

> We conclude that whether an expert's testimony is based on "scientific, technical or other specialized knowledge," *Daubert* and Rule 702 demand that the district court evaluate the methods, analysis, and principles relied upon in reaching the opinion. The court should ensure that the opinion comports with applicable professional standards outside the courtroom and that it "will have a reliable basis in the knowledge and experience of [the] discipline." [Footnote omitted.]

After *Gamill*, *Daubert*/*Robinson* challenges to testimony lying outside of the physical sciences involves two prongs: (1) establishing the "applicable professional standards outside the courtroom" and (2) providing that these standards were met by the expert in this instance.

In *Taylor v. Texas Dept of Protective & Regulatory Servs.*, 160 S.W.3d 641, 650 (Tex. App.--Austin 2005, pet. denied), the court said that "some cases involve situations that are not susceptible to scientific analysis, and the *Robinson* factors are not appropriate and do not strictly govern in those instances." The court used instead the standards established by the Texas Court of Criminal Appeals in *Nenno v. State*, 970 S.W.2d 549, 560 (Tex. Crim. App. 1998) (in fields other than hard sciences, such as the social sciences, factors like an expert's education, training, and experience are more appropriate factors in testing reliability than the scientific method), *overruled on other grounds* by *State v. Terrazas*, 4 S.W.3d 720, 727 (Tex. Crim. App. 1999). The *Taylor* court ruled that a social study prepared by a social worker was admissible using *Nenno* standards.

In *In re A.J.L.*, 136 S.W.3d 293, 301 (Tex. App.--Fort Worth 2004, no pet.), the appellate court affirmed allowing a licensed professional counselor who interacted with the child using puppets in a play-acting scenario to determine that the child felt that he needed to protect his baby sister and that he had been traumatized at home. The expert testified that she had a master's degree in counselor education and that she had attended many seminars on play therapy. The court said:

> Play therapy uses toys as "therapeutic metaphors" to help children express themselves and their feelings. Iafrate described the types of play therapy that she used. First, she built a safe environment and rapport with the child using the client-centered method. Eventually she switched to the more directive Alderian method where the therapist is more interactive in helping the child identify important aspects of their environment. She used these techniques in a manner consistent with her training during her fourteen counseling sessions with A.J.L.

*Id.* at 299.

In *In re G.B.*, No. 07-01-0210-CV, *4 (Tex. App.--Amarillo Oct. 10, 2003, no pet.) (mem. op.), the trial court was affirmed in letting a licensed professional counselor testify to best interest and the mother's parenting abilities based on "the SASSI, STAXI, the CAP and the Circumplex" tests, which the counselor testified were "widely used and accepted in the field of licensed professional counselors."

In *In re J.B.*, 93 S.W.3d 609, 625 (Tex. App.--Waco 2002, pet. denied), a divided court of appeals reversed a judgment terminating parental rights on the grounds that the psychologist expert who testified to conducting a parental assessment did not meet *Robinson* reliability standards with regard to the testing. The Waco Court of Appeals subsequently adopted the more lenient *Nenno* approach.

"[A] fair reading of this Court's more recent pronouncement in *S.R.* yields a finding that we apply the *Nenno* factors to evaluate soft-science testimony in civil cases." *In re J.R.*, 501 S.W.3d 738, 747 (Tex. App.--Waco 2016, no pet.).

A licensed psychologist "may not offer an expert opinion or recommendation relating to the conservatorship of or possession of or access to a child unless the licensee has conducted a child custody evaluation." 22 Tex. Admin. Code § 465.18. So the professional standards for a psychologist conducting a child custody evaluation refer back to the Family Code provisions on child custody determinations.

**5. Nexus Between the Data, Methodology, and Legal Issue.** *Daubert* contains a relevancy requirement, to be applied to expert evidence. As explained in *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex. 1998):

> The requirement that the proposed testimony be relevant incorporates traditional relevancy analysis under Rules 401 and 402 of the Texas Rules of Civil Evidence. To be relevant, the proposed testimony must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." Evidence that has no relationship to any of the issues in the case is irrelevant and does not satisfy Rule 702's requirement that the testimony be of assistance to the jury. It is thus inadmissible under Rule 702 as well as under Rules 401 and 402.

Some courts and commentators call this connection the "fit" between the evidence and the issues involved in the case.

**6. Disclosure of Hearsay Through Expert Testimony.** The use of hearsay by an expert witness, and the introduction of hearsay into evidence through expert testimony, is an important issue in custody litigation. Frequently experts become a conduit for the admission of statements by the children who are the subject of the custody case. Many psychologists and counselors keep "progress notes" of what the children tell them, and these progress notes, and the expert's testimony as to what the children said, when admitted, convey that hearsay to the jury. In that instance TRE 705 applies.

> Rule 705. Disclosure of Facts or Data Underlying Expert Opinion
>
> (a) Disclosure of Facts or Data. The expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event disclose on direct examination, or be required to disclose on cross-examination, the underlying facts or data.
>
> (b) Voir dire. Prior to the expert giving the expert's opinion or disclosing the underlying facts or data, a party against whom the opinion is offered upon request in a criminal case shall, or in a civil case may, be permitted to conduct a voir dire examination directed to the underlying facts or data upon which the opinion is based. This examination shall be conducted out of the hearing of the jury.
>
> * * *

> (d) Balancing test; limiting instructions. When the underlying facts or data would be inadmissible in evidence, the court shall exclude the underlying facts or data if the danger that they will be used for a purpose other than as explanation or support for the expert's opinion outweighs their value as explanation or support or are unfairly prejudicial. If otherwise inadmissible facts or data are disclosed before the jury, a limiting instruction by the court shall be given upon request.

Comment: while hearsay is an anathema in Anglo-American jurisprudence, weighing the benefits of an unbiased recounting by a qualified professional of what children said against the negative consequences of calling the children as witness tilts in favor of allowing experts to be the conduit for the children's out-of-court statements.

**F. OFFER OF EVIDENCE FOR A LIMITED PURPOSE.** Limited admissibility is covered in TRE 105. The rule arises when evidence is admissible for some purposes but not others, or admissible against some parties but not all parties. Where evidence is admissible for some purposes, but not generally, and the offer of the evidence is made generally, without limitation as to its use, the trial court should exclude the evidence. If the offer is made generally, opposing counsel should object to its admissibility on appropriate grounds. If the objection is sustained, the proponent should re-offer the evidence "for a limited purpose." If accepted by the trial court for a limited purpose, the opponent should move the court for a limiting instruction, whereby the court would instruct the jury that it can consider that evidence only for a limited purpose, and no other. *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 642 (Tex. 1987) ("Where tendered evidence should be considered for only one purpose, it is the opponent's burden to secure a limiting instruction"); *see Rankin v. State*, 974 S.W.2d 707, 712 (Tex. Crim. App. 1998) (waiting until jury charge stage to instruct jury is too late; court should instruct jury at the time the evidence is received). If the opposing party does not seek such a limiting instruction, the evidence is received for all purposes, even if it was offered only for a limited purpose. *Garcia v. State*, 887 S.W.2d 862, 878 (Tex. Crim. App. 1994); *Cigna Ins. Co. v. Evans*, 847 S.W.2d 417, 421 (Tex. App.--Texarkana 1993, no writ) (where document was read into evidence without a limiting instruction, it was in evidence for all purposes); *Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 595 (Tex. App.--Texarkana 1992, writ denied) (party could not complain that excluded evidence met state-of-mind exception to hearsay rule when the party made only a general offer of the evidence, and not an offer for the limited purpose of showing state-of-mind). *See Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 76 (Tex. App.--Corpus Christi 1993, writ denied) (evidence admitted for the limited purpose of punitive damages could not be used on appeal to support the verdict on actual damages).

Using hearsay as an example, the proper sequence is as follows:

> Proponent offers hearsay for all purposes.
> Opponent objects based on hearsay; objection is sustained.
> Proponent reoffers the hearsay for limited purpose, under an exception to the hearsay rule (such as state-of-mind, or supporting or challenging an expert's opinion).
> Opponent renews hearsay objection.
> Court overrules hearsay objection.
> Opponent requests limiting instruction.
> Court instructs the jury on limited use.

**G. GOING BEHIND THE PRIOR DECREE IN A MODIFICATION TRIAL.** In *Ogletree v. Crates*, 363 S.W.2d 431, 434 (Tex. 1963), the Supreme Court wrote: "A final judgment in a custody proceeding is res judicata of the best interests of a minor child as to conditions then existing.... The judgment of the Domestic Relations Court of Harris County was thus res judicata of the best interests of the child as to conditions existing on July 15, 1960. To authorize a change of custody there must have been a material change of conditions since that date." In *Wilson v. Elliott*, 73 S.W. 946, 947 (Tex. 1903), the Court wrote:

> The question upon the first trial in a case of a character of this is, which is the more suitable party to be intrusted with the care of the child at that time? The question in the subsequent proceeding is, which is the more suitable at the time of that trial? Since, in determining the second question, the first cannot be agitated, it follows that evidence of prior conduct of either party cannot be introduced except to corroborate some evidence of similar conduct which was developed since the original decree. As just intimated, we think, however, where testimony upon the second trial tends to show conduct on part of the one to whom the custody has been previously committed, and that he or she, since the first, has become a person not suitable for so important a charge, the rule of res adjudicata would not preclude the introduction of evidence of conduct previous to the first decree, provided it tended to corroborate the evidence of subsequent conduct of a like nature.

Subsequent courts have followed this rule of exclusion. *In re J.G.W.*, No. 06-00-00170-CV, *6 (Tex. App.--Texarkana, Aug. 23, 2001, no pet.) (unpublished) ("Evidence of misconduct before the original custody decree should be excluded in a subsequent proceeding for custody"); *In re B.S.L.*, 579 S.W.2d 527, 529 (Tex. Civ. App.--San Antonio 1979, writ ref' n.r.e.); *Green v. White*, 203 S.W.2d 960, 962 (Tex. Civ. App.--Paso 1947, no writ). Apart from the exception allowing pre-decree behavior to be introduced where there is similar post-decree behavior, a court will encounter a need for mental health professionals to go behind the decree in explaining their psychological assessment, which requires the clinician to consider the individual's psychological and behavioral history as a component of an assessment.

**VII. THE BINDING NATURE OF THE JURY'S VERDICT.** In *MacDonald v. MacDonald*, 821 S.W.2d 458, 464 (Tex. App.--Houston [14th Dist.] 1992, no writ), the court wrote: "In order for a trial court to disregard a jury's findings and to grant a motion for judgment notwithstanding the verdict, it must be determined that there is no evidence upon which the jury could have made the findings relied upon. *Naverette v. Temple Indep. School Dist.*, 706 S.W.2d 308, 309 (Tex.1986)." This is the normal rule in civil cases. However, in custody cases TFC § 105.002 applies. TFC §105.002(c) provides in part:

> (c) In a jury trial:
>
> (1) a party is entitled to a verdict by the jury and the court may not contravene a jury verdict on the issues of:
>
> (A) the appointment of a sole managing conservator;
> (B) the appointment of joint managing conservators;
> (C) the appointment of a possessory conservator;

> (D) the determination of which joint managing conservator has the exclusive right to designate the primary residence of the child;
> (E) the determination of whether to impose a restriction on the geographic area in which a joint managing conservator may designate the child's primary residence; and
> (F) if a restriction described by Paragraph (E) is imposed, the determination of the geographic area within which the joint managing conservator must designate the child's primary residence ....

The San Antonio Court of Appeals said that a trial court can grant a directed verdict before verdict, but cannot render a judgment that disregards a jury finding. *In re T.R.B.*, 350 S.W.3d 227, 231 (Tex. App.--San Antonio 2011, no pet.). However, on appeal the jury's verdict is subject to legal sufficiency review, *Gadekar v. Zankar*, No. 12-16-00209-CV, *9 (Tex. App.--Tyler May 31, 2018, no pet.) (mem. op.); and factual sufficiency review, *In Interest of H.E.B.*, No. 07-17-00351-CV, *2 (Tex. App.--Amarillo Jan. 31, 2018, pet. denied) (mem. op.). There remains the question of whether the trial court can grant a new trial after the judgment is signed. A more subtle consideration is the trial court setting rights and duties of a parent in conflict with the jury's verdict. In *Lenz v. Lenz*, 79 S.W.3d 10, 20 (Tex. 2002), the Supreme Court ruled that where a jury did not impose a geographical restriction on the children's residence, the trial court could not impose a restriction. In *Matter of Marriage of Mugford*, No. 14-16-00436-CV, *1 (Tex. App.--Houston [14th Dist.] May 22, 2018, pet. filed) (mem. op.), the father complained when the jury set the geographical restriction at "Calgary, Canada & 50 mi outward radius") but the trial court ordered "within 30 miles of the city limit of Calgary." The appellate court said it could not determine which was greater, a 50-mile radius or within 30 miles of the city limit. In a recent case, a jury found that the father should be the JMC with the right to determine primary residence. The trial court awarded the mother approximately equal possession, and the father complained that nearly equal possession contravened the jury's verdict. His argument was rejected, the court saying: "There is simply no requirement in the Family Code that one joint managing conservator be given more time of possession of a child because of any particular jury finding." *In Interest of W.B.B.*, No. 05-17-00384-CV, *3 (Tex. App.--Dallas July 17, 2018, no pet.) (mem. op.).

**VIII. FACTORS IN DECIDING CHILD CUSTODY.** Trial courts have wide discretion when deciding matters of custody, control, possession, support, and visitation.

**A. BEST INTEREST.** In 1968, the Tyler Court of Civil Appeals wrote: "It has been repeatedly held in this state that a child of tender years should be with the mother if she is at all a fit person therefor. *Grimes v. Knowles*, 431 S.W.2d 602, 606 (Tex. Civ. App.--Tyler 1968), *rev'd*, 437 S.W.2d 816 (Tex. 1969). The court cited *Beasley v. Beasley*, 304 S.W.2d 158, 161 (Tex. Civ. App.--Dallas, 1957, writ ref., n.r.e.). In *Spitzmiller v. Spitzmiller*, 429 S.W.2d 557, 561 (Tex. Civ. App.--Houston [1st Dist.] 1968, writ refused n.r.e.), the court said that "[t]he rule of law giving the mother the preference in awarding the custody of young children has been forcefully laid down in many Texas cases. See those cited in *Longoria v. Longoria*, 324 S.W.2d 244 (San Antonio Civ. App. 1959, writ dism., w.o.j.)." In *Brown v. Brown*, 500 S.W.2d 210, 217 (Tex. Civ. App.--Texarkana 1973, no writ), the court said that "the rule is that All things being equal, children of tender age should be placed in the custody of the mother.... This is not a hard and fast rule to be applied as a matter of law, but the controlling issue is always the best interests of the children."

This changed when Title 2 of the TFC was enacted in 1973, effective on January 1, 1974 when the "tender years presumption" was supplanted by the best interest test. Section 14.07 of the TFC said: "The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child."

Courts have avoided trying to articulate a bright line test for what constitutes best interest. "Suits affecting the parent-child relationship are intensely fact driven, which is why courts have developed best-interest tests that consider and balance numerous factors." *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002).

The Legislature, in TFC § 153.134, listed the following factors to consider in determining joint managing conservatorship:

> (a) If a written agreed parenting plan is not filed with the court, the court may render an order appointing the parents joint managing conservators only if the appointment is in the best interest of the child, considering 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.

The Texas Supreme Court gave a list of factors to consider on best interests, in a parental termination case, in *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976). The Court listed: the child's desires; the child's current and future physical and emotional needs; current and future emotional and physical danger to the child; parental abilities of the persons seeking custody; programs available to assist those persons seeking custody to promote the best interest of the child; plans for the child by the individuals or agency seeking custody; stability of the home or proposed placement; acts or omissions of the parent that may indicate the existing parent-child relationship is not appropriate; and any excuse for the parent's acts or omissions. These standards are better suited to a parental termination case than a custody case, but this list of factors has been used in both contexts.

The Legislature has given a list of factors to consider regarding best interest in connection with

placing children under the care of the DFPS, in TFC § 263.307:

§ 263.307. Factors in Determining Best Interest of Child

(a) In considering the factors established by this section, the prompt and permanent placement of the child in a safe environment is presumed to be in the child's best interest.

(b) The following factors should be considered by the court and the department in determining whether the child's parents are willing and able to provide the child with a safe environment:

(1) the child's age and physical and mental vulnerabilities;

(2) the frequency and nature of out-of-home placements;

(3) the magnitude, frequency, and circumstances of the harm to the child;

(4) whether the child has been the victim of repeated harm after the initial report and intervention by the department;

(5) whether the child is fearful of living in or returning to the child's home;

(6) the results of psychiatric, psychological, or developmental evaluations of the child, the child's parents, other family members, or others who have access to the child's home;

(7) whether there is a history of abusive or assaultive conduct by the child's family or others who have access to the child's home;

(8) whether there is a history of substance abuse by the child's family or others who have access to the child's home;

(9) whether the perpetrator of the harm to the child is identified;

(10) the willingness and ability of the child's family to seek out, accept, and complete counseling services and to cooperate with and facilitate an appropriate agency's close supervision;

(11) the willingness and ability of the child's family to effect positive environmental and personal changes within a reasonable period of time;

(12) whether the child's family demonstrates adequate parenting skills, including providing the child and other children under the family's care with:

(A) minimally adequate health and nutritional care;

> (B) care, nurturance, and appropriate discipline consistent with the child's physical and psychological development;
>
> (C) guidance and supervision consistent with the child's safety;
>
> (D) a safe physical home environment;
>
> (E) protection from repeated exposure to violence even though the violence may not be directed at the child; and
>
> (F) an understanding of the child's needs and capabilities; and
>
> (13) whether an adequate social support system consisting of an extended family and friends is available to the child.

These factors are not well-suited to ordinary custody litigation, but they illustrate the kinds of concerns that are appropriate in private custody litigation if a parent has acted in a manner that is detrimental to the child.

**B. COMPARING THE PARENTS.** "Where two parties are competing for the custody of a child, the comparative affection of such parties for the child, their willingness and ability to administer to its present and future material and moral welfare, are to be considered by the jury for what, under the evidence, they may deem them to be worth, in deciding the issue of the child's welfare." *Clayton v. Kerbey*, 226 S.W. 1117, 1119 (Tex. Civ. App.--Austin 1920, writ ref'd.). When Title 2 of the TFC was adopted, Section 14.07(b) said: "In determining the best interest of the child, the court shall consider the circumstances of the parents."

**C. GENDER.** Gender has recently come to the forefront of social and legal consciousness. Gender impacts child custody determinations in several ways.

**1. Gender of Parent.** Under the "tender years presumption" discussed above, gender was a significant determinant of child custody for young children. Texas voters adopted the equal rights amendment to the Texas Constitution on Nov. 7, 1972, which provides that "equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Tex. Const. Art. 1.§ 3a. TFC §153.003 bars consideration of gender and marital status in determining custody and the terms of conservatorship and possession:

> Sec. 153.003. NO DISCRIMINATION BASED ON SEX OR MARITAL STATUS.
>
> The court shall consider the qualifications of the parties without regard to their marital status or to the sex of the party or the child in determining:
>
> (1) which party to appoint as sole managing conservator;
>
> (2) whether to appoint a party as joint managing conservator; and

(3) the terms and conditions of conservatorship and possession of and access to the child.

The State Bar of Texas' Pattern Jury Charges PJC 215.7 instructs the jury not to consider gender of the parties of the child in deciding managing conservatorship. Of course, simply saying that doesn't actually change what for many persons are life-long prejudices about children who are very young, and also children who have reached puberty. As the old division of labor between working father and stay-at-home mother continues to break down, judges and jurors will have to contend with "role reversals" (where mother works and father stays at home) or families where both parties work and child care is partially provided by relatives, hired "nannies," or child care operations. This will naturally lead people away from gender stereotypes to more critical assessment of who has the ability, will take the time, and make the effort, to be the better parent.

**2. Same-Sex Marriage.** In *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the United States Supreme Court ruled that the Fourteenth Amendment to the U.S. Constitution requires states to permit same-sex marriages and to recognize same-sex marriages validly performed elsewhere. However, in *Pidgeon v. Turner*, 538 S.W.3d 73, 86 (Tex. 2017), *cert. denied*, 138 S. Ct. 505, 199 L. Ed. 2d 385 (2017), the Texas Supreme Court endorsed the following statement: 'Whatever ramifications *Obergefell* may have for sexual relations beyond the approval of same-sex marriage are unstated at best....' *Coker v. Whittington*, 858 F.3d 304, 307 (5th Cir. 2017)." It cannot yet be determined whether the recognition of the constitutionally-required validity of same-sex marriage means that participation in a same sex marriage is not a factor that can properly be considered in deciding child custody.

**3. Sexual Preference.** The case of *In Interest of McElheney*, 705 S.W.2d 161, 162 (Tex. App.--Texarkana 1985, no writ), held that evidence of a parent's sexual preferences was admissible in a suit for custody or termination brought by the Department of Human Resources. That case has not been cited since it was decided, and no other cases on the topic were discovered in preparing for this article. The James Byrd, Jr. Hate Crimes Act of 2001, Tex. Code Crim. P. art. 42.014, relating to enhanced punishment for a hate crime, included in its list of targeted categories "sexual preference." Art. 42.014(c) defines "sexual preference" for purposes of the statute to mean heterosexuality, homosexuality, or bisexuality. Texas Disciplinary Rules of Professional Conduct 5.08 prohibits a lawyer from manifesting bias or prejudice based upon, among other things, sexual orientation. Rule 5.08(b) allows mention of advocacy regarding sexual orientation if that advocacy "(i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure." The Texas Equal Rights amendment mentions "sex, race, color, creed, or national origin, but not sexual preference. So the propriety of arguing sexual preference as a factor in determining custody is uncertain.

**D. ABILITY TO MEET THE NEEDS OF THE CHILD.** In *Mumma v. Aguirre*, 364 S.W.2d 220, 223 (Tex. 1963), the Supreme Court talked about the trial court's opportunity to "observe and evaluate the personalities of the contending claimants, to weigh the credibility of their testimony, to assess the physical, mental, moral and emotional needs of the child, and to adjudge from personal observation which of the claimants can best meet the needs of the child."

**E. CHILD'S WISHES.** The impact of the child's wishes on a custody determination is somewhat complicated.

**1. Interviewing the Child in Chambers.** TFC § 153.009 provides for the court to interview the child in chambers. Section 53.009 provides:

> (a) In a nonjury trial or at a hearing, on the application of a party, the amicus attorney, or the attorney ad litem for the child, 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 to determine the child's wishes as to conservatorship or as to the person who shall have the exclusive right to determine the child's primary residence. The court may also interview a child in chambers on the court's own motion for a purpose specified by this subsection.

Subsection (b) allows for in camera interview at the instigation of the a party, the amicus attorney, the attorney ad litem for the child, but adds to them "on the court's own motion." Subsection (c) says that the interview does not diminish the trial court's discretion. Subsection (d) prohibits such an interview in a jury trial with regard to any issues to be submitted to the jury. Subsection (e) permits the court to allow the attorney for a party, the amicus attorney, guardian ad litem, or attorney ad litem, to be present during the interview. Subsection (f) requires the court to cause a court reporter's record to be made of the interview where the child is 12 years or older, upon the motion of a party, the amicus attorney, or the attorney ad litem for the child, or on the court's own motion. The record is part of the reporter's record for appeal.

The child's stated preference for custodial parent can supplant the requirement of proving a material and substantial change as a condition to modifying a SAPCR order. TFC § 156.101(a)(2).

TFC § 153.009 does not assign any particular weight to what the child says in the in-chambers interview. But it impliedly authorizes the trial court to consider the statements of the child in deciding the case, even though they are unsworn and untested by cross-examination. The court in *In re A.C.*, 387 S.W.3d 673, 676 (Tex. App.--Texarkana 2012, pet. denied), said that the child's statements are "strictly supplemental to the evidence taken in court...." How the child's statements should figure into the trial court's decision and the appellate court's review of the sufficiency of the evidence remains unclear.

Things to remember about an in-chambers interview with a child:

> 1. The court is not required, but is permitted, to interview a child under age 12. If the child is 12 or older, the court is required to conduct the interview. If the trial court refuses to conduct the interview, the aggrieved party must make an "offer of proof" about what the child would have said. Whether the offer of proof would be through a question-and-answer session with the child on the witness stand (which defeats the purpose of an in-chambers interview); or through a summary by the proposing attorney; or by the testimony of a witness who talked to the child; or by letters, emails, and texts by the child; is not determined. Absent an offer of proof, the appellate court cannot determine whether the error in refusing to conduct an interview was reversible error. *In re T.A.L.*, No. 07-17-00274-CV (Tex.--Amarillo August 14, 2016 pet. filed, response requested and filed) (mem. op.).

2. Where the child is 12 or older, the court must upon request have a court reporter report the in-chambers interview. The requesting party must object if the court fails to accede to the request. However, without a record, it is difficult to make a case of harmful error. *See In re A.C.*, 387 S.W.3d 673, 676 (Tex. App.--Texarkana 2012, pet. denied).

**2. The Child as a Witness.** Some counties have adopted local rules that govern when a child can be brought to the courthouse to testify. It is possible that such a rule has not been approved by the Texas Supreme Court, in which event it is not effective, per TRCP 3a. The Texas Rules of Evidence contemplate child witnesses. TRE 601(a) says that "[e]very person is competent to be a witness unless these rules provide otherwise." The criteria for allowing a child to testify is set out in TRE 601(a)(2), which declares as incompetent "[a] child–or any other person–whom the court examines and finds lack sufficient intellect to testify concerning the matters in issue."

**F. VIOLENCE AND SEXUAL CRIMES.** The impact of violent behavior and sexual crimes radically alter the landscape of custody litigation. These issues are dealt with in detail in Section VI.A.2 above.

**G. SPLIT CUSTODY.** Split custody occurs when siblings have different managing conservators, or different primary residences, or have periods of possession that do not coincide.

**1. Public Policy.** TFC § 153.251, Policy and General Application of Guidelines, makes the comment in connection with periods of possession for the non-custodial parent: "It is preferable for all children in a family to be together during periods of possession." Because this policy statement is located in the subchapter relating to visitation guidelines, this rule will likely not be considered applicable to determinations of managing conservatorship. It does, however, reflect public policy in a general way.

**2. Old Case Law.** In *Coleman v. Coleman*, 109 S.W.3d 108, 112 (Tex. App.--Austin 2003, no pet.), the court wrote:

> There is a long line of jurisprudence in Texas supporting a preference that two or more children of a marriage should not be divided absent clear and compelling reasons. *See Zuniga v. Zuniga*, 664 S.W.2d 810, 812 (Tex. App.--Corpus Christi 1984, no writ); *O. v. P.*, 560 S.W.2d 122, 127 (Tex. Civ. App.--Fort Worth 1977, no writ); *Ex parte Simpkins*, 468 S.W.2d 908, 909 (Tex. Civ. App.--Amarillo 1971, no writ); *Griffith v. Griffith*, 462 S.W.2d 328, 330 (Tex. Civ. App.--Tyler 1970, no writ); *Huffman v. Huffman*, 408 S.W.2d 248, 250 (Tex. Civ. App.--Amarillo 1966, no writ); *Meyer v. Meyer*, 361 S.W.2d 935, 940 (Tex. Civ. App.--Austin 1962, writ dism'd); *Autry v. Autry*, 350 S.W.2d 233, 236 (Tex. Civ. App.--El Paso 1961, writ dism'd); *De Gaish v. Marriott*, 345 S.W.2d 585, 587 (Tex. Civ. App.--San Antonio 1961, no writ); *Beasley v. Beasley*, 304 S.W.2d 158, 161 (Tex. Civ. App.--Dallas 1957, writ ref'd n.r.e.); *Beadles v. Beadles*, 251 S.W.2d 178, 180 (Tex. Civ. App.--Texarkana 1952, no writ); *cf. Ditraglia v. Romano*, 33 S.W.3d 886, 890 (Tex. App.--Austin 2000, no pet.). Consistent with this jurisprudence, the legislature articulated Texas' preference that children be kept together in the family code. See Tex. Fam.Code Ann. § 153.251(c) (West 2002) ("It is preferable for all children in a family to be together during periods of possession.").

However, in *MacDonald v. MacDonald*, 821 S.W.2d 458, 463 (Tex. App.--Houston [14th Dist.] 1992, no pet.), the court wrote: "Split custody is simply a factor, among many, to consider in determining the best interest of the child." The Beaumont Court of Appeals agreed that there is no requirement to show clear and compelling reasons to split custody; instead the burden of proof of preponderance of the evidence, and the test is best interest. *In re C.S.*, No. 09-06-211-CV, *2 (Tex. App.--Beaumont Mar. 8, 2007, no pet.) (mem. op.). The court in *In re T.A.L.*, No. 07-17-00274-CV (Tex. App.--Amarillo August 14, 2018, pet. filed, response requested and filed) (mem. op.), agreed that it is preferable not to split custody, but that is only one factor to consider.

**3. The Pattern Jury Charge Questions on Custody.** The State Bar of Texas Pattern Jury Charges PJC 216 sets out the jury's managing conservatorship questions. PJC 216.1B applies when there is an agreement to keep the children together, in which event multiple children are submitted in one question, and the same fate befalls all of them. PJC 216.2C submits a separate managing conservator question for each child. Would it be error if the trial court *forced* a single question for multiple children over objection and despite a request to submit the children separately? That presents a *Casteel* problem. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) (it is reversible error to premise one damage question on multiple theories of liability when one or more of those theories is invalid); *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002) (*Casteel* extended to situation where a broad form submission of all damages in a single answer made it impossible for a party to attack on appeal a particular element of damages as having no evidentiary support, because the error "probably prevented the petitioner from properly presenting its case to the appellate courts").

**H. PAST CONDUCT & FUTURE CONDUCT.** A court is free to use a parent's past conduct to measure that parent's likely future conduct. *In Interest of I.M.F.*, No. 14-17-00758-CV, *6 (Tex. App.--Houston [14th Dist.] Mar. 6, 2018, pet. denied) (mem. op.); *In re J.D.*, 436 S.W.3d 105, 119 (Tex. App.--Houston [14th Dist.] 2014, no pet.); *Castorena v. Texas Dep't of Protective & Regulatory Servs.*, No. 03-02-00653-CV, *10 (Tex. App.--Austin Apr. 29, 2004, no pet.) (mem. op.). However, in *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.), the court said: "An adult's future conduct may be somewhat determined by recent past conduct.... In and of itself, however, evidence of past misconduct may not be sufficient to show present unfitness." The Court in *In the Interest of M.W.*, 959 S.W.2d 661, 665 (Tex. App.--Tyler 1997, writ denied), said: "When determining fitness of a parent, the material time to consider is the present.... This concept is abrogated, however, by the fact that an adult person's future conduct may be somewhat determined by recent past conduct.... Nonetheless, evidence of past misconduct may not by itself be sufficient to show present unfitness." In *May v. May*, 829 S.W.2d 373, 377-78 (Tex. App.--Corpus Christi 1992, writ denied), the Court said:

> In the present case, the only evidence offered to show that Robert's custody of the children would significantly impair their physical or emotional health, was that he used and sold drugs two years ago in the home where his children resided with him and their mother.... We conclude that the trial court may logically infer that serious violations of the law by the parent, such as the use and sale of drugs, especially when committed in the same home in which the children reside, would set an unacceptable standard for the children to follow and significantly impair their emotional development. In addition, we do not believe that the passage of two years since the last proven violation in the present case conclusively negates the inference that Robert's deliberate use and sale of drugs in the past is indicative of

drug-related conduct which is likely to continue. There is some evidence to show that appointment of Robert as managing conservator would not be in the best interest of his children, because it would significantly impair their emotional development.

**I. PSYCHOLOGICAL ASSESSMENTS.** Many a custody case has been conducted using psychological test results for or against a party. If the expert is a psychologist, the evidence will invariably include psychological test results, because psychological testing is what psychologists are educated, trained, and licensed to do. The most prevalent psychological tests that appear in custody litigation are the Minnesota Multiphasic Personality Inventory-2 ("the MMPI-2"), the Millon Clinical Multiaxial Inventory-IV ("the Millon"), and the Rorschach Ink Blot test. Following behind in popularity are the House-Tree-Person Test (for children), and the Sentence Completion Test. We could go on for hours about the reliability and validity of these tests, but the reliability and validity measures for these tests really have little to do with the problem at hand. None of these tests were designed to evaluate parenting skills, and none were normed against persons going through custody litigation, and there is no theory or body of information suggesting how a custody evaluator can get from psychological test results to a conclusion about child custody. No reliability measures or validity measures have been established to show the usefulness of these tests in determining child custody or possession. At best these tests provide additional data that can supplement clinical observations and other information that is assembled to make a custody evaluation, but some studies have shown that additional data does not always improve the quality of a judgment and sometimes actually makes it worse.

**J. PSYCHIATRIC DIAGNOSES.** Another weapon in the custody lawyer's arsenal is psychiatric diagnoses of mental disorders. The go-to authority on psychiatric diagnoses is the Diagnostic and Statistical Manual of Mental Disorders (5th Ed.), commonly called "DSM-5." The DSM series of books has been published by the American Psychiatric Association, a group of American M.D. psychiatrists. While the process of creating and testing the categories and diagnostic criteria of mental disorders was arduous and exacting, it focused on improving the reliability of getting the same diagnoses from different diagnosticians who were looking at the same data (inter-rator reliability), and not underlying validity. The value of the product is impaired by the fact that the edifice underlying the DSM-5 was created by psychiatrists, largely to the exclusion of psychologists, and relies on as primary inputs the kind of information a psychiatrist gets from talking to the patent in the office for several 50-minute sessions (i.e., self-reporting by the patient), without the benefit of psychological testing or (in most instances) the requirement of getting corroborating information from third parties. The Council for Evidence-Based Psychiatry says on their web site: "Psychiatric diagnostic manuals such as the DSM and ICD (chapter 5) are not works of objective science, but rather works of culture since they have largely been developed through clinical consensus and voting. Their validity and clinical utility is therefore highly questionable, yet their influence has contributed to an expansive medicalisation of human experience." Apart from a taxonomy of mental disorders that was not originally founded on scientific observation, a perhaps even deeper problem is the concept of limiting the input for making psychiatric diagnoses to the most subjective of all sources (i.e., reliance on the patient's self-report of mental and emotional states). Carrying this over to custody evaluations, there is very little scientific basis, or even a non-scientific basis, for correlating diagnoses of mental disorders with child custody or possessory determinations. The DSM-5 has a one-page "Cautionary Statement for Forensic Use of DSM-5," where the Manual recognizes that using the DSM-5 in the courtroom presents a "risk that diagnostic information will be misused or

misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." DSM-5, p. 25 (American Psychiatric Publishing, 2013). Another difficulty is that most of the diagnoses in DSM require the concurrence of several diagnostic criteria before a diagnoses of a specific mental disorder can be made, and many litigants meet some but not enough of the diagnostic criteria of one or more mental disorders to justify making a diagnosis. In that situation, the clinician can give a diagnostic label with the phrase "other specified disorder," or can diagnose an "unspecified [type] disorder." DSM-5 p. 15. Many people exhibit behaviors that are problematic, but are not manifested in enough different ways to meet the required number of diagnostic criteria to establish a mental *disorder*. Regardless of the reservations that may exist for the DSM framework, if you want to talk in concrete terms about mental disorders, DSM is the only game in town. But there is nothing in the DSM about translating the DSM categories to custody recommendations. Regardless of the lack of confirmation of the validity of the DSM approach to diagnosing mental disorders, due to general acceptance of the DSM it is likely fruitless for a litigant to attack the DSM framework on *Daubert* reliability grounds, but there is much room still to attack any conclusions that draw on a DSM diagnosis to make a custody recommendation.

The Legislature was alert to the possibility that undiagnosed mental disorders might surface in a child custody evaluation. TFC § 107.1101(c) says that, if a custody evaluator observes a potentially undiagnosed "serious mental illness," as that terms is defined in Section 1355.001, Insurance Code, then"[t]he child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations." Insurance Code Section 1355.001 describes "serious mental illness" as a specified list of mental disorders as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM). [See Section VI.K below for the list of disorders.] This is a legislative endorsement of the DSM-5.

**K. MENTAL ILLNESS.** In *In re S.H*, No. 05-18-00733-CV, 2018 WL 6845314, *4 (Tex. App.--Dallas Nov. 16, 2018, n.p.h.) (mem. op.), the court said that "a parent's mental state may be considered in determining whether a child is endangered if that mental state allows the parent to engage in conduct that is detrimental to the child's physical and emotional well-being." The court in *In Interest of I.M.F.*, No. 14-17-00758-CV, *5 (Tex. App.--Houston [14th Dist.] Mar. 6, 2018, pet. denied) (mem. op.), wrote:

> A parent's mental illness alone does not necessarily demonstrate that a child's physical health or emotional development will be significantly impaired by parental custody. *In re L.D.F.*, 445 S.W.3d 823, 831 (Tex. App.--El Paso 2014, no pet.). Untreated mental illness, however, can endanger a child, and accordingly is a factor the court may consider. *See Id*. (considering father's diagnosis of bipolar disorder and his five hospitalizations in connection with that disorder); *see also In re A.L.H.*, 515 S.W.3d 60, 91 (Tex. App.--Houston [14th Dist.] 2017, pet. ref'd) (considering parent's persistent and untreated mental illness as evidence of endangerment for purposes of termination of parental rights); *In re J.I.T.P.*, 99 S.W.3d 841, 845 (Tex. App.--Houston [14th Dist.] 2003, no pet.) (considering parent's mental health and noncompliance with medication schedule as factors in endangering child for purposes of termination of parental rights).

TFC § 107.1101, Effect of Potentially Undiagnosed Serious Mental Illness, provides:

> (a) In this section, "serious mental illness" has the meaning assigned by Section 1355.001, Insurance Code.
>
> (b) If a child custody evaluator identifies the presence of a potentially undiagnosed serious mental illness experienced by an individual who is a subject of the child custody evaluation and the evaluator is not qualified by the evaluator's licensure, experience, and training to assess a serious mental illness, the evaluator shall make one or more appropriate referrals for a mental examination of the individual and may request additional orders from the court.
>
> (c) The child custody evaluation report must include any information that the evaluator considers appropriate under the circumstances regarding the possible effects of an individual's potentially undiagnosed serious mental illness on the evaluation and the evaluator's recommendations.

Insurance Code § 1355.001, Definitions, says:

> In this subchapter:
>
> (1) "Serious mental illness" means the following psychiatric illnesses as defined by the American Psychiatric Association in the Diagnostic and Statistical Manual (DSM):
>
> (A) bipolar disorders (hypomanic, manic, depressive, and mixed);
> (B) depression in childhood and adolescence;
> (C) major depressive disorders (single episode or recurrent);
> (D) obsessive-compulsive disorders;
> (E) paranoid and other psychotic disorders;
> (F) schizo-affective disorders (bipolar or depressive); and
> (G) schizophrenia.

**IX. GEOGRAPHICAL RESTRICTION.** TFC § 153.134(5) permits a court, in appointing joint managing conservators, to "establish...a geographic area within which the conservator shall maintain the child's primary residence." TFC § 153.132 permits a court in appointing joint managing conservators, to "establish...a geographic area within which the conservator shall maintain the child's primary residence." It is noteworthy that the Family Code provisions regarding geographical restriction relate only to joint managing conservators, but not sole managing conservators. Despite this statutory oversight, In *In re A.S.*, 298 S.W.3d 834, 836 (Tex. App.--Amarillo 2009, no pet.), the Amarillo Court of Appeals held that the trial court had the power to impose a geographical restriction on a sole managing conservator. Some states apply a presumption against the custodial parent moving the children to a new residence away from the visiting parent. Other states apply a presumption in favor of the custodial parent's choice. Other states have no presumption for or against moving away. Texas has no presumption, either way. *Bates v. Tesar*, 81 S.W.3d 411, 422 (Tex. App.--El Paso 2002, no pet.). *See Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002). At the time of the initial custody determination, neither party has a burden of proof as to geographical restriction, but each party has the burden to prove his or her view of what is in the child's best interest. When a SAPCR order has been issued,

either imposing or not imposing a geographical restriction, and suit is filed to modify that part of the order, the burden is on the party seeking modification to prove a material and substantial change of circumstances (or its substitutes) and best interest. A jury's verdict on geographical restriction is binding on the trial court. TRC § 105.002(c)(1) (E) & (F). See Section VII above.

**X. AGREEMENTS BETWEEN THE PARTIES.** Different types of settlement agreements are handled differently in SAPCRs.

**A. RULE 11 AGREEMENTS.** The basic rule governing agreements made during litigation is TRCP 11. Rule 11 provides:

> RULE 11. AGREEMENTS TO BE IN WRITING
>
> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.

The rationale supporting what became Rule 11 was given in *Birdwell v. Cox*, 18 Tex. 535, 537 (1857):

> Agreements of counsel, respecting the disposition of causes, which are merely verbal, are very liable to be misconstrued or forgotten, and to beget misunderstandings and controversies; and hence there is great propriety in the rule which requires that all agreements of counsel respecting their causes shall be in writing, and if not, the court will not enforce them. They will then speak for themselves, and the court can judge of their import, and proceed to act upon them with safety.

The Supreme Court recently said that "Litigants' Rule 11 agreements are contracts relating to litigation ...." *Shamrock Psychiatric Clinic, P.A. v. Tex. Dep't of Health and Human Services*, 540 S.W.3d 553, 560 (Tex. 2018) (per curiam). In another case the Supreme Court said: "A trial court has a ministerial duty to enforce a valid Rule 11 agreement." *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 651 (Tex. 2007); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).

The Court, in *Shamrock Psychiatric Clinic*, also said: "To be effective, a Rule 11 agreement must consist of "a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement," citing *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995) (quoting *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978)). The Court continued: "We have held that a series of letters between the parties is sufficient to constitute a Rule 11 agreement." *Id.* at 455. Another court held that a "series of e-mails" established an agreement between the parties. *See, e.g., Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 692 (Tex. App.--Houston [14th Dist.] 2011, no pet).

The Court in *Shamrock Psychiatric Clinic*, went on, at p. 561-62, to say:

> The power to conduct adjudicative proceedings necessarily includes (1) the power to accept and act upon an agreement between the parties that removes from dispute

> and litigation a subsidiary issue of fact or law; (2) the power to interpret the agreement when a dispute arises subsequently in that regard; and (3) the power to formulate and award a reasonable remedy necessary to effectuate the agreement.

*Cities of Abilene v. Pub. Util. Comm'n of Tex.*, 146 S.W.3d 742, 747 (Tex. App.--Austin 2004, no pet.) (citing *Pub. Util. Comm'n. of Tex. v. Sw. Bell Tel. Co.*, 960 S.W.2d 116, 119-20 (Tex. App.--Austin 1997, no pet.)). Wielding this power is not only a judge's right, but a judge's responsibility. *Cantu*, 234 S.W.3d at 651 ("A trial court has a ministerial duty to enforce a valid Rule 11 agreement.").

In *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979), the court held that a judge's signature on a summary judgment stipulation made in open court and described in the court's order satisfied Rule 11's signature requirement.

Texas has adopted the Uniform Electronic Transactions Act, Tex. Bus. & Comm. Code § 322.007. The Act states that "[i]f the law requires a signature, an electronic signature satisfies the law."

In *Green v. Midland Mortg. Co.*, 342 S.W.3d 686, 691 (Tex. App.--Houston [14th Dist.] 2011, no pet.), the court ruled that a combination of emails confirmed by a letter constituted a Rule 11 agreement. The court also held that an attorney can execute an enforceable Rule 11 agreement on behalf of a client. *Id.* at 691.

A series of emails can constitute a Rule 11 agreement, so long as the email chain is "complete within itself in every material detail, and which contains all of the essential elements of the agreement.…'" *John A. Broderick, Inc. v. Kaye Bassman Int'l Corp.*, 333 S.W.3d 895, 904-905, 909 (Tex. App.--Dallas 2011, no pet.) (quoting *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995)). Whether an email is "signed" is not clear-cut. In *Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519, 529 (Tex. App.--Fort Worth 2011, pet. denied), the court found that an automatically-generated signature block was not purposeful and did not constitute a signature under Rule 11. However, a personally typed name, or a typed "/s/" with a name would have been a sufficient signature.

While a party can revoke consent to a Rule 11 agreement, that only delays but does not defeat enforcement of the agreement. A court cannot render judgment on a Rule 11 agreement where the agreement has been repudiated prior to rendition of judgment. *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995). But, the aggrieved party can amend his pleadings and sue for specific performance on the Rule 11 agreement and get judgment entered that way. *Id.* As stated in *Exxon Mobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 309 (Tex. App.--Houston [1st Dist.] 2005, pet denied):

> A court is not precluded from enforcing a Rule 11 agreement once it has been repudiated by one of the parties, but an action to enforce a Rule 11 agreement to which consent has been withdrawn must be based on proper pleading and proof. *See Padilla*, 907 S.W.2d at 462; *Quintero*, 654 S.W.2d at 444. In such a case, a party may seek to enforce the agreement under contract law. *Padilla*, 907 S.W.2d at 461; *Davis v. Wickham*, 917 S.W.2d 414, 416 (Tex. App.--Houston [14th Dist.] 1996, no writ).

**B. AGREED PARENTING PLANS.** A "parenting plan" is defined in TFC § 153.601(4) as "the

provisions of a final court order that: (A) set out rights and duties of a parent or a person acting as a parent in relation to the child; (B) provide for periods of possession of and access to the child, which may be the terms set out in the standard possession order under Subchapter F and any amendments to the standard possession order agreed to by the parties or found by the court to be in the best interest of the child; (C) provide for child support; and (D) optimize the development of a close and continuing relationship between each parent and the child." A parenting plan must be included in a final SAPCR order (except for an order only modifying child support, an order only terminating parental rights, an order terminating or dismissing a SAPCR, an order denying paternity, and a final order of adoption). TFC § 153.603(a); TFC § 155.001(b).

TFC § 153.007(a) provides that "parties may enter into a written agreed parenting plan containing provisions for conservatorship and possession of the child and for modification of the parenting plan, including variations from the standard possession order." Subsection (b) provides: "If the court finds that the agreed parenting plan is in the child's best interest, the court shall render an order in accordance with the parenting plan." Subsection (d) provides: "If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan. If the parties do not submit a revised parenting plan satisfactory to the court, the court may, after notice and hearing, order a parenting plan that the court finds to be in the best interest of the child."

TFC § 153.133 governs parenting plans for joint managing conservatorship. Section (a) requires that, if a written agreed parenting plan is filed with the court, the court "shall" render judgment appointing the parents as joint managing conservators, but only if certain conditions are met. The parenting plan must: (1) designate the conservator who has the exclusive right to designate the primary residence of the child and (A) establish, until modified by further order, the geographic area within which the conservator shall maintain the child's primary residence; or (B) specify that the conservator may designate the child's primary residence without regard to geographic location; (2) specify the rights and duties of each parent regarding the child's physical care, support, and education; (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends; (4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent provided by Chapter 151; (5) have been voluntarily and knowingly made by each parent and not been repudiated by either parent at the time the order is rendered; and (6) be in the best interest of the child. Subsection (c) provides that condition (1) for designating a conservator with the exclusive right to determine primary residence is not required if the parenting plan provides that the child's primary residence is within a specified area.

Points to remember about parenting plans:

1. A parenting plan is required for all SAPCR decrees that establish conservatorship, possession, etc.

2. The court may reject a written agreed parenting plan that the court thinks is not in the child's best interest.

3. If an agreed parenting plan is rejected, the court can request that the parties try again, and failing a satisfactory parenting plan, the court can order its own plan.

4. If the parties submit a written agreed parenting plan for joint managing conservatorship, the court "shall" render judgment accordingly, provided the statutory conditions are met, including a determination by the court that the plan is in the child's best interest. Notably, either parent can repudiate a written agreed parenting plan for joint managing conservatorship at any time before judgment is rendered. It is unclear whether written parenting plans that are not for joint managing conservatorship are revocable.

5. There is no requirement that the agreed parenting plan must exist separately from a decree, so an agreed written SAPCR decree containing a parenting plan should suffice.

**C. WRITTEN SETTLEMENT AGREEMENTS.** Tex. Civ. Prac. & Rem. Code § 154.071 discusses written settlement agreements reached in an alternative dispute resolution process. If the parties reach and execute a written settlement agreement disposing of the dispute, "the agreement is enforceable in the same manner as any other written contract." *Id.* at 154.071(a). The court has the discretion to incorporate the agreement into a final decree. *Id.* at 154.071(b). Such an agreement does not affect an existing court order unless it is incorporated into a subsequent decree. *Id.* at 154.071(c). The Supreme Court has ruled that such a settlement agreement is enforceable as a contract even if it is not incorporated into a decree. *Compania Financiara Libano, S.A. v. Simmons*, 53 S.W.3d 365, 367 (Tex. 2001). If consent to the agreement is withdrawn, it may be enforced as a separate contract claim, with proper pleadings and proof. A suit to enforce should be asserted, if possible, before judgment in the original cause; if the dispute erupts while the case is on appeal, the appeal should be abated. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658-59 (Tex. 1996).

**D. MEDIATED SETTLEMENT AGREEMENTS.** Many SAPCRs are settled in mediation, with the signing of a mediated settlement agreement ("MSA"). Section 154.071 of the Tex. Civ. Prac. & Rem. Code applies to MSAs, but more specific statutes are contained in the TFC, and when in conflict the specific controls over the general. TFC § 153.0071 applies to MSAs in SAPCR proceedings. TFC § 153.0071(c), (d) & (e) provide in pertinent part:

TFC § 153.0071, Alternate Dispute Resolution Procedures

* * *

(c) On the written agreement of the parties or on the court's own motion, the court may refer a suit affecting the parent-child relationship to mediation.

(d) A mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;

(2) is signed by each party to the agreement; and

(3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

**1. Pre-Suit MSA.** In *Highsmith v. Highsmith*, No. 07-15-00407-CV (Tex. App.--Amarillo Sept. 28, 2017, pet. filed & briefing requested) (mem. op.), the court held that an MSA signed before suit was filed was not enforceable under TFC § 6.602 (relating to divorce). The court did not address the question of whether the MSA was enforceable under ordinary contract law. (It should be noted that the case was appealed to the Supreme Court and the Supreme Court requested briefing. Respondent's brief is due on 1-29-2019). In *In re S.K.D.*, No. 05-11-00253-CV, *1 (Tex. App.--Dallas July 8, 2014, no pet.) (mem. op.), the court held that an MSA signed in a SAPCR that was dismissed for want of prosecution, and then refiled, was binding in the refiled suit. In *Williams v. Finn*, No. 01-17-00476-CV, *3 (Tex. App.--Houston [1st Dist.] Oct. 18, 2018, no pet.) (mem. op.), the court held that a post-judgment MSA was enforceable in a subsequent suit to modify the earlier judgment.

**2. Temporary Orders.** In *Matter of Marriage of Harrison*, 557 S.W.3d 99, 139 (Tex. App.--Houston [14th Dist.] 2018. no pet.), the court ruled that a court was permitted to issue temporary orders that varied from an MSA where circumstances had changed.

**3. Where There is No Referral by the Court to Mediation.** One court has held that an MSA can be binding under TFC § 153.0071(d), even if the court did not refer the case to mediation, as the statute seems to require. *In re J.A.W.-N.*, 94 S.W.3d 119, 120–21 (Tex. App.--Corpus Christi 2002, no pet.). The requirement of a referral to mediation was deemed a necessary prerequisite to enforcement under the Family Code in *Lee v. Lee*, No. 10–03–00182–CV, *1–2 (Tex. App.--Waco Aug. 11, 2004, pet. denied) (mem. op.) (involving TFC § 6.602 for divorces). This argument was rejected in *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893, *4 (Tex. App.--Austin June 16, 2016, no pet.) (mem. op.).

**4. Setting Aside MSA Based on Best Interest or Endangerment.** In *In re Lee*, 411 S.W.3d 445, 453 (Tex. 2013), a divided Supreme Court (4-1-4) held that a trial court is not permitted to overturn or disregard an MSA in a SAPCR, except under the exception set out in Section 153.0071(e-1). Subsection (e–1) allows a trial court to decline to render judgment on an MSA when three requirements are met: (1) a party to the agreement was a victim of family violence, and (2) the court finds the family violence impaired the party's ability to make decisions, and (3) the agreement is not in the child's best interest. A majority of the Court (the four Justices who joined in the plurality opinion plus Justice Guzman, concurring) held that a trial court could not reject an MSA based on a best interest determination. *Id.* at 457-58; *Id.* at 462 (Guzman, J., concurring). However, a different majority of the court approved a trial court disregarding an MSA based on endangerment of the child. Since the different majorities depend on the concurrence of Justice Guzman, her language on the point may be considered to state the controlling law:

> In sum, I believe section 153.0071 of the Family Code precludes a broad best-interest inquiry. A trial court may, however, when presented with evidence that entering judgment on an MSA could endanger the safety and welfare of a child, refuse to enter judgment on the MSA.

*Id.* at 466 (Guzman, J., concurring).

**5. Setting Aside MSA for Fraud, Illegality, Material Breach, Etc.** In *Boyd v. Boyd*, 67 S.W.3d 398, 404–05 (Tex. App.--Fort Worth 2002, no pet.), the court affirmed the trial judge's setting aside a divorce-related MSA for non-disclosure of pertinent facts. The court said: "Where a person is under a duty to disclose material information, refrains from doing so, and thereby leads another to contract in reliance on a mistaken understanding of the facts, the resulting contract is subject to rescission due to the intentional nondisclosure." In this instance, the duty to disclose arise from the recital in the MSA of full disclosure. *Id.* at 404.

In *Durham v. Durham*, No. 03-03-00303-CV, *2 (Tex. App.--Austin Mar. 25, 2004, no pet.) (mem. op.) , the court said: "If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. *Id.* §§ 6.602(c), 153.0071(e). But, like other contracts, such a mediated settlement agreement can be set aside if a party was induced to enter the agreement through unacceptable conduct like duress, fraud, or other dishonest or unfair tactics."

A claim that an MSA should be set aside due to fraudulent inducement, "requires evidence (1) that [a party] made a material misrepresentation that was false, (2) that was either known to be false when made or was asserted without knowledge of its truth, (3) that it was intended to be acted upon, (4) that it was relied on, and (5) that such reliance caused ... injury." *Olvera v. Olvera*, No. 01-07-00231-CV, *4 (Tex. App.--Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op.).

In *In re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.--Houston [14th Dist.] 1999, no pet.), the appellate court held that the trial court did not abuse its discretion by refusing to enter judgment on an MSA in a SAPCR where the MSA contained an illegal provision.

With regard to contractual defenses to MSAs under TFC § 153.0071, in *In re C.H.C.*, 396 S.W.3d 33, 44–45 (Tex. App.--Dallas 2013, no pet.), the court wrote:

> It is not clear whether the defenses of lack of consideration, failure of consideration, mutual mistake, and lack of meeting of the minds apply to mediated settlement agreements under section 153.0071. Father argues they do not apply because subsection (e) provides that judgment may be entered on the mediated settlement agreement "notwithstanding ... another rule of law," and the defenses of lack of and failure of consideration, mutual mistake, and lack of meeting of the minds are "another rule of law." Courts have considered the merits of the defenses of mutual mistake and no meeting of the minds to mediated settlement agreements under section 153.0071(e) and the similar provision in section 6.602(c) without discussing the effect of the "notwithstanding ... another rule of law" provision. *See Toler v. Sanders*, 371 S.W.3d 477, 481–82 (Tex. App.--Houston [1st Dist.] 2012, no pet.); *Milner v. Milner*, 360 S.W.3d 519, 524 (Tex. App.--Fort Worth 2010), *aff'd on other grounds*, 361 S.W.3d 615 (Tex. 2012); *Mullins v. Mullins*, 202 S.W.3d 869, 875–78 (Tex. App.--Dallas 2006, pet. denied). No court appears to have considered the affect of that language on the defenses of lack of consideration and failure of consideration. Without determining whether any of these defenses are applicable to an agreement under section 153.0071, we conclude

> Mother has failed to show the trial court reversibly erred in entering judgment on the agreement. [Footnote omitted.]

**6. When Decree Deviates From MSA.** In *Barina v. Barina*, No. 03-08-00341-CV, *5 (Tex. App.--Austin Nov. 21, 2008, no. pet.) (mem. op.), the trial court was reversed for signing a judgment that deviated from the MSA with regard to possessory periods of the children. In *Casper v. Preston*, No. 01-01-00322-CV, *2 (Tex. App.--Houston [1st Dist.] Mar. 27, 2003, no pet.) (mem. op.), the trial court was reversed when weekend possession mentioned in the MSA was not carried forward into the decree. In *Garcia-Udall v. Udall*, 141 S.W.3d 323, 327 (Tex. App.--Dallas 2004, no pet.), the court found that the decree varied from the MSA as to who could authorize medical treatment, so the decree was modified by the appellate court. Mismatches between the MSA and decree cannot be fixed by judgment nunc pro tunc, where the judgment was rendered on the decree and not on the MSA. *Matter of Marriage of Russell*, 556 S.W.3d 451, 459 (Tex. App.--Houston [14th Dist.] 2018, no pet.) (case involved property division, not parental rights).

**7. MSA in Parental Termination Proceedings.** It should be noted that two courts of appeals have been unwilling to permit an MSA in a parental termination proceeding to override the court's authority to conduct a best interest review. *In re Morris*, 498 S.W.3d 624 (Tex. App.--Houston [14th Dist.] 2016, orig. proceeding); *In re K.D.*, 471 S.W.3d 147 (Tex. App.--Texarkana 2015, no pet).

**8. MSA Can't Override Mandatory Venue Statute.** It should be noted that one appellate court disregarded a provision in an MSA purporting to fix venue contrary to a mandatory venue provision in the Family Code. The court said that "An MSA is a contract between the parties .... Therefore, the mere fact that the parties entered into a contractual agreement purporting to fix venue in the 246th District Court is not itself sufficient to override the mandatory venue provision at Section 155.201(b)." *In re Lovell-Osburn*, 448 S.W.3d 616, 620 (Tex. App.--Houston [14th Dist.] 2014, no pet.).

**E. INFORMAL SETTLEMENT AGREEMENTS.** TFC § 6.604, relating to divorce proceedings, provides for a written settlement agreement reached at an informal settlement conference ("ISA"). Such an agreement is binding on the parties if it: "(1) provides, in a prominently displayed statement that is in boldfaced type or in capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed." However, the court can reject the ISA if it finds that the terms of the ISA are not just and right. While litigants will sometimes include terms relating to the parent-child relationship in their ISA, there is no provision in the TFC that permits an ISA in a SAPCR. Therefore, while the portions of an ISA relating to husband-wife issues may be non-revocable, portions relating the SAPCR are revocable. In such a situation, the court must decide whether the collapse of the SAPCR terms invalidates the entire agreement. *See In re Poly-Am., L.P.*, 262 S.W.3d 337, 360 (Tex. 2008) ("Whether or not the invalidity of a particular provision affects the rest of the contract depends upon whether the remaining provisions are independent or mutually dependent promises, which courts determine by looking to the language of the contract itself.... The relevant inquiry is whether or not parties would have entered into the agreement absent the unenforceable provisions.") (citations omitted).

**XI. BINDING ARBITRATION.** TFC § 153.0071(a) & (b) permit litigants to agree to arbitrate

SAPCR disputes. The arbitration can be binding or non-binding. If binding, the court "shall" render an order reflecting the arbitrator's award, unless "the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award." The request for a best interest determination must be made before judgment is rendered or it is waived. *In re T.B.H.-H.*, 188 S.W.3d 312, 315 (Tex. App.--Waco 2006, no pet.). The trial court's decision is evaluated on appeal under an abuse of discretion standard. *Stieren v. McBroom*, 103 S.W.3d 602, 606 (Tex. App.--San Antonio 2003, pet. denied). If the arbitration award is set aside, the court must refer the case back to arbitration. *Id.* at 607. The right to a post-arbitration judicial determination of best interest can be waived in the agreement to arbitrate. *In re C.A.K.*, 155 S.W.3d 554, 560 (Tex. App.--San Antonio 2004, pet. denied).

So, the trial court retains the power to conduct a hearing to determine whether an arbitration award is not in the child's best interest (unless that right was waived in the arbitration agreement). How to conduct such a hearing is unclear. The court could review the reporter's written record of the evidence submitted in arbitration (if a record was made). Or the court could hear witnesses testify about best interest. It is easy to imagine that a best interest hearing could essentially become a retrial of the arbitration, with a full complement of witnesses.

Important note on arbitration:

1. The parties' MSA may say that future disputes arising under the MSA are to be arbitrated by the mediator-turned-arbitrator. If the language is not limited in some way, an argument can be made that post-judgment disputes may be subject to the arbitration provision. If the agreement incident to divorce or decree say that the MSA is merged into the agreement or decree, and the agreement and decree do not contain an arbitration clause, then the arbitration provision should be put to rest unless a new arbitration provision is included in the agreement incident to divorce or decree.

**XII. SAME-SEX RELATIONSHIPS.** Same-sex relationships can present issues of SAPCR standing where a married couple has a child, but only one of the spouses had adopted the child or given birth to the child by assisted reproduction and the other partner or spouse has not taken steps to establish a legal relationship with the child.

In *Coons-Andersen v. Andersen*, 104 S.W.3d 630, 636 (Tex. App.--Dallas 2003, no pet.), the female former domestic partner of the child's mother did not have standing under TFC § 102.003(a)(9) because she had had only "occasional" visitation with the child, and had had no possession within six months of filing suit.

In *In re M.K.S.-V.*, 301 S.W.3d 460, 464 (Tex. App.--Dallas 2009, pet. denied), a lesbian couple decided to raise a child together. One woman gave birth through artificial insemination. The couple ended their relationship, but the non-mother continued to have regular visitations. The mother eventually cut off contact, and the non-mother partner filed for managing conservatorship. The non-mother asserted standing under TFC § 102.003(a)(9), arguing that she had 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. The non-mother also asserted parenthood by estoppel and also sued for

adoption. The trial court found no standing to seek conservatorship under Section 102.003(a)(9), but found standing to seek adoption under TFC § 102.005. The appellate court reversed, finding a six month period of actual care, custody, and control. The appellate court affirmed the dismissal of the adoption, because the mother did not consent. [The court may have mixed standing with the merits.]

In *In re Fountain*, No. 01-11-00198-CV (Tex. App.--Houston [1st Dist.] May 2, 2011, orig. proceeding) (mem. op.) the former domestic partner of the child's mother had standing because she had: provided the child with a place to sleep, food, clothing, toys, and medicine; made improvements to her and her partner's homes to make them suitable for a small child; and participated in important decisions related to the child's welfare, including attending medical appointments and providing for the child's daycare.

In *In re Wells*, 373 S.W.3d 174, 175 (Tex. App.--Beaumont 2012, no pet.), one woman in a same-sex couple gave birth to a child while the two women were living together. They separated and divided parenting responsibilities, and agreed in writing to a possession schedule in which both women had the child about half the time. The biological mother cut-off contact, and the other woman filed a SAPCR to be appointed sole managing conservator. The biological mother unsuccessfully challenged standing. The court of appeals granted mandamus directing dismissal, on the grounds that the non-parent had *legal* control. This view was overruled later by the Supreme Court in *In re H.S.*, 50 S.W.3d 151 (Tex. 2018). See Section II.D above.

In *In Interest of R.E.R.*, 534 S.W.3d 1, 4 (Tex. App.--Corpus Christi 2016, pet. denied), same-sex female partners decided to have a child. The women signed a donor agreement that the biological mother could appoint her partner as guardian and they could decide all matters relating to the child without the involvement of the sperm donor or his wife. The agreement also provided for a second parent adopting, which never occurred. The parties lived together with the child for four years, then separated. The couple signed an agreement for the partner to have "temporary rights" to the child. The child lived exclusively with the partner. The biological mother eventually cut off visitation, and the partner filed for managing conservatorship. The biological mother filed a motion to dismiss for lack of standing, which was granted with a finding of fact that the parties had stopped living together more than 90 days prior to the filing of the SAPCR (i.e., under TFC § 102.003(a)(11)). The dismissal was reversed because the partner presented some evidence that supported standing. The case was remanded for the trial court to consider standing under TFC § 102.003(a)(9).

The Texas Supreme Court is presently considering *In the Interest of A.E.*, No. 09-16-00019-CV, *5 (Tex. App.--Beaumont April 27, 2017, pet. pending) (mem. op.), a same-sex marriage case where one female spouse ("the mother") gave birth to a child through assisted reproduction (artificial insemination), but the non-biologically-related spouse ("the claimant") did not sign a written consent to conceive under TFC § 160.703 ("If a husband ... consents to assisted reproduction by his wife ....") and did not adopt the child. The claimant's SAPCR was dismissed for lack of standing. The claimant asserts parentage on the ground that she consented to the birth and the parties openly treated the child as their own (which is a substitute for the requirement of a written assisted-reproduction agreement). The claimant also asserts a presumption of parentage arising from birth during marriage under TFC 160.204(a)(1) ("A man is presumed to be the father of a child if ... he is married to the mother of the child and the child is born during the marriage"), and the impossibility of rebutting the presumption by showing another person as the parent. The claimant also asserts that the biological mother is

estopped from raising genetic testing to exclude the claimant as a parent based on detrimental reliance. The Court of Appeals rejected the claimant's argument about openly treating the child as theirs, on the ground that the statute was phrased in terms of the "failure of the husband to sign a consent." The Court of Appeals declined to substitute the word "spouse" for the word "husband." The claimant argues that *Obergefell* requires a gender neutral interpretation of the statute, an argument rejected by the Court of Appeals. The case on the Supreme Court's docket is No. 17-0458, *In the Interest if A.E.*

**XIII. LIMITS ON REMOVING OR DELEGATING PARENTAL AUTHORITY.** While the hoopla about the state's intrusion into family relations focuses almost entirely on the standing of non-family members to litigate custody of or access to minor children, there are also constitutional dimensions to a court taking decision-making authority away from parents and giving it to the court or delegating it to a non-parent (like a psychologist). The natural rights existing between parents and their children are constitutionally protected. *Holick v. Smith*, 685 S.W.2d 18, 20 (Tex. 1985); *In re G.M.*, 596 S.W.2d 846, 846 (Tex. 1980). These natural parental rights have been characterized as "essential," a "basic civil right [] of man," and "far more precious ... than property rights." *Stanley v. Illinois*, 405 U.S. 645 (1972); *Holick*, 685 S.W.2d at 20. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000). In *In re Derzapf*, 219 S.W.3d 327, 331-33 (Tex. 2007), the Supreme Court talked about "the presumption that a parent acts in his or her child's best interest," and the elevated burden to overcome this presumption. *Id.* at 333. Non-custody-related parental decision-making authority includes significant matters like education, medical care, psychological and psychiatric care, and counseling. Too great an intrusion by the court in taking away parental decision-making authority may be subject to constitutional attack under *Troxel*.

Another recurring issue in SAPCR proceedings is the use by the court of a court-appointed professional to make decisions regarding some aspects of the parent-child relationship, such as periods of possession. "A court's authority cannot be delegated and a trial judge may not relinquish its powers to others." *In re Webster*, 982 S.W.2d 526, 528 (Tex. App.--Amarillo 1998, no pet.). Several appellate courts have upheld the delegation of judicial authority when there were extreme circumstances or a severely impaired parent, and the delegation did not involve a core parental right. *In re J.S.P.*, 278 S.W.3d 414, 422 (Tex. App.--San Antonio 2008, no pet.) (citing *In re L.M.M.*, No. 03–04–00452–CV, *1 (Tex. App.--Austin Aug. 31, 2005, no pet.) (mem. op.)).