



January 2009

Family Law: Patent and Child

Linda B. Thomas

Ardita L. Vick

Recommended Citation

Linda B. Thomas & Ardita L. Vick, *Family Law: Patent and Child*, 62 SMU L. REV. 1197 (2009)
<https://scholar.smu.edu/smulr/vol62/iss3/16>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

FAMILY LAW: PARENT AND CHILD

Linda B. Thomas*
Ardita L. Vick**

TABLE OF CONTENTS

I. INTRODUCTION	1197
II. TERMINATION OF PARENTAL RIGHTS	1198
A. CONSTITUTIONAL CHALLENGES TO SECTION 263.405(i)	1198
1. <i>Facial Challenge—Due Process</i>	1199
2. <i>Facial Challenge—Separation of Powers</i>	1200
3. <i>“As Applied” Challenge—Due Process</i>	1203
4. <i>“As Applied” Challenge—Ineffective Assistance</i> ...	1206
B. PRESERVATION OF ISSUES FOR APPEAL	1208
1. <i>Supplementation of the Record</i>	1208
2. <i>Conservatorship and Termination</i>	1209
3. <i>Extension of Time to File Statement of Points</i>	1211
C. APPOINTMENT OF COUNSEL	1212
III. STANDING	1212
1. <i>Grandparent Access</i>	1212
2. <i>Same-Sex Couples</i>	1214
3. <i>Temporary Guardians</i>	1215
IV. PARENTAL PRESUMPTION AND GRANDPARENTS	1216
V. PATERNITY	1218
VI. CHILD SUPPORT	1219
VII. CONCLUSION	1220

I. INTRODUCTION

MORE than half of this article is devoted to discussing constitutional challenges to section 263.405(i) of the Family Code governing the appeal of an order terminating a parent's parental rights. Although the statute was found by a number of appellate courts to be facially unconstitutional or unconstitutional as applied, the Texas Supreme Court declined to consider the issue. That may change with *In*

* Chief Justice, Fifth District Court of Appeals at Dallas. Chief Justice Thomas received her BA from the University of Texas at Arlington and her JD from Southern Methodist University.

** Solo Attorney, Fifth District Court of Appeals at Dallas. Ms. Vick received her BS from the University of Houston and her JD from Baylor University.

re J.O.A.,¹ a case from the Amarillo Court of Appeals, in which the court not only found the statute unconstitutional as applied to the father, but reversed the termination order.

In other areas of family law, the trend of the strict application by the courts of the Family Code as written continues. However, as in other areas of the law, the courts are lifting or relaxing technical procedural bars to pursuing an appeal. Read together, while it may be easier to get into court, you need to preserve your record and try your case cleanly to prevail on appeal.

II. TERMINATION OF PARENTAL RIGHTS

A. CONSTITUTIONAL CHALLENGES TO SECTION 263.405(i)

Section 263.405 of the Family Code provides for an accelerated appeal of a final order in cases where the Department of Family and Protective Services (“the Department”) has assumed the care of the child.² Within fifteen days of the trial court signing the final order, the party is required to file with the trial court either a statement of the points the party intends to appeal or a statement of points combined with a motion for new trial.³ The notice of appeal must be filed within twenty days of the trial court entering the final order.⁴ Within thirty days of signing the final order, the trial court must hold a hearing to determine whether a new trial should be granted, whether any claim of indigency should be sustained, and whether the appeal is frivolous as provided by section 13.003(b) of the Civil Practice and Remedies Code.⁵ The appellate record must be filed within sixty days after the final order is entered, and the appellate court is required to “render its final order or judgment with the least possible delay.”⁶

During the 2005 legislative session, the Legislature enacted section 263.405(i) of the Family Code prohibiting an appellate court from considering “any issue that was not specifically presented to the trial court in a timely filed statement of points on which the party intends to appeal or in a statement combined with a motion for new trial.”⁷ All fourteen appellate courts complied with the Legislature’s directive by concluding if an issue is not presented to the trial court in a statement of points or in a

1. 262 S.W.3d 7 (Tex. App.—Amarillo 2008), *aff’d as modified, and remanded*, 283 S.W.3d 336 (Tex. 2009). Although issued outside the Survey period, the Texas Supreme Court affirmed the Amarillo court’s determination, concluding the statute was unconstitutional as applied “when it precludes a parent from raising a meritorious complaint about the insufficiency of the evidence supporting the termination order.” *In re J.O.A.*, 283 S.W.3d at 339.

2. TEX. FAM. CODE ANN. § 263.405 (Vernon 2008).

3. § 263.405(b).

4. § 263.405(c); TEX. R. APP. P. 26.1(b).

5. TEX. FAM. CODE ANN. § 263.405(d) (Vernon 2008).

6. § 263.405(a), (f).

7. § 263.405(i). However, a statement of points is not required in the appeal of a private termination action in which the children were never under the Department’s care. *In re J.R.S.*, 232 S.W.3d 278, 281 (Tex. App.—Fort Worth 2007, no pet.).

statement of points combined with a motion for new trial, that issue is not preserved and may not be considered on appeal.⁸ However, a number of those courts questioned the constitutionality of the statute and essentially invited litigants to challenge the issue. The litigants accepted the invitation, leading to a number of appellate decisions during the Survey period addressing the constitutionality of the statute.

1. Facial Challenge—Due Process

In *In re S.N.*,⁹ the father argued section 263.405(i) was facially unconstitutional because it required a parent to identify issues on appeal in a statement of points prior to perfecting the appeal and before the trial court was required to file findings of fact and conclusions of law. The father asserted the statute “places an arbitrary and unreasonable barrier to appellate court consideration” and, therefore, deprived him of his right to due process.¹⁰

The Houston Fourteenth Court of Appeals noted “a facial challenge to a statute is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the statute will be valid.”¹¹ A statute is not invalid because it might operate unconstitutionally under some conceivable set of circumstances.¹² Rather, the challenger must establish that every application of the statute violates the constitution.”¹³

The court noted a statement of points is not required to include matters not found by the trial court until after the expiration of the fifteen-day deadline if (1) the only alleged trial court error occurred prior to the deadline for filing the statement of points, (2) the trial court filed its findings of fact and conclusions of law prior to the deadline for filing the statement of points, or (3) the parent requests and receives an extension of time in which to file the statement of points.¹⁴ Because these examples demonstrate situations in which the statute could operate constitutionally, the father’s argument that the statute was facially unconstitutional failed.¹⁵

8. *In re S.K.A.*, 236 S.W.3d 875, 886 (Tex. App.—Texarkana 2007), *pet. denied*, 260 S.W.3d 463 (Tex. 2008) (per curiam).

9. No. 14-07-00161-CV, 2008 WL 4547442 (Tex. App.—Houston [14th Dist.] Oct. 14, 2008), *vacated and modified*, 287 S.W.3d 183 (Tex. App.—Houston [14th Dist.] 2009, no *pet.*). Because the relevant analysis was not changed in the modified opinion, we cite to the modified opinion in this Article.

10. 287 S.W.3d at 193.

11. *Id.* at 194 (quoting *Santikos v. State*, 836 S.W.2d 631, 633 (Tex. Crim. App. 1992)).

12. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

13. *Id.*

14. *Id.*

15. *Id.* at 195; *see also In re N.C.M.*, 271 S.W.3d 327, 329 (Tex. App.—San Antonio 2008, no *pet.*) (“Although we agree with appellant that appellate counsel often has little or no background on what occurred at trial other than information obtained from trial counsel or the client, we cannot agree with appellant that these circumstances automatically result in depriving parents whose parental rights have been terminated of their due process and equal protection rights. Therefore, we conclude appellant has not established that section 263.405(i), by its terms, always has and always will operate unconstitutionally.”); *In*

The Tyler Court of Appeals took a different approach to the argument. In *In re A.T.S.*,¹⁶ the parents also argued section 263.405(i) was unconstitutional because it required them to address in the statement of points any alleged errors in the trial court's findings of fact and conclusions of law before the findings and conclusions were due under the Rules of Civil Procedure. The court noted that applying section 263.405(i) in these circumstances "would mean that the legislature did not intend for parents to appeal any alleged trial court error occurring after the date they filed their statement of points for appeal."¹⁷ Characterizing this as an "absurd result," the court, without addressing the constitutionality of the statute, concluded that section 263.405(i) does not apply to alleged errors occurring after the deadline for filing a statement of points.¹⁸

2. *Facial Challenge—Separation of Powers*

The Fort Worth Court of Appeals determined in *In re D.W.*¹⁹ that section 263.405(i) was facially unconstitutional under the Separation of Powers Clause of the Texas constitution.²⁰ The court noted the Separation of Powers Clause is "violated (1) when one branch of government assumes power more properly attached to another branch or (2) when one branch unduly interferes with another branch so that the other cannot effectively exercise its constitutionally assigned powers."²¹ Article V, section 1 of the Texas Constitution vests "[t]he judicial power of this State . . . in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts . . . and in such other courts as may be provided by law."²² An appellate court can have jurisdiction over a case under article V, section 6(a) of the Texas Constitution²³ or under a specific grant of

re M.D., No. 07-07-0126-CV, 2008 WL 833227, at *3 (Tex. App.—Amarillo Mar. 28, 2008, no pet.) (mem. op.) ("[A] procedural requirement, i.e., a specific number of days within which to file a document, in and of itself, did not violate [the parent's] due process rights.").

16. No. 12-07-00196-CV, 2008 WL 2930392 (Tex. App.—Tyler July 31, 2008, no pet.) (mem. op.).

17. *Id.* at *19.

18. *Id.*; see also *In re J.B.*, No. 09-07-625-CV, 2008 WL 4735434, at *3 (Tex. App.—Beaumont Oct. 30, 2008, no pet.) (mem. op.).

19. 249 S.W.3d 625 (Tex. App.—Fort Worth 2008) (en banc), *pet. denied*, 260 S.W.3d 462 (Tex. 2008) (per curiam).

20. Article II, section 1 of the Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

21. *In re D.W.*, 249 S.W.3d at 635.

22. TEX. CONST. art. V, § 1.

23. Article V, section 6(a) of the Texas Constitution grants the court of appeals appellate jurisdiction in "all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law.

jurisdiction by the Texas Legislature.²⁴

The Department initially argued the court's appellate jurisdiction in termination cases was purely statutory and, therefore, subject to any limitations on the right to appeal imposed by the Legislature. The court disagreed, noting its constitutional jurisdiction extends to appeals in "all cases of which the district courts have original jurisdiction, which includes termination cases."²⁵

The court then turned to the Department's argument that even the court's constitutional jurisdiction is subject to restriction. The court agreed its jurisdiction was not absolute.²⁶ It concluded, however, that "neither is the legislature's power to restrict and regulate the appellate courts' jurisdiction unlimited."²⁷ Although the Legislature may restrict and regulate an appellate court's constitutional jurisdiction over appeals from termination orders, it cannot interfere with the court's constitutionally granted powers.²⁸ Any attempt by the Legislature to do so would be null and void.²⁹

The court agreed with the Department that section 263.405(i) was intended as a procedural rule.³⁰ However, section 263.405(i) is not a substitute for preserving error under the rules of civil and appellate procedure.³¹ A party to a termination proceeding must preserve error under the applicable rules of procedure before an issue may be considered by an appellate court,³² but section 263.405(i) could prohibit an appellate court from considering even a properly preserved issue.³³

The court stated that the Legislature may not use "rules of court" to infringe upon the substantive power of the judiciary.³⁴ The court determined that section 263.405(i) is "directed at simply prohibiting exercise of [the court's] appellate power to review issues."³⁵ The statute, therefore, violates the Separation of Powers Clause because it:

interferes with [the court's] power to exercise discretion in determining whether to consider issues not listed in a statement of points, even in absence of prejudice to the Department. The statute bars our consideration of all issues not listed even when they were properly preserved for review under the rules of procedure. In effect, the legislature decides for us that complaints not listed in a timely statement of points are waived. In so doing, section 263.405(i) infringes

Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error." TEX. CONST. art. V, § 6(a).

24. *In re D.W.*, 249 S.W.3d at 636.

25. *Id.*

26. *Id.* at 637.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 639.

31. *Id.*

32. *Id.*

33. *Id.* at 640.

34. *Id.*

35. *Id.* at 642.

upon [the court's] ability to exercise a "core power" reserved for the judicial branch by telling us not only *how* we must rule on issues brought before us but that we cannot consider those issues at all.³⁶

The court then held section 263.405(i) void and considered the mother's issues on appeal.

Chief Justice Cayce, joined by Justice Holman, filed a separate opinion concurring in the judgment but dissenting to "the majority's dicta opinion, holding that section 263.405(i) violates the Separation of Powers Clause."³⁷ Chief Justice Cayce noted the majority affirmed the termination without reaching the merits of the mother's complaints because the mother failed to make a record of the hearing that was the basis of her complaints.³⁸ Because the court did not reach the merits of the mother's complaints, it was unnecessary for the court to decide whether "section 263.405(i) violates the separation of powers clause because it bars [the court] from reviewing the merits of [the mother's] complaint."³⁹ Therefore, Chief Justice Cayce concluded the majority's opinion was not only dicta, but wrong.⁴⁰

Chief Justice Cayce determined the right to appeal from a termination order is statutory, not constitutional.⁴¹ While the constitution gives an appellate court the general power to review appeals, that power is subject to restriction by the Legislature.⁴² The limitations within section 263.405(i) regarding a parent's right to appeal a termination order, "constitute[] a proper exercise of the Legislature's constitutional power to regulate and restrict such appeals."⁴³ Section 263.405(i) does not violate the Separation of Powers Clause, because it does not tell the court how to perform its judicial function or how to rule on any issue.⁴⁴ Rather, it "simply limits appellate review of termination orders to issues that are preserved in accordance with the procedures provided by the statute. This limitation is well within the Legislature's constitutional power to regulate and restrict the right to appeal a termination order."⁴⁵ Justice McCoy filed a separate concurrence, agreeing with Chief Justice Cayce that it was not necessary for the majority to reach the constitutional question and its discussion of the constitutionality of section 263.405(i) was dicta.

In a *per curiam* opinion, the Texas Supreme Court denied the Department's petition for review stating that it neither approved nor disapproved the Fort Worth court's holding that section 263.405(i) was unconstitutional.⁴⁶

36. *Id.* at 645.

37. *Id.* at 648 (Cayce, C.J., dissenting in part and concurring in judgment).

38. *Id.* at 649.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 650.

44. *Id.* at 651.

45. *Id.*

46. *In re D.W.*, 260 S.W.3d 462 (Tex. 2008) (*per curiam*).

3. "As Applied" Challenge—Due Process

The Texarkana Court of Appeals was confronted with an "as applied" challenge to the constitutionality of the statute in *In re S.K.A.*⁴⁷ The argument that a statute is unconstitutional as applied is premised on a generally constitutional statute operating "unconstitutionally concerning a person because of that person's particular circumstances."⁴⁸ In *S.K.A.*, the father argued that sections 263.405(b) and 263.405(i) of the Family Code, as applied to him as an indigent parent without counsel, despite a request that counsel be appointed to represent him, deprived him of due process under both the United States and Texas Constitutions.⁴⁹

The father was living in Mississippi when the Department filed suit to terminate his parental rights. After the father was served with citation in February 2006, he called the court coordinator and said he was not able to appear at the adversary hearing. While the record was not clear as to the father's status at the time he was served with the petition, the father's post-supervision release was revoked, and he was incarcerated in Mississippi in July 2006. The trial court set the case for trial on December 11, 2006.⁵⁰

In an envelope addressed to the court clerk, but with the district attorney's courthouse suite number, postmarked December 1, 2006, the father sent four documents: requesting a continuance; claiming indigency; requesting the appointment of counsel; disputing at least some of the State's allegations; and raising a number of defenses.⁵¹ The trial court received these documents on December 11, the date of trial, but several hours after the entry of a default judgment against the father which terminated his parental rights. On January 2 or 3, 2007, the trial court appointed counsel to represent the father. On January 3, the father's counsel filed a notice of appeal. On January 4, counsel filed a statement of points and a motion for new trial and to set aside the default judgment. After holding a hearing, the trial court found the father indigent, denied the motion for a new trial, and found the father's grounds for appeal were not frivolous.

The father's statement of points was not timely filed pursuant to section 263.405(b). Therefore, the appellate court was prohibited by section 263.405(i) from considering the father's issues on appeal.⁵² However, the father asserted in both the trial court and on appeal⁵³ that the statute, as applied to him, violated his rights to due process under the Fourteenth

47. 236 S.W.3d 875 (Tex. App.—Texarkana 2007), *pet. denied*, 260 S.W.3d 463 (Tex. 2008) (per curiam).

48. *Id.*

49. *Id.* at 886-87.

50. *Id.* at 884.

51. *Id.*

52. *Id.* at 886.

53. An "as applied" constitutional challenge can be waived. *Id.* However, the father raised the challenge in both his timely motion for new trial and his untimely statement of points. Therefore, the issue was preserved for appellate review. *Id.*

Amendment to the United States Constitution⁵⁴ and to due course of law under article I, section 19 of the Texas Constitution.⁵⁵

The court was initially required to “construe [the] statute in a manner that render[ed] it constitutional and [gave] effect to the Legislature’s intent.”⁵⁶ In doing so, the court considered “the statute’s purpose; the circumstances of the statute’s enactment; the legislative history; common-law or former statutory provisions, including laws on the same or similar subjects; a particular construction’s consequences; . . . and the title, preamble and emergency provision” of the statute.⁵⁷ The court found the first four factors particularly relevant in considering the father’s constitutional challenge.⁵⁸ After determining it could “imagine no construction of subsection [263.405(i)] that would give effect to its legislative intent while allowing [the father’s] issues, which had not been raised in a timely filed statement of points, to be addressed in this appeal,” the court considered the substance of the father’s constitutional claim.⁵⁹

Because the protections provided by the Federal Constitution and the state constitution were “without meaningful distinction,” the court’s role was to determine “whether the procedures [met] the essential standard of fairness under the Due Process Clause.”⁶⁰ The court first determined that the father’s interest in the care, custody, and control of his children was a “fundamental liberty interest[.]” and was constitutionally protected.⁶¹ Therefore, when the Department sought to terminate the father’s parental rights, it was required to provide the father with “fundamentally fair procedures.”⁶²

The court also considered the father’s right to a meaningful appeal and to counsel. Although the Federal Constitution does not guarantee any right to appeal, Texas has provided a right to appeal from a judgment in a parental termination case.⁶³ However, after giving a party a right to appellate review, Texas may not “bolt the doors to equal justice.”⁶⁴ Therefore, the Legislature may not attempt to deprive a litigant of a constitutional right “under the guise of a statute relating to procedure.”⁶⁵ In order to comply with due process, a parent’s right to appeal the termi-

54. The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

55. Article I, section 19 of the Texas Constitution provides “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.” TEX. CONST. art. I, § 19.

56. *In re S.K.A.*, 236 S.W.3d at 887 (quoting *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 381 (Tex. 2002)).

57. *Id.* at 887-88 (quoting *Tex. Mun. League Intergovernmental Risk Pool*, 74 S.W.3d at 381).

58. *Id.* at 888.

59. *Id.*

60. *Id.* at 889 (quoting *Landon v. Plasencia*, 459 U.S. 21, 34-35 (1982)).

61. *Id.* (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

62. *Id.* n.17 (quoting *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)).

63. *Id.* at 889-90.

64. *Id.* at 890 (quoting *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996)).

65. *Id.* (quoting *Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025, 1029 (1934)).

nation of his parental rights must be meaningful.⁶⁶

Similarly, the Federal Constitution does not require the appointment of counsel in every termination proceeding.⁶⁷ However, the Texas Legislature has provided an indigent parent with a statutory right to counsel in a termination proceeding.⁶⁸ Further, if the parent establishes he is indigent, he is entitled to appointed counsel for appeal.⁶⁹ Finally, the parent has the right to the effective assistance of his appointed counsel.⁷⁰ Consistent with this right, the court reasoned, “it would seem a ‘useless gesture’ to require the appointment of constitutionally effective counsel but when properly requested not require such counsel’s appointment before the critical time at which a procedural bar is imposed.”⁷¹

The court then turned to the three-part balancing test in *Mathews v. Eldridge*⁷² to determine whether the procedure for appealing the termination of parental rights violated the father’s right to due process.⁷³ The court noted it was required to weigh “the private interests at stake, the government’s interest in the proceeding, and the risk of erroneous deprivation of parental rights” and balance that result against the presumption that the procedural rule comports with constitutional due process.⁷⁴ The court concluded:

The calibration of the *Eldridge* factors in this case overcomes the presumption that subsection (i) constitutionally prohibits appellate review. While facilitating speedy finality for children and the opportunity for trial courts to correct mistakes are proper goals, the Legislature has authorized a procedure, in barring untimely statements to the trial court of issues intended to be raised on appeal, that, in the particular facts of this case, has had a profoundly discriminatory effect. We find that barring appellate review, under subsection (i), of [the father’s] issues on appeal has the result of denying [the father] the “fundamental fairness” to which he is entitled in parental rights termination proceedings and appeals. Subsection (i), as applied, has the effect of rendering [the father’s] right to effective counsel a “useless gesture” and renders counsel’s efforts at appeal a “meaningless ritual.” We therefore hold subsection (i) unconstitutional as applied to an indigent parent not provided timely requested appointed counsel during the critical period before the deadline established in subsection (b).⁷⁵

66. *Id.*

67. *Id.* (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 31 (1981)).

68. TEX. FAM. CODE ANN. § 107.013(a)(1) (Vernon 2008).

69. § 263.405(e).

70. *In re S.K.A.*, 236 S.W.3d at 891.

71. *Id.* at 892.

72. 424 U.S. 319, 335 (1976).

73. *In re S.K.A.*, 236 S.W.3d at 892.

74. *Id.* (quoting *In re M.S.*, 115 S.W.3d 534, 547 (Tex. 2003)).

75. *Id.* The Waco Court of Appeals also found section 263.405(i) to be unconstitutional as applied to an indigent parent when appellant counsel was not appointed until after the time for filing a statement of points had expired. *In re D.M.*, 244 S.W.3d 397, 415 (Tex. App.—Waco 2007, no pet.) (op. on reh’g). Chief Justice Gray dissented, concluding that the mother failed to properly invoke the appellate court’s jurisdiction.

The court determined the remedy for the constitutional violation was to deem the father's late-filed statement of points as timely filed.⁷⁶ After considering the merits of each of the father's issues, the court affirmed the trial court's judgment terminating the father's parental rights. The Texas Supreme Court denied the father's petition for review in a per curiam opinion stating "[i]n denying the petition, we neither approve nor disapprove the holding of the court of appeals regarding the constitutionality of Texas Family Code section 263.405(i)."⁷⁷

4. "As Applied" Challenge—Ineffective Assistance

In *In re J.O.A.*,⁷⁸ the trial court terminated both parents' parental rights. Trial counsel for both parents filed notices of appeal and motions to withdraw. Although the trial court never ruled on the motions to withdraw, appellate counsel was appointed for the mother seventeen days after the termination order was signed and for the father twenty-seven days after the order was signed. Neither parent filed a timely statement of points. On appeal, the parents contended section 263.405(i) was unconstitutional as applied to them because their due process right to effective assistance of counsel was violated by their counsels' failure to file a statement of points.

The Amarillo Court of Appeals first noted that an "as applied" challenge is waived if not raised in the trial court.⁷⁹ However, the parents' claim was premised on their counsels' failure to file a statement of points. The court, therefore, considered the parents' claim of ineffective assistance of counsel.⁸⁰ In doing so, the court necessarily determined a claim for ineffective assistance of counsel premised on counsel's failure to file a statement of points may be raised for the first time on appeal.⁸¹

The court determined that because a statement of points is necessary for appellate review, the deadline for filing a statement of points is a critical stage of the proceeding at which the parents were entitled to effective assistance of counsel.⁸² The court further concluded an attorney repre-

76. *In re S.K.A.*, 236 S.W.3d at 894. However, a parent must do more than simply assert that the statute violates the due process rights of an indigent parent who is appointed new counsel on appeal. Rather, the parent must demonstrate that he suffered harm. *In re R.D.G.*, No. 12-07-00322-CV, 2008 WL 2122413, at *2 (Tex. App.—Tyler May 21, 2008, no pet.) (mem. op.); *In re M.L.B.*, 269 S.W.3d 757, 759 (Tex. App.—Beaumont 2008, no pet.). Potential harm to the parent could include: (1) meaningful participation in the hearing to determine whether any appeal would be frivolous, (2) preparing a record to support a claim of ineffective assistance of counsel at trial, and (3) making it impossible to meet the Department's arguments the points for appeal were frivolous. *In re M.L.B.*, 269 S.W.3d at 762. See also *In re A.F.*, 259 S.W.3d 303, 307-08 (Tex. App.—Beaumont 2008, no pet.) (Gaultney, J., dissenting).

77. *In re S.K.A.*, 260 S.W.3d 463 (Tex. 2008) (per curiam).

78. 262 S.W.3d 7 (Tex. App.—Amarillo 2008), *aff'd as modified and remanded*, 283 S.W.3d 336 (Tex. 2009).

79. *Id.* at 17.

80. *Id.*

81. Although issued outside the Survey period, the Texas Supreme Court has agreed with this position. *In re J.O.A.*, 283 S.W.3d at 339.

82. *In re J.O.A.*, 262 S.W.3d at 18.

senting an indigent parent in the trial of a termination proceeding continues to represent the parent until the judgment is final or counsel is expressly discharged by the trial court.⁸³ Therefore, each parents' trial counsel had a duty to file a timely statement of points.⁸⁴

Under *Strickland v. Washington*, counsel is ineffective if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the complaining party.⁸⁵ In considering the first prong, the Amarillo court noted the performance is deficient if the representation is "so grossly deficient as to render the proceedings 'fundamentally unfair.'"⁸⁶ The filing of a statement of points in a termination case is a "straightforward procedure" and something "any competent trial counsel practicing in this area of the law should know."⁸⁷ Therefore, the first *Strickland* prong was satisfied.

Turning to the second prong, each parent contended counsel's failure to file a statement of points prevented the parent from presenting a meritorious point on appeal. The court concluded that "to the extent their issue is meritorious," there was a reasonable probability that without counsel's deficient performance, the result of the proceeding would have been different.⁸⁸ Therefore, each parent established that the parent's counsel was ineffective by failing to file a timely statement of points.

Because counsel was ineffective, the court considered whether the ineffective assistance deprived the parents of their constitutional right to due process. As in *S.K.A.*, the court turned to the *Eldridge* analysis. The factors considered by the court in conducting the analysis included the right of a parent to raise his or her child, the risk of permanent loss of the parent-child relationship, the parents' and the child's interest in a just and accurate decision, the governmental interest in protecting the best interest of the child and in not unduly prolonging termination proceedings, and the risk of the erroneous deprivation of parental rights.⁸⁹ The court concluded:

[w]hen we balance the presumption that our procedural rules comport with constitutional due process requirements against the *Eldridge* factors, we conclude that those factors weigh in favor of review most in those situations where a review of the sufficiency of the evidence raises the greatest concern for the potential of an erroneous deprivation of parental rights. In other words, where ineffective assistance of counsel has prevented a review of the sufficiency of the evidence, and a review of the sufficiency of the evidence reveals that there is a high probability that a parent's rights have been erroneously terminated, then due process considerations (i.e., the *El-*

83. *Id.*

84. *Id.* at 19.

85. 466 U.S. 668, 687 (1984).

86. *In re J.O.A.*, 262 S.W.3d at 19 (quoting *Brewer v. State*, 649 S.W.2d 628, 630 (Tex. Crim. App. 1983)).

87. *Id.*

88. *Id.*

89. *Id.* at 20-21.

dridge factors) weigh in favor of a sufficiency analysis, notwithstanding a procedural impediment. We acknowledge that this reasoning will require an appellate court to review both legal and factual sufficiency issues to determine if it should even consider those issues. Any lack of logic in this process can be attributed to the lack of logic in the statute itself.⁹⁰

The court then reviewed the parents' legal and factual sufficiency points and concluded that the risk of an erroneous deprivation of the mother's parental rights was slight, but that the risk of an erroneous deprivation of the father's parental rights was high. Therefore, section 263.405(i) was unconstitutional as applied to the father.

The Beaumont Court of Appeals addressed an identical claim in *In re S.M.T.*,⁹¹ in which the mother had appointed trial counsel but the father did not. The trial court terminated the parents' parental rights, but neither parent filed a timely statement of points. After the deadline passed for filing a statement of points, both parents requested the appointment of appellate counsel.

On appeal, the mother argued she received ineffective assistance of counsel. The court noted "[c]ounsel's unjustifiable failure to preserve certain issues for review . . . may deprive a parent of due process."⁹² However, in this case the record did not support a finding that counsel's performance was deficient. The mother was represented by trial counsel during the time period for filing a statement of points. It was apparent the mother knew she had a right to appeal, but did not inform trial counsel she wanted to do so until after the deadline passed. Further, the mother failed to develop a record at the post-trial hearing that would demonstrate counsel's performance was deficient.⁹³ Finally, the evidence did not support the conclusion that the mother had a valid challenge to the sufficiency of the evidence.⁹⁴

B. PRESERVATION OF ISSUES FOR APPEAL

The Texas Supreme Court addressed the appeal of a termination order in several opinions during the Survey period. Overall, the court, as in other areas, is trending away from precluding an appeal through the technical application of procedural rules. However, to ensure their right to appeal is not lost, it is clear parties must protect their record and obtain proper findings from the trial court.

1. *Supplementation of the Record*

In *In re K.C.B.*,⁹⁵ after her parental rights were terminated by an asso-

90. *Id.* at 21.

91. 241 S.W.3d 650 (Tex. App.—Beaumont 2007, no pet.).

92. *Id.* at 653.

93. *Id.*

94. *Id.* at 653-54.

95. 251 S.W.3d 514 (Tex. 2008) (per curiam).

ciate judge, the mother filed a timely statement of points and appealed the associate judge's order to the district court. After a trial de novo, the district court terminated the mother's parental rights, and the mother timely filed a second statement of points. Although the mother requested the "statement of points" be included in the clerk's record on appeal, only the first statement of points was included in the record. The appellate court concluded the mother failed to comply with section 263.405(i) by filing a statement of points after the district court's judgment and affirmed the judgment without reaching the merits of the mother's issues. The mother filed a motion for rehearing contending the first statement of points was sufficient but, in the alternative, moved to supplement the clerk's record with the second statement of points. The court of appeals denied both motions.

Relying on *Worthy v. Collagen Corp.*,⁹⁶ the Department argued the court of appeals did not abuse its discretion in denying leave to supplement the record after the case had been decided. The Texas Supreme Court disagreed, noting in *Worthy* the appellant was granted leave to supplement the record but failed to do so. The appellate court then proceeded to decide the case on the merits. Here, the record reflected confusion on the mother's part and not a purposeful omission from the record.⁹⁷ Further, allowing the supplementation would not require the appellate court to reconsider a decision on the merits.⁹⁸ Noting that "[j]udicial economy is not served when a case, ripe for decision, is decided on a procedural technicality . . . [that] can be easily corrected," the court reversed the judgment of the court of appeals and remanded the case for further consideration.⁹⁹

2. Conservatorship and Termination

In *In re J.A.J.*,¹⁰⁰ the Texas Supreme Court considered whether a mother's challenge to a termination order included a challenge to the trial court's appointment of the Department as sole managing conservator. The mother appealed the termination order, claiming the evidence was insufficient to support a statutory ground for termination,¹⁰¹ but did not assign error to the trial court's finding that the Department should be appointed sole managing conservator of the child. The court of appeals reversed the termination order, including the appointment of the Department as conservator. The Department appealed, contending that the mother had not claimed any error in the appointment determination.

The court first noted that sections 153.002, 153.005, and 153.131 of the Family Code outline the general standards for determining the conserva-

96. 967 S.W.2d 360, 365-66 (Tex. 1998).

97. *Id.* at 365.

98. *Id.* at 366.

99. *Id.* (quoting *Silk v. Terrill*, 898 S.W.2d 764, 766 (Tex. 1995) (per curiam)).

100. 243 S.W.3d 611, 612-13 (Tex. 2008).

101. See TEX. FAM. CODE ANN. § 161.001 (Vernon 2008).

torship of a child.¹⁰² Section 153.002 requires the determination of conservatorship to be in the best interest of the child.¹⁰³ Section 153.005 authorizes the appointment of a managing conservator and defines who that conservator may be.¹⁰⁴ Section 153.131 creates a rebuttable presumption that a parent will be named managing conservator, unless the trial court finds the appointment would not be in the child's best interest or that there is a "history of family violence involving the parents."¹⁰⁵ Further, pursuant to section 263.404 of the Family Code, the trial court may appoint the Department as sole managing conservator of a child without terminating a parent's parental rights if the trial court finds that (1) the parent's appointment would not be in the best interest of the child because "the appointment would significantly impair the child's physical health or emotional development," and (2) appointment of a relative of the child or another person would not be in the best interest of the child.¹⁰⁶

The court agreed with the mother that section 263.404 does not apply when the trial court terminates a parent's parental rights.¹⁰⁷ However, the Department sought conservatorship of the child not only following termination, but under sections 153.005 and 153.131.¹⁰⁸ Further, the trial court not only terminated the mother's parental rights, but found that the appointment of a parent would not be in the best interest of the child and that the appointment of the Department was in the child's best interest.¹⁰⁹ The mother did not appeal these findings or the conservatorship order.

The court also determined a challenge to the conservatorship order was not subsumed in the challenge to the termination order because (1) the elements necessary to terminate parental rights are different than those taken into account when making a conservatorship decision, and (2) the level of proof necessary to terminate parental rights is clear and convincing, while a conservatorship decision is made by the preponderance of the evidence.¹¹⁰ Therefore, while the evidence could be insufficient to support the termination order, it could be sufficient to support the conservatorship decision.¹¹¹ The court then reversed the portion of the appellate court's judgment overturning the trial court's conservatorship order.¹¹²

The court further clarified its position in denying the Department's pe-

102. *In re J.A.J.*, 243 S.W.3d at 614.

103. *Id.* (citing § 153.002).

104. *Id.* (citing § 153.005 (Managing conservator must be "a parent, a competent adult, an authorized agency, or a licensed child-placement agency.")).

105. *Id.* (citing § 153.131 (appointment of a parent as conservator is not in child's best interest if appointment would significantly impair child's physical health or emotional development)).

106. *Id.* (citing § 263.404(a)).

107. *Id.*

108. *Id.* at 615.

109. *Id.*

110. *Id.* at 615-16.

111. *Id.* at 616.

112. *Id.* at 617.

tion for review in *In re D.N.C.*¹¹³ In *D.N.C.*, the trial court terminated a mother's parental rights without making any additional findings. Since the "only available statutory mechanism for the Department's appointment was as a consequence of the termination pursuant to section 161.207," the mother's challenge to the appointment of the Department as managing conservator was subsumed in her challenge to the termination order.¹¹⁴

3. Extension of Time to File Statement of Points

In *In re M.N.*,¹¹⁵ the trial court terminated the mother's parental rights. The mother filed an untimely statement of points, but the trial court granted her an extension of time to file the points. The court of appeals held that section 263.405(i) did not allow for an extension of time to file a statement of points and concluded that it could not consider the mother's issues on appeal.

In the supreme court, the mother argued that Texas Rule of Appellate Procedure 26.3 applies to allow an extension of time for filing a statement of points.¹¹⁶ The supreme court first noted that section 263.405 does not address whether a trial court may grant an extension of time to file a statement of points.¹¹⁷ However, in the interest of the "just, fair, and equitable resolutions of issues," both the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure permit the extension of deadlines under certain circumstances.¹¹⁸ Further, while the Legislature intended to expedite the appeal of termination orders, it also intended a just, fair, and reasonable result for the parents.¹¹⁹ Therefore, Texas Rule of Civil Procedure 5 applies to whether the trial court could grant an extension of time for the mother to file her statement of points.¹²⁰

Here, in the motion to extend time, the mother's counsel stated that she had used the date she received the termination order, rather than the

113. 252 S.W.3d 317 (Tex. 2008) (per curiam).

114. *Id.* at 319; see *In re A.S.*, 261 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

115. 262 S.W.3d 799, 800 (Tex. 2008).

116. Texas Rule of Appellate Procedure 26.3 provides an appellate court "may extend the time to file the notice of appeal if, within 15 days after the deadline for filing the notice of appeal, the party:

(a) files in the trial court the notice of appeal; and

(b) files in the appellate court a motion complying with Rule 10.5(b)."

TEX. R. APP. P. 26.3.

117. *In re M.N.*, 262 S.W.3d at 802.

118. *Id.* at 802-03 (citing TEX. R. CIV. P. 5 and TEX. R. APP. P. 26.3).

119. *Id.* at 803.

120. *Id.* Texas Rule of Civil Procedure 5 provides in relevant part:

When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (a) with or without motion or notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or (b) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.

TEX. R. CIV. P. 5.

date the order was signed, in calendaring the due date for the statement of points. The Department did not contend that the mother's filing the statement of points five days late caused it any prejudice. Therefore, applying the standard in Rule of Civil Procedure 5, the trial court did not abuse its discretion in extending the time to file the statement of points.¹²¹

Justice Willett dissented, stating that the Legislature "set a firm fifteen-day deadline for filing [the] statement of points."¹²² Justice Willett would "(1) hold that court-made rules of procedure do not trump the Family Code's fifteen-day deadline and then, assuming preservation, (2) confront head-on whether this statutory deadline violates [the mother's] due-process rights or any other constitutional provision."¹²³

C. APPOINTMENT OF COUNSEL

In Texas, there is a statutory right to counsel for indigent persons in cases brought by the State to terminate parental rights.¹²⁴ In *In re J.C.*,¹²⁵ the Department initiated a termination suit against the mother. In what the Fort Worth Court of Appeals characterized as a "coordinated maneuver," the Department dismissed its termination case on the same day that the child's foster parents filed a private termination case.¹²⁶ Because the mother was defending a private termination case, rather than one brought by the Department, she did not receive appointed counsel and was forced to proceed pro se both at trial and on appeal.¹²⁷ The mother requested appointment of counsel on appeal.¹²⁸ The court abated the appeal for the trial court to consider the request, which it denied.¹²⁹

The court determined that the Legislature had mandated the appointment of counsel for an indigent parent only in a termination suit filed by a governmental entity.¹³⁰ Because there is no mandatory statutory right to the appointment of counsel in a private termination case, the court overruled the mother's issue.¹³¹

III. STANDING

1. Grandparent Access

The San Antonio Court of Appeals addressed whether grandparents could have standing to seek access to their grandchildren based on equi-

121. *In re M.N.*, 262 S.W.3d at 804.

122. *Id.* at 805.

123. *Id.*

124. TEX. FAM. CODE ANN. § 107.013 (Vernon 2008).

125. 250 S.W.3d 486, 487 (Tex. App.—Fort Worth 2008, pet. denied), *petition for cert. filed*, 78 U.S.L.W. 3015 (U.S. Jun. 25, 2009) (No. 08-1596).

126. *Id.*

127. *Id.*

128. *Id.* at 489.

129. *Id.*

130. *Id.*

131. *Id.*

table principles. In *In re H.G.*,¹³² the trial court terminated the parental rights of both parents and appointed the maternal grandparents as managing conservators. With the grandparents' consent, the children were adopted. More than two years later, the adoptive parents divorced and were named joint managing conservators of the children. Eight months later, the grandparents filed a petition for grandparent access contending they only consented to the adoption because the adoptive parents promised that the grandparents would have access to the children following the adoption. The adoptive mother responded, asserting the grandparents did not have standing. The trial court agreed and dismissed the grandparents' suit.

On appeal, the adoptive mother argued section 153.434 of the Family Code precluded the grandparents' suit.¹³³ She also asserted neither estoppel nor quasi-estoppel could be used to confer standing.

The appellate court first noted that the Legislature has "provided a comprehensive statutory framework for standing in the context of suits involving the parent-child relationship."¹³⁴ Because the grandparents could not demonstrate standing under the Family Code, they were barred from pursuing the suit unless an equitable principle conferred standing.¹³⁵ However, standing is a component of subject matter jurisdiction and courts cannot "mindlessly produce [jurisdiction] based on equity" where none exists under the legislative framework.¹³⁶

Chief Justice López dissented, noting that because the grandparents were the children's managing conservators at the time of the adoption, their consent to the adoption was statutorily required.¹³⁷ To obtain the grandparents' consent, the adoptive parents represented that the grandparents would have access to the children. Those representations were made at a time when the grandparents had standing to seek access to the children.¹³⁸ Accordingly, Chief Justice López concluded, the court's equity jurisdiction could be used to estop the adoptive mother from arguing

132. 267 S.W.3d 120, 122 (Tex. App.—San Antonio 2008, pet. denied).

133. In relevant part, section 153.434 of the Family Code provides that a grandparent may not request possession of or access to a grandchild if each of the biological parents of the child has had their parental rights terminated and the grandchild has been adopted by a person other than the child's stepparent. TEX. FAM. CODE ANN. § 153.434 (Vernon 2008).

134. *In re H.G.*, 267 S.W.3d at 124.

135. *Id.*

136. *Id.* at 125.

137. *Id.* at 127 (citing § 162.010). Section 162.010(a) of the Family Code provides [u]nless 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.

§ 162.010.

138. *In re H.G.*, 267 S.W.3d at 125.

the grandparents lacked standing.¹³⁹

In response, the majority noted that the precedent relied on by Chief Justice López did not hold that estoppel can confer subject matter jurisdiction where none exists.¹⁴⁰ The majority also noted that, although the Family Code required the grandparents, as managing conservators, to consent to the adoption, the trial court could have waived the consent if it found consent was refused without good cause.¹⁴¹ Finally, the majority agreed that the grandparents had standing prior to the adoption but disagreed with Chief Justice López's suggestion that equity mandated a continuation of the pre-adoption standing due to the adoptive parents' purported misrepresentations.¹⁴² Rather, "section 154.433 coupled with section 153.434, establishes 'a bright line before which a grandparent's request for access of a grandchild may be made and after which it may not.'" ¹⁴³ Because the grandparents did not seek the available statutory remedy prior to the adoption, they were statutorily precluded from doing so after the adoption.¹⁴⁴

2. *Same-Sex Couples*

In *In re Smith*,¹⁴⁵ one partner in a same-sex relationship, gave birth to twins conceived by artificial insemination by an anonymous donor. When the twins were four months old, both partners filed a suit affecting the parent-child relationship ("SAPCR"). When the twins were five months old, the trial court signed an agreed order appointing the two women joint managing conservators and giving them equal possession of the children at all times. Over five years later, the two women separated. The mother of the twins filed a motion to vacate the agreed order, while her former partner filed a petition to modify it. The trial court entered temporary orders rotating possession of the children between the two women. After the trial court denied the mother's motion to vacate the temporary orders, the mother sought mandamus relief.

The Beaumont Court of Appeals noted standing is a component of subject matter jurisdiction and the Family Code contains a comprehensive statutory framework for standing.¹⁴⁶ The former partner acknowledged she did not have standing under the statute at the time the original petition was filed because the twins were only four months old at the time.¹⁴⁷

139. *Id.* at 126 (citing *Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 242 S.W.3d 67, 71-72 (Tex. App.—San Antonio 2007, pet. denied); *Eckland Consultants, Inc. v. Ryder, Stilwell Inc.*, 176 S.W.3d 80, 87-88 (Tex. App.—Houston [1st Dist.] 2004, no pet.)).

140. *Id.* at 125.

141. *Id.*

142. *Id.*

143. *Id.* at 125-26 (citing *Bowers v. Matula*, 943 S.W.2d 536, 539 (Tex. App.—Houston [1st Dist.] 1997, no writ)).

144. *Id.* at 126.

145. 262 S.W.3d 463, 465 (Tex. App.—Beaumont 2008, orig. proceeding) (per curiam).

146. *Id.* at 465.

147. *Id.* at 466. Specifically, the former partner was not "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months

The former partner argued, however, that the mother's standing was sufficient to support jurisdiction in the trial court. The court disagreed, noting that a "party cannot confer jurisdiction either by consent or agreement."¹⁴⁸

The former partner next argued that the mother was equitably estopped from complaining about the trial court's exercise of jurisdiction. Again, the court disagreed, noting that standing is governed by the Family Code.¹⁴⁹ If the trial court does not have jurisdiction, a party is not entitled to relief, "regardless of their individual or collective wishes."¹⁵⁰ Each party bringing suit must have standing to do so.¹⁵¹ Because the former partner did not have standing, the original order and the temporary orders modifying the original order were void.

3. *Temporary Guardians*

In *In re A.D.P.*,¹⁵² through a series of terminations and adoptions, the child became the sibling of his mother and his grandmother. After the death of his great-grandmother (also his adoptive mother), the child ultimately began living with an unrelated couple. After the child's sister (formerly his grandmother) notified the couple of her intent to remove the child from the county, the couple filed an application for temporary guardianship of the child. The trial court granted the request and named the couple temporary guardians of the child for sixty days. The couple immediately filed a SAPCR, requesting the trial court appoint them non-parent sole managing conservators of the child. The sister, along with her other sister (formerly the child's mother), filed a counter-petition seeking to be named sole managing conservators of the child. The guardianship proceeding and the SAPCR were subsequently consolidated. The trial court named the couple sole managing conservators of the child and gave the sister (formerly the child's grandmother) access to the child. Both sisters appealed.

In the only issue relevant here, the El Paso Court of Appeals considered whether a temporary guardian has standing to file a SAPCR. Under section 102.003(a)(4) of the Family Code, a guardian of the person or the estate of a child has standing to file a SAPCR.¹⁵³ The question was whether a temporary guardian fell within the definition of guardian.

Using the rules of statutory construction, the court noted the term "guardian" in the Probate Code is "a person who is appointed guardian under Section 693 of the Probate Code, or a temporary or successor

ending not more than 90 days preceding the date of the filing of the petition. . . ." TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 2008).

148. *In re Smith*, 262 S.W.3d at 466.

149. *Id.* at 467.

150. *Id.*

151. *Id.*

152. 281 S.W.3d 541 (Tex. App.—El Paso 2008, no pet.).

153. TEX. FAM. CODE ANN. § 102.003(a)(4) (Vernon 2008).

guardian.”¹⁵⁴ The court concluded the term “guardian” in the Family Code must be construed in accordance with the Probate Code.¹⁵⁵ Therefore, a temporary guardian has standing to file a SAPCR.¹⁵⁶

IV. PARENTAL PRESUMPTION AND GRANDPARENTS

In *In re V.L.K.*,¹⁵⁷ the Texas Supreme Court concluded the standard and burden of proof differ in original custody determinations and in modification proceedings. Under chapter 153 of the Family Code, the Legislature codified a “parental presumption” in an original proceeding.¹⁵⁸ However, in a modification proceeding, under chapter 156 of the Family Code, the Legislature did not impose different burdens on parents and nonparents.¹⁵⁹ Nor does the parental presumption in chapter 153 apply in a chapter 156 modification proceeding.¹⁶⁰ Rather, section 156.101 states that a trial 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 the circumstances of the child, conservator, or other party affected by the order have materially and substantially changed” since the date of the rendition of the order.¹⁶¹

During the Survey period, several courts applied the reasoning in *V.L.K.* to situations in which grandparents sought access to the grandchild or to be named managing conservator of the grandchild.¹⁶² In the first situation, the grandparent and the parent entered into an agreement allowing the grandparent access to the child. The parent later sought to void or modify the agreement, arguing that the grandparent could not overcome the presumption that a parent acts in the best interest of the child.¹⁶³ A trial court cannot order grandparent possession or access unless the grandparent overcomes this presumption by proving by a preponderance of the evidence that denial of possession of or access to a child would significantly impair the child’s physical health or emotional well-being.¹⁶⁴ The courts concluded this presumption did not apply in a

154. *In re A.D.P.*, 281 S.W.3d at 548-49 (citing TEX. PROB. CODE ANN. § 601(11) (Vernon 2003)).

155. *Id.* at 549.

156. *Id.*

157. 24 S.W.3d 338, 339-40 (Tex. 2000).

158. *Id.* at 341.

159. *Id.* at 343.

160. *Id.* at 344.

161. TEX. FAM. CODE ANN. § 156.101(a)(1)(A) (Vernon 2008).

162. As a side note, the Texas Supreme Court concluded a trial court could not award temporary grandparent visitation without giving the parent a meaningful opportunity to be heard. *In re Chambless*, 257 S.W.3d 698, 700 (Tex. 2008).

163. § 153.433(2).

164. *Id.*

modification proceeding.¹⁶⁵

In the second situation, one of the parents died and the grandparents sought to be named the managing conservators of the child. Here, the living parent first argued that the prior conservatorship order was void following the death of the other parent and, therefore, the grandparents' suit was an original suit, not a modification.¹⁶⁶ The parent asserted that he was entitled to the presumption that a parent should be named sole managing conservator of the child.¹⁶⁷

The courts rejected this argument, noting that following the death of the child's managing conservator, a person with whom the child and the child's managing conservator resided "for at least six months ending not more than 90 days preceding the date of the filing of the petition" has standing to bring a SAPCR.¹⁶⁸ Because the Family Code "encompasses modification of a prior order following the death of a sole managing conservator," the grandparents' suit was a modification, not an original petition.¹⁶⁹ Accordingly, the parental presumption did not apply.¹⁷⁰

Finally, the Houston Fourteenth Court of Appeals has concluded that the parental presumption does not apply in a dispute between grandparents. In *In re Smith*,¹⁷¹ the paternal grandfather and his wife were named joint managing conservators of the child. The paternal grandmother requested access to the child. After the trial court entered temporary orders granting the grandmother's request, the grandfather and his wife sought mandamus relief contending that the grandmother failed to prove that the denial of access to the child would significantly impair the child's physical or emotional well-being.

The court noted a trial court should presume a fit parent acts in the child's best interest.¹⁷² However, the grandfather and his wife, as nonparents, could not claim the presumption.¹⁷³

165. *In re T.D.J.*, No. 12-07-00188-CV, 2008 WL 5006178, at *3 (Tex. App.—Tyler Nov. 26, 2008, no pet.) (mem. op.); *Spencer v. Vaughn*, No. 03-05-00077-CV, 2008 WL 615443, at *8 (Tex. App.—Austin Mar. 6, 2008, pet. filed) (mem. op.).

166. *In re Vogel*, 261 S.W.3d 917, 921-22 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding); *In re M.P.B.*, 257 S.W.3d 804, 812 (Tex. App.—Dallas 2008, no pet.); *In re C.A.M.M.*, 243 S.W.3d 211, 217 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

167. Section 153.131 of the Family Code contains a presumption that it is in the best interest of the child to appoint a parent sole managing conservator of the child unless the court finds the appointment would significantly impair the child's physical health or emotional development. TEX. FAM. CODE ANN. § 153.131(a) (Vernon 2008).

168. *In re C.A.M.M.*, 243 S.W.3d at 217 (citing §§ 102.003(a)(11), 156.002(b)); see also *In re M.P.B.*, 257 S.W.3d at 808-09 (concluding grandmother had standing under section 102.003(a)(9) of the Family Code even though grandmother's care, control, and possession of child was not exclusive).

169. *In re C.A.M.M.*, 243 S.W.3d at 217.

170. *In re Vogel*, 261 S.W.3d at 923; *M.P.B.*, 257 S.W.3d at 812; *C.A.M.M.*, 243 S.W.3d at 215.

171. 260 S.W.3d 568, 570 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

172. *Id.* at 574.

173. *Id.*

V. PATERNITY

In *In re Rodriguez*,¹⁷⁴ the Attorney General (“AG”) filed a child support action against the father. Shortly thereafter, the wife filed for divorce and the two proceedings were consolidated. In his response in the divorce proceeding, the father claimed he was not the biological father of two children born during the marriage and requested genetic testing of the children. Both children were over four years old when the father made the request.

An associate judge ordered the genetic testing and the AG appealed to the district court. The district court denied the appeal. The wife and the AG sought mandamus relief, arguing that a proceeding to determine parentage was barred by the four-year statute of limitations in section 160.607(a) of the Family Code.¹⁷⁵ The father contended that the limitations period was tolled by the mother’s fraud.

While the petition for writ of mandamus was pending in the appellate court, the associate judge entered an order that the testing should proceed within five days of the order. The mother and the AG appealed this order to the district court. The district judge not only affirmed the associate judge’s order, but ordered the testing take place instantanly, by noon on the day the order was entered:

The Court’s position is that the truth does not know a statute of limitations. The Attorney General has not shown any reason that the children should not be tested. It is clearly in the children’s best interest to know who their father is. It is clearly in the State’s best interest to know who the father is so the correct person can be paying child support. Appeal denied. Testing ordered immediately.¹⁷⁶

That afternoon, the mother and the AG sought an emergency stay from the appellate court. The court issued the stay, but the genetic testing proceeded and the testing facility prepared a parentage report. The appellate court ordered all copies of the report sealed and filed with the appellate court.

The court concluded that issues of paternity are for the Legislature.¹⁷⁷

174. 248 S.W.3d 444, 446 (Tex. App.—Dallas 2008, orig. proceeding).

175. Section 160.607 provides:

(a) Except as otherwise provided by Subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father shall be commenced not later than the fourth anniversary of the date of the birth of the child.

(b) A proceeding seeking to disprove the father-child relationship between a child and the child’s presumed father may be maintained at any time if the court determines that:

(1) the presumed father and the mother of the child did not live together or engage in sexual intercourse with each other during the probable time of conception; and

(2) the presumed father never represented to others that the child was his own.

TEX. FAM. CODE ANN. § 160.607(a) (Vernon 2008).

176. *In re Rodriguez*, 248 S.W.3d at 452.

177. *Id.*

Section 160.607 establishes Texas's policy to "generally limit challenges to legally established paternity to four years after the birth of the child."¹⁷⁸ The trial court abused its discretion by refusing to apply the four-year statute of limitations established by the Legislature.¹⁷⁹

The trial court also abused its discretion by placing the burden on the AG to show that the children should not be tested.¹⁸⁰ The statute placed the burden on the husband to establish the exception to the limitations period in section 160.607(b).¹⁸¹ The father put on no evidence to establish the statutory requirements.

Finally, the trial court abused its discretion by ordering the testing to be performed instantaneously under the threat of contempt.¹⁸² The record contained no evidence of an emergency requiring immediate testing.¹⁸³ By ordering the testing be done immediately, the trial court denied the mother and the AG the ability to "obtain meaningful review of the order prior to the time it had to be completed under threat of contempt."¹⁸⁴

VI. CHILD SUPPORT

The Dallas Court of Appeals also considered the status of missed child support payments. In *Burnett-Dunham v. Spurgin*,¹⁸⁵ the parties divorced in 1967 and the father was ordered to make weekly child support payments until the youngest child turned eighteen years old. In March 2006, when the children were in their forties, the mother filed a notice of application for judicial writ of withholding and a child support lien seeking over \$200,000 in unpaid child support. The trial court dismissed the action, holding that section 157.327 of the Family Code was not available to the mother.¹⁸⁶

The court first noted that under the Family Code "a child support payment not timely made constitutes a final judgment for the amount due and owing, including interest as provided in this chapter."¹⁸⁷ The court concluded the "plain and common meaning of the statute is clear: once a child support payment is overdue, it becomes a final judgment."¹⁸⁸ There is nothing to show the Legislature meant the term "final judgment" to have a different meaning in the family law context than in other areas of the law.¹⁸⁹ The court recognized that the Texarkana Court of Appeals

178. *Id.*

179. *Id.* at 452-53.

180. *Id.* at 453.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. 245 S.W.3d 14 (Tex. App.—Dallas 2007, pet. filed).

186. Section 157.327 of the Family Code allows for the execution and levy on the financial assets of a child support obligor. TEX. FAM. CODE ANN. § 157.327 (Vernon 2008).

187. *Burnett-Dunham*, 245 S.W.3d at 16 (citing § 157.261(a)).

188. *Id.*

189. *Id.*

reached a different conclusion in *In re Kuykendall*,¹⁹⁰ but disagreed with the finding that a “final judgment” within the context of the Family Code does not mean final.¹⁹¹

The father’s last payment was due on March 27, 1979 and became a final judgment at that time. A writ of execution must be issued within ten years after the rendition of a judgment or the judgment becomes dormant.¹⁹² Execution may not issue on a dormant judgment unless it is revived.¹⁹³ A dormant judgment must be revived within two years of becoming dormant.¹⁹⁴ Therefore, there is a twelve-year residual limitation period for final judgments.¹⁹⁵ Because the mother waited too long before filing, each missed payment (i.e. final judgment) became dormant.¹⁹⁶

VII. CONCLUSION

It was an interesting year in this area of the law, particularly regarding the strong opinions from the appellate courts on how to achieve consideration of the merits of a parent’s appeal of a termination order in the face of section 263.405(i). Although the courts’ willingness to excuse both technical and substantive procedural bars to the ability to maintain an appeal increased, the final outcome remained the same. The courts continue to strictly apply the language and requirements of the Family Code. It, therefore, remains essential for a litigant to know what he is required to prove and how he is required to prove it in order to obtain a judgment and maintain it on appeal.

190. 957 S.W.2d 907, 910 (Tex. App.—Texarkana 1997, no pet.) (holding “although labeled as ‘final judgments’ in the Family Code, the individual monthly arrearages are not final judgments to which the dormancy statute should be applied”). See also *In re T.L.K.*, 90 S.W.3d 833, 838-39 (Tex. App.—San Antonio 2002, no pet.); *In re S.C.S.*, 48 S.W.3d 831, 835-36 (Tex. App.—Houston [14th Dist.] 2001, pet. denied.).

191. *Burnett-Dunham*, 245 S.W.3d at 17.

192. *Id.* (citing § 34.001).

193. *Id.*

194. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.006 (Vernon 2008)).

195. *Id.*

196. *Id.* at 18.