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Family Law: Parent &(and) Child

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FAMILY LAW: PARENT & CHILD

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I. INTRODUCTION

DURING the Survey period, Texas courts tended to strictly interpret the provisions of the Family Code in addressing a number of issues. Although this sometimes led to harsh results, particularly in cases involving the appeal of an order terminating parental rights, it provided slightly more certainty in this practice area. Yet, as a number of

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the cases discussed below demonstrate, any greater predictability provided by the courts came at a price. It is clearly imperative for a party to consider, and meet, all statutory deadlines and requirements in order to avoid the possible loss of a claim or argument.

II. GRANDPARENT'S ACCESS

A. STATUTORY PRESUMPTION

During the 2005 session, the Texas Legislature amended the grandparent access statute, in light of the plurality opinion of four justices of the United States Supreme Court in *Troxel v. Granville*,[1] to add a presumption that a parent acts in the best interest of the child.[2] For a grandparent to be awarded access to or possession of a child, the grandparent, in addition to the other statutory requirements, must now overcome this presumption 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.[3] In *In re Derzapf*,[4] the Texas Supreme Court considered whether a grandmother overcame the presumption and established her right of access to the children.

In *Derzapf*, the grandmother and step-grandfather (collectively, the "grandparents") provided the majority of the children's care during the summer months following the death of the children's mother. When the school year began, the father attempted to reassert himself as the children's primary caregiver. The grandparents resisted the transition and ultimately filed a suit affecting the parent-child relationship ("SAPCR") seeking both custody of the children and to be named sole managing conservators of the children. The trial court dismissed the SAPCR, finding the grandparents did not have standing to be named sole managing conservators or joint managing conservators of the children because "there was no evidence that [the father's] care of the children created 'serious question[s] concerning [their] physical health or welfare' as Family Code section 102.004(a) required."[5]

Following the SAPCR, the father refused the grandparents any access to the children. The grandparents then filed a petition for access under section 153.433. The trial court granted the petition and awarded visitation with the children during part of Thanksgiving Day and on the first Saturday of each month.[6] The father sought relief through a petition for writ of mandamus.

The supreme court first considered whether the step-grandfather had standing to seek grandparent access. Only a biological or adoptive grandparent has standing to file a suit seeking access to or possession of a

1. 530 U.S. 57 (2000) (plurality opinion).
2. TEX. FAM. CODE ANN. § 153.433 (Vernon Supp. 2008).
3. § 153.433(2).
4. 219 S.W.3d 327 (Tex. 2007) (orig. proceeding) (per curiam).
5. *Id.* at 329.
6. *Id.* at 331.

grandchild under chapter 153 of the family code and, therefore, the step-grandfather did not have standing under the statute.[7] Because the trial court awarded access based on section 153.433, the court declined to substantively address the step-grandfather's arguments he had standing under section 102.003[8] of the family code or that he had a justiciable interest sufficient to confer standing. Finding the step-grandfather had standing on these other grounds would override the statutory requirements established by the Legislature in section 153.432.[9]

The court then turned to whether the trial court abused its discretion by awarding the grandmother access to the children. Section 153.433 requires a grandparent to overcome the statutory presumption that a parent acts in the child's best interest.[10] "A trial court abuses its discretion when it grants access to a grandparent who has not met [the statutory] standard because '[a] trial court has no "discretion" in determining what the law is or applying the law to the facts[,]' even when the law is unsettled."[11]

In order to overcome the statutory presumption, the grandmother was required to prove the denial of access to her in particular would significantly impair the children's physical health or emotional well-being.[12] The psychologist appointed by the trial court to evaluate the parties testified it was in the best interest of the children to have contact with their mother's family. However, the psychologist's opinion was based on the family as a whole, including the step-grandfather and three uncles—specifically on the strengths of the step-grandfather.[13] The psychologist also noted the grandmother's resistance to transitioning the children to the father's full-time care "interfered with the children's emotional and behavioral adjustment."[14] Further, the grandmother actively attempted to alienate one of the children from the father.

A grandparent has a "high threshold" to overcome the presumption that a fit parent acts in his children's best interest, and the trial court may not interfere with a fit parent's decisions "simply because a 'better decision' may have been made."[15] The court concluded the evidence did not support awarding the grandmother access over the father's objection.[16]

Turning to the father's request for mandamus relief, the court determined the trial court's order "divest[ed] a fit parent of possession of his

7. *Id.* at 331-32 (citing TEX. FAM. CODE ANN. § 153.432 (Vernon Supp. 2007)).
8. TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon Supp. 2008) (providing standing to file SAPCR to person who had care, control, and possession of the child for at least six months ending not more than ninety days before suit filed).
9. *Derzapf*, 219 S.W.3d at 333-34. However, this conclusion does not mean "grandparents may not seek *conservatorship* by satisfying chapter 102's standing requirements." *Id.* at 333 n.10 (emphasis in original).
10. *Id.* at 333.
11. *Id.* (citations omitted).
12. *Id.* at 333 (emphasis in original) (citing § 153.433(2)).
13. *Id.* at 334.
14. *Id.*
15. *Id.* (citing Troxel v. Granville, 530 U.S. 57, 73 (2000) (plurality opinion)).
16. *Id.*

children, in violation of *Troxel's* cardinal principle and without overcoming the statutory presumption that the father is acting in his children's best interest."[17] Because the divesture was irremediable, the father was entitled to mandamus relief.[18]

B. Application of Presumption

Two courts of appeals, however, have limited the application of the statutory presumption outside an original suit for grandparent access. In *In re M.A.S.*,[19] the trial court issued a custody order naming the mother and father of the children joint managing conservators and naming the maternal grandmother a possessory conservator. Almost two years later, the mother filed a motion to modify, requesting the trial court terminate the grandmother's access to the children. The trial court granted the motion.

On appeal, the grandmother asserted the trial court erred in applying the section 153.433 presumption that a parent acts in a child's best interest in a modification proceeding. Relying on *In re V.L.K.*,[20] the San Antonio Court of Appeals agreed with the grandmother.[21]

V.L.K. involved the statutory presumption in section 153.131 of the Family Code that it is in the child's best interest for custody to be awarded to the parent.[22] Chapter 153 of the Family Code governs original custody determinations while chapter 156 governs modifications.[23] Because chapter 156 did not include the same presumption as chapter 153, the presumption applied only in original custody determinations and not in modification suits.[24]

In *M.A.S.*, the San Antonio Court of Appeals determined the parental presumption for grandparent access is also contained in chapter 153 and, therefore, is applicable only in original custody determinations.[25] Accordingly, the trial court erred in applying the presumption in granting the mother's motion to modify.[26] Rather, the mother was required under section 156.101 of the Family Code to prove the modification was in the children's best interest and the circumstances of at least one of the parties affected by the order had materially and substantially changed since the order took affect.[27]

The Corpus Christi Court of Appeals considered a similar issue in

17. *Id.* at 335.
18. *Id.*
19. No. 04-06-00629-CV, 2007 WL 2608552 (Tex. App.—San Antonio Sept. 12, 2007, no pet.) (mem. op.).
20. 24 S.W.3d 338 (Tex. 2000).
21. *M.A.S.*, 2007 WL 2608552, at *1.
22. *V.L.K.*, 24 S.W.3d at 341 (addressing Tex. Fam. Code Ann. § 153.131 (Vernon Supp. 2007)).
23. *Id.*
24. *Id.*
25. *M.A.S.*, 2007 WL 2608552, at *1.
26. *Id.*
27. *Id.* (citing Tex. Fam. Code Ann. § 156.101 (Vernon Supp. 2007)).

Banta v. Texas Department of Family & Protective Services.[28] There, the grandfather sought access to the child in a termination proceeding. The child had been living with his mother and grandfather. The Texas Department of Family and Protective Services (the "Department") removed the child from the home and sought to terminate both parents' parental rights. The grandfather intervened, seeking managing conservatorship of the child, and later filed a supplemental petition requesting grandparent access.[29] The trial court denied the request.

On appeal, the grandfather contended the parental presumption does not apply following the termination of parental rights. The court agreed the presumption was inapplicable because neither parent "could be presumed 'fit' at the time the trial court considered [the grandfather's] request."[30] However, access under section 153.433 is "subject to the trial court's determination of the best interest of the child."[31] Because the evidence did not establish that giving the grandfather access to the child was in the child's best interest, the trial court did not err in denying the grandfather's request.[32]

III. PATERNITY

The San Antonio Court of Appeals determined in *In re H.C.S.*[33] that a sperm donor does not have standing to bring a proceeding to adjudicate the parentage of a child conceived using the donor's sperm. In *H.C.S.*, the sperm donor's sister was in a same-sex relationship with a woman who wanted to have a child. The brother agreed to provide sperm to artificially inseminate his sister's partner. Approximately five years after the child was born, the two women's relationship ended.

The brother brought suit to adjudicate the parentage of the child, contending he and the mother had verbally agreed he would be involved in the child's life. The mother filed a plea to the jurisdiction, arguing a sperm donor is precluded from filing suit to adjudicate parental rights because he was not a parent of the child.[34]

The brother contended section 160.602 of the family code allows a "man whose paternity of the child is to be adjudicated" to maintain a suit to adjudicate parentage.[35] In support of his argument, the brother relied on *In re Sullivan*[36] in which the Houston Fourteenth District Court of

28. No. 13-06-00548-CV, 2007 WL 2128901 (Tex. App.—Corpus Christi July 26, 2007, no pet.) (mem. op.).

29. At trial, the grandfather abandoned his request to be named managing conservator. *Id.* at *2.

30. *Id.* at *3.

31. *Id.* at *2 (citing TEX. FAM. CODE ANN. § 153.002 (Vernon 2002)).

32. *Id.* at *4-5.

33. 219 S.W.3d 33 (Tex. App.—San Antonio 2006, no pet.).

34. TEX. FAM. CODE ANN. § 160.702 (Vernon 2002) ("A donor is not a parent of a child conceived by means of assisted reproduction.").

35. *H.C.S.*, 219 S.W.3d at 35; TEX. FAM. CODE ANN. § 160.602 (Vernon Supp. 2008).

36. 157 S.W.3d 911, 919 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]).

Appeals determined section 160.602 conferred "standing on a man alleging himself to be the biological father of the child in question and seeking an adjudication that he is the father of the child." The Houston court concluded the "issue of the man's status as a donor under section 160.702 is to be decided at the merits stage of the litigation rather than as part of the threshold issue of standing."[37]

The San Antonio Court of Appeals noted section 102.003 of the Family Code, the general standing provision for SAPCRs, allows "a man alleging himself to be the father of a child filing in accordance with [c]hapter 160, subject to the limitations of that chapter, but not otherwise" to file a SAPCR.[38] However, a "male donor" is specifically excluded as an alleged father.[39] Chapter 160 defines a "donor" as "an individual who produces . . . sperm used for assisted reproduction. . . ."[40] Accordingly, the brother was not an "alleged father" for purposes of section 102.003.[41]

Further, standing under section 102.003 is subject to other provisions of the Family Code, including those allowing a "male donor to effectively become the parent of a child conceived by means of assisted reproduction if he and the mother of the child 'sign [and file] an acknowledgment of paternity with the intent to establish the man's paternity.'"[42] The brother failed to follow these procedures and could not "now circumvent the statutory plan for establishing paternity in assisted reproduction cases."[43]

"[B]ased on the plain language of the Family Code," the San Antonio Court of Appeals concluded the brother "as an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, does not have standing to pursue a suit to determine paternity of the child born through the assisted reproduction."[44] In doing so, the court disagreed with the Houston court's "conclusion [in *Sullivan*] that status as a donor is irrelevant to the question of standing to establish parentage."[45] The San Antonio court also disagreed that donor status should be decided during the merits stage of the litigation.[46]

The Texas Legislature addressed this issue during the 2007 legislative session. The Family Code now provides an unmarried man is the father of a child if, with the intent to be the father of the resulting child, the man provides sperm to a licensed physician to be used for assisted reproduc-

37. *Id.*

38. *H.C.S.*, 219 S.W.3d at 36 (citing TEX. FAM. CODE ANN. § 102.003(8) (Vernon Supp. 2007)).

39. *Id.* (citing TEX. FAM. CODE ANN. § 101.0015(b)(3) (Vernon 2002)).

40. *Id.* (citing TEX. FAM. CODE ANN. § 160.102(6) (Vernon Supp. 2007)).

41. *Id.*

42. *Id.* (citing TEX. FAM. CODE ANN. §§ 160.301, 160.305) (Vernon 2002 & Supp. 2007)).

43. *Id.* at 36-37.

44. *Id.* at 36.

45. *Id.* at 35-36.

46. *Id.*

tion by an unmarried woman.[47] The man's consent to be the father of the child must be in a record signed by the man and the unmarried woman and kept by a licensed physician.[48]

IV. ADOPTION

The Austin and Houston First District Courts of Appeals considered the issue of adoption of a child by same sex couples. The facts in *Goodson v. Castellanos*[49] and *Hobbs v. Van Stavern*[50] are very similar. In each case, one of the women in a same sex relationship was the mother of the child—in *Goodson* by adoption and in *Hobbs* by birth. The other woman in each relationship adopted the child with the mother's consent. After the relationship ended, the former partner who adopted the child filed a SAPCR seeking joint managing conservatorship of the child. Both mothers challenged their former partner's standing to bring the SAPCR, contending Texas law does not allow two individuals of the same sex to adopt a child, and therefore, the adoption decrees were void.

A parent has standing to bring an original SAPCR.[51] The mothers both argued the term "parent" is defined by the Family Code to be "the mother of the child or a man who has been adjudicated to be the father of the child" and, therefore, the former partner was not a "parent" and did not have standing to bring a SAPCR.[52] Both courts of appeals rejected this argument, noting section 101.024(a) of the Family Code expressly provides that an adoptive parent is a parent.[53] The Austin court also found standing based on the former partner's actual care, control, and possession of the child for at least six months ending not more than ninety days preceding the filing of the petition.[54]

In both cases, the mothers argued the former partner lacked standing because the adoption orders were void under Texas law. Relying on section 162.001 of the Family Code, the mothers argued that, under the circumstances, only a stepparent or former stepparent could have adopted each child.[55] Because their former partners were neither, they were not

47. TEX. FAM. CODE ANN. § 160.7031(a) (Vernon Supp. 2008).
48. § 160.7031(b).
49. 214 S.W.3d 741 (Tex. App.—Austin 2007, pet. denied).
50. 249 S.W.3d 1 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).
51. TEX. FAM. CODE ANN. § 102.003(a)(1) (Vernon Supp. 2008).
52. *Hobbs*, 249 S.W.3d at 3-4; *Goodson*, 214 S.W.3d at 742.
53. *Hobbs*, 249 s.W.3d at 4; *Goodson*, 214 S.W.3d at 752.
54. *Goodson*, 214 S.W.3d at 752-53 (citing TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon Supp. 2008)).
55. *Hobbs*, 214 S.W.3d at 4; *Goodson*, 249 S.W.3d at 747. At the time of the adoptions, section 162.001, in relevant part, allowed for the adoption of a child if the parent–child relationship had been terminated with respect to at least one parent, the other parent consented to the adoption, and the person seeking to adopt the child was (1) a stepparent or (2) a former stepparent who had been a managing conservator or had actual care, possession, and control of the child for a period of six months preceding the adoption. Act of May 16, 1997, 75th Leg., R.S., ch. 562, § 14, 1997 Tex. Gen. Laws 1983, 1991 (amended 2003) (current version at TEX. FAM. CODE ANN. § 162.001 (Vernon Supp. 2008)). In 2003, the legislature amended section 162.001 to make it optional that the person seeking to adopt be the child's former stepparent.

eligible to adopt the child.

The Austin Court of Appeals concluded the adoption decree was not void.[56] Rather, the district court is a court of general jurisdiction under the Texas Constitution and is specifically authorized by the Family Code to issue adoption orders.[57] Even assuming the district court erred in issuing the adoption decree, the "error was based on an erroneous construction of statutes, and the judgment would be based on an erroneous holding of substantive law."[58] However, these errors would neither deprive the district court of jurisdiction over the adoption nor render the decree void.[59]

Both courts of appeals agreed with the former partners' argument that the mothers failed to timely attack the adoption. Section 162.012 of the Family Code "prohibits all challenges to an adoption decree if they are filed more than six months after an adoption order is signed."[60] The legislature included no exceptions in section 162.012—"not for challenges to purportedly void adoption orders, not for good cause, and not for public policy reasons."[61] Because more than six months had passed since the adoptions, section 162.012 precluded the mothers from attacking the decrees.[62]

Both mothers also argued the adoption of a child by two people of the same sex violated the public policy of the state and—Goodson argued—was fundamental error. The Houston court made short work of this argument, noting the Family Code allowed an adoptive parent to seek joint managing conservatorship.[63] The Austin court first declined the invitation to apply the fundamental error doctrine "in this area of the law."[64] It then addressed the mother's public policy arguments in a somewhat stronger tone than the Houston court, concluding:

> there is no direct statement of public policy found in the family code or the constitution prohibiting the adoption of a child by two individuals of the same sex. Accordingly, any concern with the propriety of this adoption must yield to the directly stated public policy of this State prohibiting a direct or collateral attack on a judgment more than six months after an adoption is ordered and providing children with a stable home environment.[65]

Both courts of appeals affirmed the trial courts' judgments regarding conservatorship.

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56. *Goodson*, 214 S.W.3d at 747.
57. *Id.* at 747-48 (citing TEX. CONST. art. V, § 8 and TEX. FAM. CODE ANN. § 162.016 (Vernon Supp. 2007)).
58. *Id.* at 748.
59. *Id.*
60. *Id.* at 748-49; *see Hobbs*, 249 s.W.3d at 4 (citing TEX. FAM. CODE ANN. § 162.012 (Vernon 2002)).
61. *Hobbs*, 249 S.W.3d at 4; *see Goodson*, 214 S.W.3d at 749.
62. *Hobbs*, 249 S.W.3d at 4; *Goodson*, 214 S.W.3d at 749.
63. *Hobbs*, 249 S.W.3d at 5.
64. *Goodson*, 214 S.W.3d at 750.
65. *Id.* at 751 (internal citations omitted).

V. TERMINATION

A. APPEAL OF TERMINATION

Section 263.405 of the Family Code provides for an accelerated appeal of a final order in cases where the Department has assumed the care of the child.[66] Within fifteen days of the trial court signing the final order, the party must 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.[67] The notice of appeal must be filed within twenty days of the trial court entering the final order.[68] 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.[69] 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."[70]

1. Statement of Points

During the 2005 legislative session, the Legislature enacted section 263.405(i) of the Family Code mandating that, for any appeal filed after September 1, 2005, the appellate court could not "consider 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."[71] All fourteen appellate courts have complied with the Legislature's directive by concluding any issues not presented to the trial court in a statement of points or in a statement of points combined with a motion for new trial are not preserved and may not be considered on appeal.[72] Further, a trial court may not grant an

66. TEX. FAM. CODE ANN. § 263.405 (Vernon Supp. 2008).
67. § 263.405(d).
68. § 263.405(c); TEX. R. APP. PROC. 26.1(b).
69. § 263.405(d).
70. § 263.405(a), (f).
71. § 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.).
72. *In re* R.M., No. 04-07-00048-CV, 2007 WL 1988149, at *2 (Tex. App.—San Antonio July 11, 2007, pet. denied); *In re* M.N., 230 S.W.3d 248, 249 (Tex. App.—Eastland 2007, pet. filed); *In re* R.C., 243 S.W.3d 674, 675-76 (Tex. App.—Amarillo 2007, no pet.); *In re* R.J.S., 219 S.W.3d 623, 627 (Tex. App.—Dallas 2007, pet. denied); *In re* R.M.R., 218 S.W.3d 863, 864 (Tex. App.—Corpus Christi 2007, no pet.); Adams v. Tex. Dep't of Family & Protective Servs., 236 S.W.3d 271, 278 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *In re* J.F.R., No. 09-06-00115-CV, 2007 WL 685640, at *1-2 (Tex. App.—Beaumont Feb. 8, 2007, no pet.) (mem. op.); *In re* J.H., No. 12-06-00002-CV, 2007 WL 172105, at *1 (Tex. App.—Tyler Jan. 24, 2007, no pet.) (mem. op.); *In re* A.H.L., III., 214 S.W.3d 45, 53 (Tex. App.—El Paso 2006, pet. denied); *In re* C.M., 208 S.W.3d 89, 91-92 (Tex. App.—Houston [14th Dist.] 2006, no pet); *In re* D.A.R., 201 S.W.3d 229, 230 (Tex. App.—Fort Worth 2006, no pet.); Coey v. Tex. Dep't of Family & Protective Servs., No. 03-05-00679-CV, 2006 WL 1358490, at *1-2 (Tex. App.—Austin May 19, 2006, no pet.) (mem. op.); *In re* E.A.R. 201 S.W.3d 813, 814 (Tex. App.—Waco 2006, no pet.); *In re* J.M.S., No. 06-05-00139-CV, 2005

extension of time in which to file the statement of points.[73]

2. *Ineffective Assistance of Counsel*

In Texas, there is a statutory right to counsel for indigent persons in cases brought by the State to terminate parental rights.[74] This right embodies the right to effective counsel.[75] To establish ineffective assistance of counsel, the appellant must prove that counsel's assistance fell below an objective standard of reasonableness and that the deficient assistance prejudiced the appellant.[76] The record must affirmatively demonstrate the alleged ineffectiveness.[77]

The appellate courts have struggled with ineffective assistance of counsel claims in a parental rights termination case due to the stringent appellate timeline in section 263.405(i). In *Doe v. Brazoria County Child Protective Services*,[78] the trial court terminated the mother's parental rights on September 15, 2005. On October 12, 2005, the mother's trial counsel filed a notice of appeal. The trial court appointed appellate counsel on October 13, 2005. On November 8, 2005, the mother filed a motion with the appellate court to extend the time to file notice of appeal. Ten days later, the mother filed a motion for new trial and a motion to abate with the appellate court. The motion to abate contained a copy of the motion for new trial and a statement of points on appeal.

The Houston First District Court of Appeals abated the case and remanded it to the trial court for a hearing on the issue of ineffective assistance of counsel. At the hearing, the mother's trial counsel testified, in relevant part, that he did not timely file the notice of appeal because he did not know the appeal was accelerated until more than fifteen days after the judgment. He admitted he did not file a motion for new trial on the mother's behalf and did not know he failed to preserve the mother's legal and factual insufficiency issues by failing to file one. He also did not know the mother waived points on appeal by not filing a statement of points. The trial court found the mother's counsel was ineffective post-judgment.[79]

Brazoria County Child Protective Services filed a motion to dismiss, contending the appellate court did not have jurisdiction over the appeal because the mother's notice of appeal and motion to extend time to file notice of appeal were both untimely. A notice of appeal in a termination

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WL 3465518, at *1 (Tex. App.—Texarkana Dec. 19, 2005, no pet.) (mem. op.). However, outside the Survey period both the Fort Worth and Texas Courts of Appeals found this unconstitutional *In re* D.W., 249 S.W.3d 625, 648 (Tex. App.—Fort Worth 2008, pet. denied) (en banc); *In re* S.K.A., 236 S.W.3d 875, 894 (Tex. App.—Texarkana 2008, pet. denied) (as applied).

73. *M.N.*, 230 S.W.3d at 249.
74. TEX. FAM. CODE ANN. § 107.013 (Vernon Supp. 2008).
75. *In re* M.S., 115 S.W.3d 534, 544 (Tex. 2003).
76. *Id.* at 545 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).
77. *In re* J.W., 113 S.W.3d 605, 616 (Tex. App.—Dallas 2003, pet. denied).
78. 226 S.W.3d 563 (Tex. App.—Houston [1st Dist.] 2007, no pet.)
79. *Id.* at 570.

case must be filed within twenty days after the judgment is signed.[80] However, the appellate court may extend the time to file a notice of appeal if, within fifteen days after the deadline for filing the notice of appeal, the party files the notice of appeal and a motion complying with Texas Rule of Appellate Procedure 10.5(b).[81] A motion to extend time to file notice of appeal is implied when an appellant, acting in good faith, files a notice of appeal "within the fifteen day period in which [the] appellant would be entitled to move to extend the filing deadline."[82]

In *Doe*, the mother's notice of appeal was due by October 5, 2005. She filed her notice of appeal on October 12, 2005, which was within the fifteen-day grace period. Therefore, a motion to extend time was necessarily implied.[83] The testimony of the mother's trial counsel that he did not know the appeal was accelerated until more than fifteen days after judgment was a "plausible statement that the failure to timely file the notice of appeal was the result of mistake."[84] Accordingly, the mother's notice of appeal was timely.[85]

Among other claims, the mother argued on appeal that her trial counsel was ineffective by failing to file a statement of points on appeal, thereby precluding her from raising any issues on appeal. The Houston court disagreed, noting it had considered the mother's "ineffective assistance of counsel claim because she can raise it for the first time on appeal without preserving it in the trial court."[86] Further, within the context of the ineffective assistance of counsel claim, the court considered the mother's factual insufficiency points.[87] Therefore, the mother was unable to show trial counsel's failure to file a statement of points prejudiced

80. TEX. FAM. CODE ANN. § 109.002(a) (Vernon 2002); TEX. R. APP. P. 26.1(b).

81. *Doe*, 226 S.W.3d at 570.

82. *Id.* at 570-71 (citing Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997)).

83. *Id.* at 571.

84. *Id.* Although it is not clear from the opinion, it appears the appellate court relied on trial counsel's testimony during the ineffective assistance of counsel hearing to provide the reasonable explanation for filing the notice of appeal late. Rule 10.5(b) requires the "facts relied upon to reasonably explain the need for an extension" to be included in the motion to extend. TEX. R. APP. P. 10.5(b). A careful practitioner should not rely on testimony taken after filing the motion to extend to supply the reasonable explanation.

85. *Doe*, 226 S.W.3d at 571.

86. *Id.* at 576. Approximately six weeks after issuing *Doe*, the Houston First District Court of Appeals issued a substituted opinion in Pool v. Tex. Dep't of Family & Protective Servs., 227 S.W.3d 212 (Tex. App.—Houston [1st Dist.] 2007, no pet.) following the father filing a motion for rehearing. The court denied the motion for rehearing and concluded that section 263.405(i) precluded it from considering the father's issues on appeal because he failed to file a statement of points. The father argued this result prevented him from asserting his "right to appeal the judgment of the trial court terminating his parental rights." *Id.* at 216. He noted that his appellate counsel was not appointed until after the deadline for filing a statement of points had passed and that his trial counsel failed to file the statement of points. *Id.* The court of appeals summarily rejected the argument because the father did not assert that his trial counsel "effectively abandoned him after the trial court signed its judgment" or "provided ineffective assistance in not filing a statement of points or a new trial motion." *Id.* Therefore, in order to obtain the relief given in *Doe*, the appellant must file the proper motions and clearly present his ineffective assistance of counsel claim.

87. *Doe*, 226 S.W.3d at 573-75.

her.[88]

As an additional note, in *In re D.H.*,[89] the Houston Fourteenth District Court of Appeals denied a mother's request to abate the appeal and remand the case to the trial court for an evidentiary hearing on the mother's ineffective assistance of counsel claim. The court of appeals noted the mother cited no authority for the contention she was entitled to the relief sought and addressed the claim under a traditional ineffective-assistance-of-counsel review without an evidentiary hearing on the mother's claims.[90]

The Beaumont Court of Appeals disagreed with *Doe* in *In re J.F.R.*,[91] noting the *Doe* court failed to "analyze section 263.405(i)'s impact on ineffective assistance claims" and relied on *In re J.M.S.*,[92] "a case decided before section 263.405(i) became effective," in determining an ineffective assistance of counsel claim could be made for the first time on appeal.[93] Because "the constitutional dimension of the parent-child relationship does not automatically override the procedural requirements for error preservation," the Beaumont court concluded an ineffective assistance of counsel claim must be preserved in a statement of points before it can be considered on appeal.[94] The Tyler,[95] Corpus Christi,[96] El Paso,[97] Fort Worth,[98] and San Antonio[99] courts have also determined an ineffective assistance of counsel claim must be preserved in a timely filed statement of points.

3. *Factual Sufficiency of the Evidence*

In *In re A.S.*,[100] the trial court terminated both parents' parental rights. The parents filed a motion for new trial and statement of points, attacking each of the grounds for termination based on legal and factual sufficiency. The trial court found the father was indigent, but an appeal would be frivolous. On appeal, the father argued due process required the preparation of a reporter's record of the termination trial so the Beaumont Court of Appeals could review the finding that an appeal would be frivolous. The court of appeals framed the issue as "whether limiting the

88. *Id.* at 576.
89. No. 14-06-00187-CV, 2007 WL 2447273 (Tex. App.—Houston [14th Dist.] Aug. 30, 2007, no pet.) (mem. op.).
90. *Id.* at *2.
91. No. 09-06-00115-CV, 2007 WL 685640, at *2 (Tex. App.—Beaumont Feb. 8, 2007, no pet.) (mem. op.).
92. 43 S.W.3d 60, 64 (Tex. App.—Houston [1st Dist.] 2001, no pet.).
93. *J.F.R.*, 2007 WL 685640, at *2.
94. *Id.*
95. *In re* J.H., No. 12-06-00002-CV, 2007 WL 172105, at *1 (Tex. App.—Tyler Jan. 24, 2007, no pet.) (mem. op.)
96. *In re* R.M.R., 218 S.W.3d 863, 864 (Tex. App.—Corpus Christi 2007, no pet.).
97. *In re* A.H.L., III, 214 S.W.3d 45, 54 (Tex. App.—El Paso 2006, pet. denied).
98. *In re* D.A.R., 201 S.W.3d 229, 230-31 (Tex. App.—Fort Worth 2006, no pet.).
99. *In re* R.M., No. 04-07-00048-CV, 2007 WL 1988149, at *1-2 (Tex. App.—San Antonio July 11, 2007, pet. denied).
100. 239 S.W.3d 390 (Tex. App.—Beaumont 2007, no pet.).

scope of our review to the record of the hearing held under Family Code [section] 263.405(d) [the determination of whether an appeal would be frivolous], as clearly contemplated by the legislature, deprives the parent of due process, particularly when new counsel has been appointed since trial."[101]

The court disagreed that a reporter's record from the termination trial was required.[102] Rather, it was sufficient to consider the record from the post-judgment hearing at which the Department's attorney "described evidence [from the trial] that would support its alleged grounds for termination."[103] The father, however, did not identify at the hearing "evidence from the trial that would arguably support an argument that the jury could not reasonably have formed a firm belief or conviction as to the truth of the allegations."[104] Based on counsel's summaries from the hearing, due process did not require the father to receive a free record of the termination trial.[105]

Justice Gaultney dissented, noting the court should follow the Fort Worth Court of Appeals' opinion in *In re M.R.J.M.*[106] and order a record of the entire trial.[107] In Justice Gaultney's opinion, the court of appeals could not "determine whether a factual sufficiency issue is frivolous without reviewing the evidence."[108] He also questioned whether appellate counsel could "adequately challenge a frivolous finding on a factual sufficiency issue without access to a reporter's record."[109] According to the dissenting opinion, to assume a factual sufficiency challenge is frivolous based on counsel's summaries of the evidence at a post-trial hearing "carries an unacceptable risk when the evidence is disputed."[110]

Although outside the Survey period, the Waco Court of Appeals recently followed the Fort Worth Court of Appeals and concluded an indigent father who raised legal and factual sufficiency claims was entitled to a full record of the termination trial for the court of appeals to use in reviewing the trial court's determination that any appeal would be frivolous.[111]

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101. *Id.* at 392.
102. *Id.* at 393.
103. *Id.*
104. *Id.*
105. *Id.*
106. 193 S.W.3d 670 (Tex. App.—Fort Worth 2006, no pet.) (en banc).
107. *A.S.*, 239 S.W.3d at 393-94.
108. *Id.* at 394.
109. *Id.*
110. *Id.*
111. *In re* S.T., 242 S.W.3d 923, 924-25 (Tex. App.—Waco 2008, no pet.) (published order) (per curiam). Chief Justice Gray dissented from a November 28, 2007, order in the same case because he disagreed the appellate court had jurisdiction. *In re* S.T., 239 S.W.3d 452 (Tex. App.—Waco 2007, no pet.) (published order) (per curiam). He noted, however, a full record of the trial was necessary because, at the frivolousness hearing, the trial court took judicial notice of the evidence at trial. *Id.* at 464. Chief Justice Gray concluded the summary procedure used in *A.H.* was the procedure that seems to have been contemplated by the Legislature. *Id.* at 464-65.

B. Affidavit of Indigency

In *In re M.A.*,[112] the trial court entered an order terminating the mother's parental rights on July 14, 2006. Therefore, the mother's notice of appeal was due on August 3, 2006. The mother filed the notice of appeal on August 15, 2006, within fifteen days of when it was due, and the notice was deemed timely by the Houston Fourteenth District Court of Appeals.[113] The mother filed an affidavit of indigency on September 14, 2006.

The Houston Court of Appeals noted Texas Rule of Appellate Procedure 20.1(c)(1) required the affidavit of indigency to be filed in the trial court with or before the notice of appeal.[114] The deadline can be extended if, within fifteen days after the deadline, the party files a motion under rule 10.5(b) in the appellate court.[115] Accordingly, even with an extension, the latest date the mother could have filed the affidavit of indigency was September 4, 2006.

The court noted the Texas Supreme Court's decision in *Higgins v. Randall County Sheriff's Office*[116] "appears to allow an affidavit of indigency to be filed much later."[117] However, unlike *Higgins*, *M.A.* "involve[d] the termination of parental rights and the mandatory deadlines of section 263.405 of the Texas Family Code."[118] Under section 263.405(e), if the trial court does not rule on a claim of indigency before the thirty-sixth day after the final order is signed, the appellant is considered indigent.[119] The *Higgins* rule, therefore, did not apply because:

> an affidavit of indigence filed more than thirty-six days after the final order is signed would either (1) entitle the appellant to indigent status because it would be too late for the trial court to deny the claim, or (2) require the trial court, and consequently the court of appeals, to ignore the statutory deadline. Both scenarios violate the rules of statutory construction by rendering meaningless either Texas Rule of Appellate Procedure 20.1 or section 263.405 of the Texas Family Code. Consistent with traditional statutory construction principles, the more specific statute, section 263.405 of the Texas Family Code, should control over the more general Rule 20.1, as interpreted by the

112. 222 S.W.3d 670 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (per curiam).

113. *Id.* at 670 (citing Verburgt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997)).

114. *Id.*

115. *Id.*; *see* Tex. R. App. P. 20.1(c)(3).

116. 193 S.W.3d 898 (Tex. 2006) (per curiam). In *Higgins*, the appellant filed a notice of appeal without a filing fee or an affidavit of indigency. Four months later the court of appeals notified the appellant the appeal would be dismissed if a filing fee was not paid within ten days. Nine days later, the appellant filed an affidavit of indigency. The court of appeals dismissed the appeal because the affidavit was untimely and was not accompanied by a motion to extend time. The Texas Supreme Court reversed, noting the affidavit was "no longer a jurisdictional requirement" and the court of appeals was required to allow the appellant a reasonable time to correct the defect. *Id.* at 899.

117. *M.A.*, 222 S.W.3d at 671 (noting affidavit of indigency filed in *Higgins* 133 days after the notice of appeal).

118. *Id.*

119. *Id.* (citing Tex. Fam. Code Ann. § 263.405(e) (Vernon Supp. 2007)).

Texas Supreme Court in *Higgins*.[120]

Further, allowing the *Higgins* rule to extend the time for filing an affidavit of indigency "would frustrate the Legislature's intent in enacting those deadlines to reduce post-judgment delays" in termination cases.[121] Accordingly, the *Higgins* rule does not apply to extend the time for filing an affidavit of indigency in the appeal of a termination order.[122]

C. Grounds for Termination

1. Incarceration

Section 161.001(1)(Q)(ii) of the Family Code provides parental rights can be terminated if the parent is incarcerated or confined and is unable to care for the child for at least two years from the date the termination petition is filed.[123] In *In re H.R.M.*,[124] the mother and the stepfather of the child sought to terminate the rights of the father under section 161.001(1)(Q)(ii). The jury found the father's parental rights should be terminated. However, the court of appeals reversed, concluding the evidence was factually insufficient to support a finding the father would still be imprisoned on July 6, 2006, two years from the date the petition was filed.

The Texas Supreme Court recognized "a two-year sentence does not automatically meet subsection Q's two-year imprisonment requirement."[125] Often, "neither the length of the sentence nor the projected release date is dispositive of when the parent will in fact be released from prison."[126] Therefore, "evidence of the availability of parole is relevant to determine whether the parent will be released within two years."[127] But, because parole decisions are "inherently speculative," evidence relating to the possibility of parole "does not prevent a factfinder from forming a firm conviction or belief that the parent will remain incarcerated for at least two years."[128] Otherwise, parental rights could be terminated under 160.001(1)(Q)(ii) only when there was no possibility of parole.[129] This outcome would "impermissibly elevate the burden of proof from clear and convincing to beyond a reasonable doubt."[130]

The supreme court determined the court of appeals misapplied the standard for reviewing factual sufficiency in parental termination cases.[131] Although the father testified he would be eligible for parole each year

120. *Id.*
121. *Id.*
122. *Id.*
123. Tex. Fam. Code Ann. § 161.001(1)(Q)(ii) (Vernon 2008)
124. 209 S.W.3d 105 (Tex. 2006) (per curiam).
125. *Id.* at 108.
126. *Id.*
127. *Id.* at 109.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

and that he was participating in a pre-release program available to inmates within two years of parole, "the jury was free to disregard [this] testimony, which was barely more than conjecture."[132] The court of appeals failed to weigh all the evidence and based its decision on the father's testimony that he had a possibility of parole.[133] In doing so, the court of appeals merely substituted its judgment for that of the jury.[134]

The father also argued he provided care for the child by leaving her with her mother. The supreme court concluded "[a]bsent evidence that the non-incarcerated parent agreed to care for the child on behalf of the incarcerated parent, merely leaving a child with a non-incarcerated parent does not constitute the ability to provide care."[135] Otherwise, as long as one parent was not incarcerated and was willing to care for the child, the incarcerated parent's parental rights could never be terminated under section 160.001(1)(Q)(ii).[136]

2. *Failure to Support*

Section 161.001(1)(F) of the Family Code provides for the termination of parental rights if a parent has failed to support the child in accordance with the parent's ability during a period of one year ending within six months of the date of the filing of the petition to terminate.[137] In 1993, the Corpus Christi Court of Appeals held that in *In re R.R.F.*,[138] (1) a "child support order includes within it an implicit finding that the obligor has the means to pay the amount ordered," and (2) the "inability to pay support under a valid order is an affirmative defense that must be raised by the party defending the allegation of failure to pay." In *In re D.S.P.*,[139] the Corpus Christi court revisited *R.R.F.*, noting that although *R.R.F.* had been both criticized and utilized approvingly, the criticism "largely stems from our analogy between a termination proceeding and a contempt proceeding for failure to pay child support."[140]

The court concluded there were significant differences between contempt and termination proceedings. In a contempt proceeding, the obligee must prove child support was due and not paid.[141] The obligor may plead the "affirmative defense of inability to provide support, which the obligor then has the burden to prove by a preponderance of the evidence."[142] In contrast, section 161.001 of the Family Code does not include any affirmative defenses, does include the failure to pay in

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 110.
136. *Id.*
137. TEX. FAM. CODE ANN. § 161.001(1)(F) (Vernon Supp. 2008).
138. 846 S.W.2d 65, 68 (Tex. App.—Corpus Christi 1992, writ denied), *overruled by In re D.S.P.*, 210 S.W.3d 776, 781 (Tex. App.—Corpus Christi 2006, no pet.).
139. 210 S.W.3d 776, 780 (Tex. App.—Corpus Christi 2006, no pet.).
140. *Id.*
141. *Id.* at 781.
142. *Id.*

accordance with ability as an element of termination, and requires each finding needed for termination to be based on clear and convincing evidence.[143] Further, the consequences of a termination are permanent, but a finding of contempt can be purged by payment of the owed child support.[144]

Accordingly, the court determined it erred in *R.R.F.* by concluding the inability to pay support under a valid order is an affirmative defense that must be raised and proved by the obligor.[145] The court recognized a "child support order does contain an implied finding that the obligor has the ability to pay the support."[146] However, this "matter should not be afforded any relevance in a termination proceeding involving section 161.001(F)" because:

> [r]equiring a parent at risk of losing her parental rights to present evidence of her inability to pay for the purpose of either (1) asserting an affirmative defense or (2) overcoming a child support order's implied finding of ability to pay, wrongfully shifts the burden of proving ability to pay to the parent and excuses the movant in the termination proceeding from the burden of proving that the parent failed to support in accordance with the parent's ability.[147]

The Corpus Christi Court of Appeals then overruled *R.R.F.*[148]

VI. JURISDICTION

A. Home State of Child

Section 152.201(a) of the Family Code provides that a Texas court may make an initial custody determination regarding a child if (1) the child's home state is Texas, (2) the child's home state was Texas within six months prior to the commencement of the proceeding if the child is absent from Texas but a parent continues to live in the state, (3) the child has no home state or a court of the child's home state declined to exercise jurisdiction over the child because Texas is the more appropriate forum, (4) all courts potentially having jurisdiction over the child declined to exercise it because Texas is the more appropriate forum, or (5) no court of any other state would have jurisdiction over the child.[149] A child's "home state" is the state in which the child lived with a parent or person acting as a parent for at least six months immediately before commencement of the child custody proceeding.[150] However, even if Texas is not the child's home state, a Texas court may exercise jurisdiction over a child if the child is abandoned or if court intervention is "necessary in an emergency"

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* The El Paso Court of Appeals has since agreed with the reasoning in of *D.S.P.* in *In re* E.M.E., 234 S.W.3d 71, 74 (Tex. App.—El Paso 2007, no pet.).
149. Tex. Fam. Code Ann. § 152.201(a)(1)-(4) (Vernon 2002).
150. § 152.102(7).

to protect a child subjected to or threatened with mistreatment or abuse.[151]

In *In re J.C.B.*,[152] the Amarillo Court of Appeals considered whether the trial court had jurisdiction to order the termination of parental rights. On October 4, 2004, the child, who was approximately sixteen months old and his parents were driving through Texas from Oklahoma when the parents were arrested for possessing drugs.[153] The Department took custody of the child and immediately filed a petition for conservatorship and termination of the parents' parental rights. On November 1, 2004, the Department was appointed the child's managing conservator. The trial court subsequently granted the termination and the mother appealed.

The Amarillo Court of Appeals noted that when the Department took control of the child, neither the child nor his parents were residents of Texas. Further, it was undisputed Oklahoma was the child's home state and no Oklahoma court declined to exercise its jurisdiction over the child. Therefore, the trial court did not have jurisdiction over the child, absent the emergency exception.[154]

The child was only sixteen months old at the time of his parents' arrest and was unable to care for himself. There were also no friends or relatives available to take the child. Accordingly, while the parents' arrest was not "abandonment of [the child] in a technical sense, the child, no doubt, was faced with impending mistreatment or abuse if left alone."[155] Therefore, the trial court had temporary jurisdiction over the child to secure his welfare.[156]

The child remained in the managing conservatorship of the Department from November 1, 2004, until the termination trial in February 2006. The court of appeals recognized the definition of "home state" includes a "residency requirement for a particular period *before* suit is commenced."[157] However, a custody determination entered pursuant to the court's emergency jurisdiction becomes final if, "among other things, the child's home state becomes Texas once the order is entered."[158] Therefore:

> the concept of "home state" differs when jurisdiction is invoked under [the emergency exception] and omits the requirement that the six months of residence occur before the proceeding is commenced. If this were not so, then there could be no home state for purposes of finalizing orders rendered via emergency jurisdiction since the proceeding began before the child had resided with a parent or parent surrogate in Texas for six months.[159]

151. TEX. FAM. CODE ANN. § 152.204(a).
152. 209 S.W.3d 821 (Tex. App.—Amarillo 2006, no pet.).
153. *Id.* at 823.
154. *Id.*
155. *Id.* at 824.
156. *Id.*
157. *Id.* at 824 n.4 (emphasis in original).
158. *Id.*
159. *Id.*

During the fourteen months the child was in the Department's care, the child's home state became Texas.[160] The trial court, therefore, had jurisdiction over the termination.[161]

B. Declaratory Judgment Act

In *Monk v. Pomberg*,[162] the Houston First Court of Appeals considered the intersection of the Family Code and the Texas Declaratory Judgments Act ("DJA").[163] In *Monk*, the mother and the child moved to Iowa in 2002. In November 2003, the father sought to modify conservatorship of the child. The trial court declined jurisdiction because it found Texas was an inconvenient forum for the litigation, Iowa was the child's home state, and neither the child nor the mother had a significant connection with Texas.[164]

In January 2004, the father filed for bankruptcy. In May 2004, the mother filed for termination of the father's parental rights in Iowa, alleging the father failed to pay court-ordered child support. The mother dismissed the petition due to concerns it violated the stay entered by the bankruptcy court and asked the bankruptcy court to lift the stay so she could pursue the termination of the father's parental rights. In July 2004, the bankruptcy court lifted the stay to permit the mother to "commence an action in the court that entered the divorce decree for that court to hear [the mother's] petition to seek termination of the parent-child relationship, or for that court to refer the matter to another forum after it conducted a hearing."[165]

The mother filed suit for declaratory relief in the trial court, requesting the court declare the child's home state was Iowa, her petition to terminate the father's parental rights would not be properly commenced in Texas, and Iowa was the proper jurisdiction and forum to hear the termination petition. The trial court granted the requested relief, declined jurisdiction, and deferred jurisdiction to Iowa.[166] The father appealed, arguing the trial court did not have subject matter jurisdiction to enter the declaratory judgment and the mother did not have standing to pursue a declaratory judgment.

A Texas court with jurisdiction to make a child custody determination may, at any time, decline to exercise its jurisdiction if it determines it is an inconvenient forum under the circumstances and that a court of another

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160. *Id.* at 824.

161. *Id.*

162. No. 01-05-00429-CV, 2007 WL 926491 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, no pet.).

163. Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (Vernon 2008). The Legislature amended section 37.004 during the 2007 session. Because the amendment did not substantively affect the analysis in *Monk*, we will, for convenience, cite to the current version of the statute.

164. *Monk*, 2007 WL 926491, at *1.

165. *Id.* at *2.

166. *Id.*

state is a more appropriate forum.[167] The issue of an inconvenient forum "may be raised upon motion of a party, the court's own motion, or request of another court."[168] The father claimed the mother's petition for declaratory judgment did not meet the statutory requirements.

The court of appeals agreed, concluding the order of the bankruptcy court "did not request or require [the mother] or the trial court to seek another forum, but rather left it up to [the mother] whether to seek termination of [the father's] parental right in the [trial court] or in another forum."[169] Accordingly, the mother failed to comply with section 152.207's procedural requirements.[170] The question, therefore, was whether the mother could "pursue declaratory judgment to raise the issue of inconvenient forum under section 152.207 of the Family Code" or was required to proceed under section 152.207.[171] The Houston court concluded the DJA may be used to determine a party's rights under a statute, municipal ordinance, contract, or franchise.[172] Construing the statute liberally, the court determined the DJA "allows [the mother] to have the trial court declare her rights, status and other legal relations under section 152.207."[173]

VII. CHILD SUPPORT

The Texas Legislature made a number of statutory changes during the 2007 session that affect child support. First, the statutory cap of $6,000 on net resources used when calculating child support has been increased to $7,500.[174] This change effectively increased the amount of child support a high-earning parent must pay. Further, the cap now automatically adjusts every six years, based on the consumer price index, to reflect inflation.[175]

The Legislature also modified the credit an obligor receives for paying for a child's health insurance.[176] Historically, the obligor received a deduction from net resources used to calculate monthly child support for the total cost of health insurance for the obligor's child who was the subject of the child support order—even if other children were part of the cost of the insurance. In 2007, the Legislature adjusted the credit to reflect that more than one child could be covered on the same insurance policy. The credit is now the cost of insuring the children divided by the number of children covered.[177]

The Family Code also now provides a child support obligation accelerates if the obligor dies, with the remaining balance of child support and

167. TEX. FAM. CODE ANN. § 152.207(a) (Vernon 2002).
168. *Id.*
169. *Monk*, 2007 WL 926491, at *4.
170. *Id.*
171. *Id.*
172. *Id.* at *5.
173. *Id.*
174. TEX. FAM. CODE ANN. § 154.125(a) (Vernon Supp. 2008).
175. *Id.*
176. § 154.062(e).
177. *Id.*

costs of health insurance, calculated through the month the child turns eighteen, becoming payable on the date of the obligor's death.[178] The trial court must calculate the present value of the unpaid child support and determine whether any benefits the child is receiving—such as insurance proceeds, trust distributions, or Social Security benefits—satisfy the child support obligation.[179] If not, the obligee may collect from the obligor's estate.[180] The trial court may also order an obligor to purchase life insurance sufficient to satisfy the child support obligation in the event of the obligor's death.[181]

The Legislature also addressed the "redirection" of child support payment in cases where the obligee has voluntarily relinquished possession of the child; been incarcerated or sentenced to be incarcerated for at least ninety days; or relinquished primary possession of the child in a proceeding under the Juvenile Justice Code or under chapter 262 of the Family Code (dealing with removal of the child by a governmental agency).[182] On motion of a party or the person having physical possession of the child, the trial court is required to modify a child support order to redirect the child support to the person having possession of the child for at least six months.[183]

VIII. CONSERVATORSHIP

A. Extended Possession

In *In re C.A.P., Jr.*[184] the trial court named the mother and the father joint managing conservators of their two children. Approximately five years later, the mother filed a motion to modify, seeking to confirm child support arrearages, clarify health care obligations, increase the amount of child support, and enter wage withholding. The trial court granted the motion.

Two months later, the father filed a motion to modify, seeking extended possession of the children under section 153.317 of the Family Code.[185] Section 153.317 gives a possessory conservator the right to extended possession of a child if the child is enrolled in school and the possessory conservator elects for the extended possession "before or at the time of the rendition of the original or modification order."[186] The mother objected to the father's motion, arguing the father failed to timely request extended possession under section 153.317 because he did not request it before or at the time of the hearing on the mother's motion to

178. Tex. Fam. Code Ann. § 154.015 (Vernon Supp. 2008).
179. *Id.*
180. *Id.*
181. Tex. Fam. Code Ann. § 154.016(a) (Vernon Supp. 2008).
182. § 156.409.
183. *Id.*
184. 233 S.W.3d 896 (Tex. App.—Fort Worth 2007, no pet.).
185. *Id.* at 898.
186. Tex. Fam. Code Ann. § 153.317 (Vernon Supp. 2008).

modify. The trial court dismissed the father's motion to modify, and the father appealed.

In an issue of first impression, the Fort Worth Court of Appeals considered whether a possessory conservator has an independent right to seek extended possession under section 153.317. The father argued sections 153.001 (setting out the public policy of Texas is for both parents to be involved with the children),[187] 153.002 (providing the best interest of the child is the primary consideration of the court in determining issues of conservatorship and possession of and access to a child),[188] 153.251 (stating provisions of standard possession is intended to guide courts as to the minimum possession for a joint managing conservator and that it is the public policy of Texas to encourage frequent contact between a child and each parent),[189] and 153.252 (establishing a rebuttable presumption that the standard possession order provides reasonable minimum possession for a parent named a possessory or joint managing conservator and is in the best interest of the child)[190] of the family code took precedence over section 153.317 in situations where it is in the best interest of the child to extend visitation.[191]

Although it noted that section 153.317 appears to conflict with sections 153.002 and 153.252, the court of appeals, applying principles of statutory construction, concluded these provisions could be harmonized to give effect to all sections.[192] Because all sections are contained within the same chapter of the family code, section 153.317 is "governed by the 'general provisions' that clearly state that the public policies and best interest standards are to be paramount."[193]

Section 153.317 provides that the possessory conservator must request extended possession either before or at the time of rendition of the original or modification order.[194] Accordingly, the court of appeals was required to "assume that the exclusion of the time period *after* the rendition of the original or modification order was intentional on the part of the legislature."[195] In limiting the application of section 153.317 to requests made before or at the time of rendition of the original or a subsequent modification order, the legislature "ensured that the best interest of the child would be considered by the court when granting requests for extended possession under section 153.317 because the court is already considering the best interest of the child at possession and modification hearings."[196] Therefore, there is no independent right under section 153.317 to seek extended possession at any time and, if the possessory

187. § 153.001.
188. § 153.002.
189. § 153.251.
190. § 153.252.
191. *C.A.P., Jr.*, 233 S.W.3d at 901.
192. *Id.*
193. *Id.* at 902.
194. *Id.*
195. *Id.* (citing TEX. GOV'T CODE ANN. § 312.002 (Vernon 2005)).
196. *Id.* (citing TEX. FAM. CODE ANN. § 153.002 (Vernon Supp. 2007)).

conservator "fails to ask for extended visitation under section 153.317 until after the modification order is issued, then the request is untimely by virtue of the statute itself."[197]

B. Statutory Presumption

Section 153.131 of the Family Code establishes a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.[198] In *Gardner v. Gardner*,[199] the wife had three children. The husband was the biological father of one of the children and the adoptive father of another of the children. He was neither the adoptive nor the biological father of the third child. After the wife filed for divorce, the parties entered into a mediated settlement agreement addressing a number of issues including joint managing conservatorship of all three children, the wife's right to establish the primary residence of the child the husband had adopted, and visitation terms.[200] After trial, the trial court named the husband and wife joint managing conservators of all three children in accordance with the settlement agreement, but gave the father the right to establish the primary residence of two of the children. The wife appealed, contending the evidence was insufficient to overcome the statutory presumption that a parent should have custody of a child and, therefore, the trial court erred in giving the husband the right to determine the primary residence of the child for whom the husband was neither the natural nor the adoptive father.

The San Antonio Court of Appeals determined that, pursuant to the statutory presumption, "if a non-parent and a parent both seek managing conservatorship of a child, a court may not appoint the non-parent as managing conservator unless the non-parent submits sufficient proof that the appointment of the parent would not be in the best interest of the child."[201] But because the wife agreed to joint managing conservatorship of all three children, the only issue before the trial court was which joint managing conservator should be awarded the right to determine the primary residence of the two children.[202] Accordingly, the statutory presumption did not apply.[203]

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197. *Id.* The court noted that, pursuant to section 156.101 of the family code, a possessory conservator may generally seek a modification when (1) the circumstances of the child or party affected by the order have materially and substantially changed; (2) the child is at least twelve years old and wishes to change the child's primary residence; or (3) the conservator who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary case and possession of the child to another person for at least six months. *Id.* at 902-03 (citing Tex. Fam. Code Ann. § 156.101 (Vernon Supp. 2006)).

198. Tex. Fam. Code Ann. § 153.131(b) (Vernon 2002).

199. 229 S.W.3d 747 (Tex. App.—San Antonio 2007, no pet.).

200. *Id.* at 750.

201. *Id.* at 752.

202. *Id.*

203. *Id.*

The court recognized that the El Paso Court of Appeals had determined in *In re De La Pena*[204] that the presumption applied not only to determination of conservatorship but also to which conservator would have the right to determine the child's primary residence.[205] However, courts are required to interpret statutes according to their plain meaning, and section 153.131 "clearly states the presumption applies only to determinations of conservatorship."[206] The San Antonio Court of Appeals concluded it "would have to rewrite the statute in order to reach" the same result as the El Paso court.[207]

C. Legislative Changes

During the 2007 session, the Texas Legislature made several changes regarding conservatorship of a child. Recognizing the importance of electronic communication, the legislature allowed a trial court to order communication between a child and a conservator through electronic means such as the Internet or videoconferencing.[208] The electronic communication supplements a conservator's periods of possession, but does not substitute for physical possession of the child where appropriate. When ordering electronic communication, the court considers if the communication is in the best interest of the child and if the necessary equipment is reasonably available.[209]

The Legislature also amended the Family Code to address some important issues for military families. The definition of "military deployment" is no longer restricted to military assignments outside the United States.[210] Rather, "military deployment" is military duty for a period of more than six months during which the person ordered to serve is not provided the option of being accompanied by the child and is serving in a location where access to the child is not reasonably possible.[211] A possessory conservator who does not have the exclusive right to determine the primary residence of the child and who is subject to military deployment may designate a person to exercise the possessory conservator's existing periods of possession of the child.[212] If the trial court determines it is in the child's best interest, the person designated by the possessory conservator will have the right to possession of the child while the possessory conservator is deployed.[213] The Legislature also established the military deployment of a conservator without the exclusive right to determine the primary residence of the child is a material and substantial change of cir-

204. 999 S.W.2d 521, 534-35 (Tex. App.—El Paso 1999, no pet.).
205. *Gardner*, 229 S.W.3d at 752 (citing *De La Pena*, 999 S.W.2d at 534-35).
206. *Id.*
207. *Id.*
208. Tex. Fam. Code Ann. § 153.015 (Vernon Supp. 2008).
209. *Id.*
210. § 153.3161(a).
211. *Id.*
212. § 153.3161(b).
213. *Id.*

cumstances sufficient to justify a modification of an existing custody order.[214]

IX. CONCLUSION

The law governing parent-child relationships remains fluid due to the need to base decisions on the best interest of the child. However, during the Survey period, the Texas Legislature addressed some unsettled, or inequitable, areas of the law through amendments and additions to the code. The appellate courts, using principles of statutory construction and strict readings of the statutory language of the family code, also provided greater clarity to some unsettled issues. But, as the cases demonstrate, strict compliance with the Family Code is necessary for a party to avoid losing valuable rights or compelling arguments.

214. TEX. FAM. CODE ANN. § 156.105(b) (Vernon Supp. 2008).