The Ever-Evolving Landscape of Third-Party Standing and Parental Presumptions

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Organizations and Committees:

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

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

Listed as San Antonio Scene's Best Lawyers in San Antonio (2004 - 2019)
Listed in Martindale-Hubbell/ALM - Top Rated Lawyers in Texas (2010 - 2019)
Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2014)
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Listed as one of Texas' Top Ten Lawyers in all fields, *Texas Monthly* Super Lawyers Survey (2009)
Listed as Family Lawyer of the Year by BEST LAWYERS (2012)
Listed as Family Lawyer of the Year by BEST LAWYERS (2011)
Listed as Texas' Top Family Lawyer, Texas Lawyer's *Go-To-Guide* (2007)
Listed as one of Texas' Top 100 Lawyers, and Top 50 Lawyers in South Texas, *Texas Monthly* Super Lawyers Survey(2003-2015)
Listed in the BEST LAWYERS IN AMERICA: Family Law (1987-2020); Appellate Law (2007-2020)

Books and Journal Articles:

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

Magazines:

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

Error Preservation for Evidentiary Rulings; THE ADVOCATE Fall 2016; State Bar of Texas, p 19.

Follow the Money, TEXAS BAR JOURNAL December 2016; pp. 808-809.

Continuing Legal Education Administration:

Course Director, State Bar of Texas:
- Practice Before the Supreme Court of Texas Course (2002 - 2005, 2007, 2009, 2011, 2013, 2015, 2017, and 2019)
- *Enron, The Legal Issues* (Co-director, March, 2002) [Won national ACLEA Award]
- Advanced Expert Witness Course (2001, 2002, 2003, 2004)
- 1999 Impact of the New Rules of Discovery
- 1998 Advanced Civil Appellate Practice Course
- 1991 Advanced Evidence and Discovery
- Computer Workshop at Advanced Family Law (1990-94) and Advanced Civil Trial (1990-91) courses
- 1987 Advanced Family Law Course. Course Director
- 1987 Texas Academy of Family Law Specialists First Annual Trial Institute, Las Vegas, Nevada

SELECTED CLE SPEECHES AND ARTICLES

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

Characterization, Reimbursement, Valuation, and Division Upon Divorce (2010); Separate & Community Property: 30 Rules With Explanations & Examples (2010); The Role of Reasoning in Constructing a Persuasive Argument (2011); Negotiating a Family Law Case (2012) New Appellate Rules for CPS Cases (2012); Court-Ordered Sanctions (2013); Different Ways to Trace Separate Property (2014); Probate & Family Law - What a Family Lawyer Can Learn from the Texas Estates Code (2015); Dividing Ownership Interests in Closely-Held Business Entities: Things to Know and to Avoid (2016); Compensation, Return on Capital and Return of Capital (2017); Tracing and Characterization Techniques (2018); Attacking and Defending Trusts in Divorce (2019)

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

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

SBOT's **New Frontiers in Marital Property Law**: Estate Planning Devises in Divorce–Attacking, Defending and Using Trusts, Estates, Family Partnerships and Other Estate Planning Devices (1996); Bill of Review (2000); Marital Property Issues: Tracing Reimbursement, and Claims for Economic Contribution (2002); Busting Trusts Upon Divorce (2003); Distinguishing Enterprise Goodwill from Personal Goodwill (2006); Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007); Different Ways to Trace Separate Property (2008); Reassessing Some of Our Approaches to Family Law Cases (2009); 21st Century Discovery and Evidence: Electronically Stored Information (2010); A New Approach to Determining Enterprise and Personal Goodwill Upon Divorce (2011); Compensation, Return on Capital and Return of Capital (2012); Distributions from Business Entities: Six Possible Approaches to Characterization (2015); New Frontiers in Tracing Separate Property (2017); Gifts and Trusts, and How to Attack Them (2018)

Texas Center for the Judiciary: Marital Property Issues: Tracing, Reimbursement, and Claims for Economic Contribution (2002); Family Law Updates (2004); Important Topics in Family Law (2007); Family Law Update (2013); Two Hot Topics in Family Law: Same-Sex Marriage; Mediated Settlement Agreements (2014); Same-Sex Marriage and Gender Identity Issues (2015); Same-Sex Marriage and Gender Identity Issues (2016); Dividing the Estate Upon Divorce (2017); 20 Rules for Characterizing Marital Property in Texas (2017); Current Issues Related to Child Custody (2019); Family Law Case Update (2019)

Other CLE: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); SBOT In-House Counsel Course: When an Officer Divorces: How a Company can be Affected by an Officer's Divorce (2009); Fiduciary Litigation Trial Notebook Course: Family Law and Fiduciary Duty (2010); SBOT Handling Your First Civil Appeal The Role of Reasoning and Persuasion in Appeals (2011-2012); AICPA-AAML National Conference on Divorce: Business Valuation Upon Divorce: How Theory and Practice Can Lead to Problems In Court & Goodwill Upon Divorce: Distinguishing Between Intangible Assets, Enterprise Goodwill, and Personal Goodwill (2012); SBOT Anatomy of Fiduciary Litigation: Voir Dire and Jury Questionnaires; History of Texas Supreme Court Jurisprudence, 170 Years of Texas Contract Law (2013); SBOT Exceptional Legal Writing: The Role of Reasoning and Persuasion in Legal Argumentation (2013); Family Law Update - 2013, Judicial Conference (2013); Family Law and Fiduciary Duty, Fiduciary Litigation Course (2013); SBOT Advanced Personal Injury Course, Court-Ordered Sanctions (2014); History of Texas Supreme Court Jurisprudence, The Rise of Modern American Contract Law (2015); Selective Fiduciary Issues in Family Law, 10th Annual Fiduciary Litigation Course (2015); Evidence & Experts, SBOT Child Protection Law Section (2019); Tracing Separate Property in a Texas Divorce, Texas CPA Course (2019)

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

Table of Contents

The Ever-Evolving Landscape of Third-Party Standing and Presumptions in Suits Affecting the Parent-Child Relationship

by

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Texas Board of Legal Specialization

I. INTRODUCTION. This paper discusses standing to participate in suits affecting the parent-child relationship in Texas courts. The paper also discusses the presumptions that are set out in the Texas Family Code that affect burdens of producing evidence and burdens of persuasion in parent-child suits.

Abbreviations. The following acronyms are used in this paper: "TFC" for the Texas Family Code; "TRCP" for Texas Rule of Civil Procedure;"TRE" for the Texas Rules of Evidence; "SAPCR" for suit affecting the parent-child relationship; "DFPS" for the Department of Family and Protective Services; "MC" stands for managing conservator; and "JMC" stands for joint managing conservators.

II. "CONSTITUTIONAL" STANDING. American courts have developed the concept of "standing" to determine whether a particular litigant has sufficient interests at stake to be allowed to bring a lawsuit, or to intervene in a pending lawsuit. In this paper, this aspect of standing is called "constitutional standing," to distinguish it from standing requirements imposed by legislation, which in this paper is called "legislative standing."

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

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

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

1. Cannot be Conferred by Waiver or Consent. "Jurisdiction of the subject matter exists by operation of law only, and cannot be conferred upon any court by consent or waiver." *Fed. Underwriters Exch. v. Pugh*, 174 S.W.2d 598, 600 (1943). In *Tex. Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993) ("*T.A.B.*"), the Texas Supreme Court ruled that, because the justiciable interest requirement of standing affects subject matter jurisdiction, lack of standing can be raised at any time in the litigation process, including for the first time on appeal, by any party, or by the court. *T.A.B.*, 852 S.W.2d 440, 445-46 (Tex. 1993). A trial court's determination regarding standing is subject to de novo review on appeal. *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). If the plaintiff lacks standing, all actions of the trial court are void. *T.A.B.*, 852 S.W.2d 440, 443 (Tex. 1993).

2. Pleading and Proof. "[P]leading a proper basis for standing is sufficient to show standing, unless a party challenges standing and submits evidence showing the non-existence of a fact necessary for standing." *In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.--Houston [14th Dist.] 2014, no pet.) (involving grandparent standing to bring a SAPCR). In *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-28 (Tex. 2004), the Supreme Court explained:

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

The Court went on to say:

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

Id. at 228.

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

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

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

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

Id. at 554-55.

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

held that the grandmother lacked standing to claim reversible error in terminating the unknown father. This conception of constitutional standing to raise complaints on appeal is different from constitutional standing to bring suit in the trial court.

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

1. Constitutional Standing Versus Statutory Standing. Because standing based on justiciable interest is founded on separation of powers in the U.S. and Texas Constitutions, while the standing statutes in the TFC are based on the Texas Legislature's view of public policy, some courts have distinguished between "constitutional" and "statutory" standing. In this view, a party can have a justiciable interest but still not have statutory standing due to the failure to meet the specific requirements of the TFC regarding who can bring or intervene in a SAPCR.

"It has been held that, as a matter of law, grandparents possess a justiciable interest in their grandchild ...." *McCord v. Watts*, 777 SW 2d 809, 812 (Tex. App.–Austin 1989, no writ); citing *Young v. Young*, 693 S.W.2d 696, 698 (Tex. App.--Houston [14th Dist.] 1985, writ dism'd) ("grandparents possess a justiciable interest as 'natural guardians' of a grandchild"); which in turn cited *Herod v. Davidson*, 650 S.W.2d 501, 503 (Tex. App.--Houston [14th Dist.] 1983, no writ). However, while a justiciable interest may meet the constitutional requirement for standing, as seen below there is a legislative framework for standing in SAPCRs that limits the ability of grandparents to initiate and intervene in a SAPCR. *See In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.--Houston [14th Dist.] 2016, pet. denied) (child's grandmother had standing to bring a SAPCR because grandparents as a matter of law have a justiciable interest in their grandchildren, but the grandparent must still plead and prove statutory standing); *see also In re Derzapf*, 219 S.W.3d 327, 331-32 (Tex. 2007) (step-grandparent does not have a justiciable interest in seeking possession or access sufficient to overcome the statute restricting suits for possession or access to biological and adoptive grandparents).

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

S.W.3d 419, 423 (Tex. App.--Houston [14th Dist.] April 16, 2016, pet. den.) (mem. op) (distinguishing constitutional standing from "statutory restrictions on who may bring suit").

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

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

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

Several points should be noted about standing:

1. The claimant must plead facts that affirmatively demonstrate the court's jurisdiction to hear the case. *T.A.B.*, 852 S.W.2d at 446. Where standing is challenged for the first time on appeal, the appellate court "must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing." *T.A.B.*, 852 S.W. 2d at 446. At the trial level, however, standing is sometimes determined not just by the pleadings, but also the evidence offered by the parties for or against standing. *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). In a SAPCR, "[t]he party seeking relief must allege and establish standing within the parameters of the language used in the statute." *In Interest of K.S.*, 492 S.W.3d 419, 423 (Tex. App.--Houston [14th Dist.] 2016, pet. denied) (involving grandparent standing in a SAPCR). "The petitioner must also show the facts establishing standing existed at the time suit was filed in the trial court." *Id.* at 423.

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

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

4. The United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), is the preeminent source of standards in the area of limiting the right of non-parents to participate in parent-child litigation. The case involved substantive due process and not standing per se, but in Texas [*Troxel*] instigated statutes regarding standing and burdens of proof. In *Troxel*, a majority of the Court voted to reverse a state court's award of visitation to the grandparents of the children of their deceased son. However, there were six Opinions in that case, and none garnered a majority vote. The plurality Opinion written by Justice Sandra Day O'Connor garnered the most votes (four), and is therefore the "lead" Opinion. Justices Souter and Thomas each wrote concurring Opinions that no other Justice joined. Justices Stevens, Scalia, and Kennedy each wrote dissenting Opinions that no other Justice joined. The Court was therefore very fractured on the subject of the constitutional dimensions of standing in parent-child litigation. Because Justice O'Connor's plurality Opinion was not supported by a majority of the Justices, it is not stare decisis or binding precedent. A case with no majority opinion could be confined to its holding, but some argue that in a plurality case the various Opinions issued by the Justices should be compared to see if there are overlapping statements that suggest a theoretical majority on one

or more points of law.[1] Other courts should have considered Justice O'Connor's Opinion as instructive, or perhaps even persuasive, but not as binding authority. However, the Texas Supreme Court adopted into Texas law Justice O'Connor's view that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family." *In re Mays–Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (quoting *Troxel*, at 68; *see also Troxel*, 530 U.S. at 72–73, noting that the constitution "does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better decision' could be made"). So Justice O'Connor's non-precedential Opinion has become binding precedent in Texas. *Troxel* also motivated the Texas Legislature to adopt statutes governing standing in SAPCRs, and the burden of persuasion in denying a parent MC status, resulting in a high degree of complexity and much confusion in some cases.

III. STATUTORY STANDING IN TEXAS SAPCRs. The Legislature has adopted a statutory framework governing standing to initiate or intervene in a SAPCR.

A. CANNOT AWARD PARENTAL RIGHTS TO NON-PARTY. To be eligible to be awarded court-ordered rights and responsibilities over a child, the person must initiate, or intervene in, or be joined as a respondent in, a SAPCR. So it has been held that a court cannot award visitation to a non-party. *Matter of Marriage of D.E.L. & J.J.P.*, No. 14-17-00216-CV, at *3 (Tex. App.--Houston [14th Dist.] Feb. 12, 2019, no pet.) (mem. op.) ("In the absence of a non-parent's intervention, the trial court has no authority to award any non-party visitation"); *accord*, *In re H.R.L.*, 458 S.W.3d 23, 31 (Tex. App.--El Paso 2014, orig. proceeding) (trial court had no jurisdiction to award grandmother relief without first determining she had standing and granting her leave to intervene). However, joinder as a party might not be required where the parties agree to give parental rights or duties to a non-party. And the standing statutes do not regulate when a party can join someone without standing as a respondent or third-party respondent. [Author's note: A court, wishing to involve non-parties in a child's upbringing, could advise the parties of the court's receptiveness to the joinder of the non-party, or the court could appoint a guardian ad litem who could hire an attorney to intervene on behalf of the children and join the non-party as a respondent in the proceeding. However, *In re A.M.S.* 227 S.W.3d 92, 97-99 (Tex. App.--Texarkana 2009, no pet.), held that an agreed order making a step-grand parent JMC was void.]

IV. STATUTORY STANDING IN TEXAS SAPCRs. As noted in Section II.C above, a party with a justiciable interest (i.e., constitutional standing) can be precluded by statute from bringing (or intervening in) a lawsuit. In *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000), the Court called this a statutory prerequisite to bringing suit. The Texas Legislature has adopted an elaborate framework of statutory prerequisites for bringing or intervening in a SAPCR.

They are:

§ 102.003 General Standing to File a SAPCR

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

§ 102.004 Standing for Grandparent or Other Person Seeking Custody
§ 102.004(b) Standing to Intervene
§ 102.0045 Standing for Sibling
§ 102.005 Standing for Termination and Adoption
§ 102.006 Standing Where Living Parents Have Been Terminated
§ 102.007 Standing of Title IV-D Agency to seek child support
§ 153.431 Appointment of Grandparent, Aunt, or Uncle as Managing Conservator
§ 153.432 Standing for Grandparent Possession or Access
§ 154.303 Standing to Seek Child Support for Adult Disabled Child
§ 156.002 Standing to Seek Modification

The Legislature provided in TFC § 34.007(c) that being named as an adult caregiver, under a Chapter 34 authorization agreement to provide care for a child, does not confer or affect standing or the right to intervene in a SAPCR.

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

(1) a parent of the child;

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

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

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

(5) a governmental entity;

(6) the DFPS;

(7) a licensed child placing agency;

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

(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;

(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162 [Termination of the Parent-Child Relationship];

(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child's guardian, managing conservator, or parent is deceased at the time of the filing of the petition;

(12) a person who is the foster parent of a child placed by the DFPS in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition [however, a foster parent can file to adopt the child at any time after the foster parent has been approved to adopt the child, if the child is eligible to be adopted. See TFC § 102.003(c)];

(13) a person who is a relative of the child within the third degree by consanguinity,[2] as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition;

(14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035,[3] regardless of whether the child has been born; or

(15) a person who is an intended parent under a gestational agreement that complies with TFC § 160.754, provided that the SAPCR is filed jointly with the other intended parent or is filed against the other intended parent under the gestational agreement. See TFC § 102.003(d).

Several points should be noted regarding TFC § 102.003:

1. Section 102.003 applies to initiating a SAPCR relating to any issue, be that managing or possessory conservatorship, geographical restriction, parental rights and responsibilities, child support, possessory periods, court-ordered access to the child, establishing or terminating the parent-child relationship, or adoption. See the definition of a SAPCR in TFC § 101.032. The courts of appeals disagree on whether Section 102.003 provides standing to intervene in a pending SAPCR.

2. The term "parent" used in Section 102.003(1) is defined in Section 101.024 in this way: "Parent" means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father. Except as provided by Subsection (b), the term does not include a parent as to whom the parent-child relationship has been terminated.... Under Tex. Fam. Code § 160.204(a)(1), a man is presumed to be the father of a child if he is married to the mother of the child and the child is born during the marriage. In Marriage of Mitchell, No. 06-18-00047-CV (Tex. App.--Texarkana Aug. 6, 2019, n.p.h.) (mem. op.), the appellate court held that the husband of a child born during

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

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

marriage was a presumed parent, even if he was not the biological father, and thus had standing under Section 102.003 to bring a SAPCR as "a parent of the child."

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

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

5. Older cases, decided before the extensive standing statutory framework was enacted, looked to the statute regarding service of citation to see who had a sufficient interest in a child to afford standing. *See Pratt v. Texas Department of Human Resources*, 614 S.W.2d 490 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.) (list of persons to be served in SAPCR was "a legislative determination of the persons who have a relationship with the child of sufficient legal dignity to be entitled to participate in an action involving the child." Current TFC §102.009 lists persons entitled to service of citation in a SAPCR: a managing conservator; a possessory conservator; a person having possession of or access to the child under an order; a person required by law or by order to provide for the support of the child; a guardian of the person of the child; a guardian of the estate of the child; each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Ch. 161; an alleged father, unless there is attached to the petition an affidavit of waiver of interest in a child executed by the alleged father as provided by Ch. 161 or unless the petitioner has complied with the provisions of §161.002(b)(2), (3), or (4); a man who has filed a notice of intent to claim paternity as provided by Ch. 160; the DFPS, if the petition requests that the department be appointed as managing conservator of the child; the Title IV-D agency, if the petition requests the termination of the parent-child relationship and support rights have been assigned to the Title IV-D agency under Ch. 231; a prospective adoptive parent to whom standing has been conferred under §102.0035; and a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Ch. 161 or to whom consent to adoption has been given in writing under Ch.162.

1. Actual Care, Control, and Possession for at Least Six Months. TFC § 102.003(a)(9) grants standing to file a SAPCR to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TFC § 102.003(b) provides that in computing the time under subsection (9), the trial court "may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit."

The Texas Supreme Court addressed TFC § 102.003(a)(9) in the case of *In re H.S.*, 550 S.W.3d 151

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

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

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

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

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

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

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

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

5. TFC § 102.003(a)(9)'s standard of "actual care, control, and possession" could apply to a

step-parent, a female spouse or unmarried partner of a biological mother, a grandparent, or a non-relative.

B. GRANDPARENTS/OTHER RELATIVES INITIATING OR INTERVENING. The Legislature has enacted a special standing provision for a child's grandparents and other relatives within the third degree of consanguinity who file or intervene in an original SAPCR. TFC § 102.004, Standing for Grandparent or Other Person, provides:

> Sec. 102.004. STANDING FOR GRANDPARENT OR OTHER PERSON.
>
> (a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
>
> (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or
>
> (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.
>
> (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this chapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.
>
> (b-1) A foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).
>
> (c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153.

1. Observations on the Statute.

Several things should be noted about TFC § 102.004:

1. Section 102.004(a) exists apart from the general standing statute (Section 102.003), so it is an alternative basis for determining standing that applies to persons within the third degree of consanguinity. Relatives within the third degree of consanguinity can establish standing under either Section 102.003 or Section 102.004(a).

2. Section 102.004(b) is couched in terms of standing to intervene in a pending SAPCR. One court has held that this Code provision cannot bestow standing for a grandparent to file an

original proceeding where there was no pending proceeding in which to intervene. *See In re R.M.*, No. 02-17-00234-CV, *5 (Tex. App.--Fort Worth Nov. 16, 2017, no pet.) (mem. op.).

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

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

5. The terms "substantial past contact" used in TFC § 102.004(b) is not defined by statute or case law. The question is determined on a case-by-case basis. *In re L.S.B.*, No. 05-17-00929-CV, *1 (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.); *In re N.L.D.*, 412 S.W.3d 810, 815 (Tex. App.--Texarkana 2013, no pet.) (substantial past contact is determined on a case-by-case basis). In evaluating a grandparent intervention in a SAPCR, the appellate court in *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), reverted to the dictionary definition of substantial as meaning "of ample or considerable amount, quantity, sized, etc." *Id.* at *4. (The same dictionary definition was used in *In re Tinker*, 549 S.W.3d 747, 751 (Tex. App.--Waco 2017, orig. proceeding)). The *Schick* court engaged in a "fact-intensive" inquiry focused on the amount of actual contact the child had with the adult. The court listed examples of substantial past contact in other cases, including *Chavez v. Chavez*, 148 S.W.3d 449, 456 (Tex. App.--El Paso 2004, no pet.) (grandparents had standing to intervene when children lived with them for over a year); *In re A.M.*, 60 S.W.3d 166, 169 (Tex. App.--Houston [1st Dist.] 2001, no pet.) (foster parents had standing when seventeen-month-old child resided with them for fourteen months); *In re M.T.*, 21 S.W.3d 925, 927 (Tex. App.--Beaumont 2000, no pet.) (foster parents had standing to intervene after children lived with them for fourteen months); *In re Hidalgo*, 938 S.W.2d 492, 495 (Tex. App.--Texarkana 1996, no writ) (step-grandmother had standing to file petition for managing conservator when she and the child were close since child's birth and child resided with her). Considering the circumstances of the case at bar, the appellate court in *Schick* ruled that the grandparents failed to show substantial past contact. *Id.* at *6.

6. The statutory language "grandparent or other person, subject to the requirements of Subsection (b-1) if applicable, deemed by the court to have had substantial past contact with the child ..." raises the question of whether the substantial-past-contact requirement applies to both grandparents and other persons, or just to "other persons." The court in *In re M.A.M.*, 35 S.W.3d 788, 790 (Tex. App.--Beaumont 2001, no pet.), invoked the rule that "[a] qualifying phrase contained in a statute must be confined to the words and phrases immediately preceding it to

which it may be applied without impairing the meaning of the sentence." The court thus concluded: "The qualifying phrase, 'deemed by the court to have had substantial past contact with the child,' modifies 'other person,' not 'grandparent or other person.'" *Accord*, *In re Nelke*, 573 S.W.3d 917, 921 (Tex. App.--Dallas 2019, orig. pet.) (invoking the last-antecedent doctrine). The contrary conclusion was reached in *In re Clay*, 02-18-00404-CV, at *4-5 (Tex. App.--Fort Worth Feb. 12, 2019, orig. proceeding), *mandamus denied sub nom. In re Cheryl Jackson*, No. 19-0256 (Tex. April 5, 2019).

7. Subsection (b) says that "the court *may* grant a grandparent ... leave to intervene ..." The question arises whether the term "may" allows a trial court to deny standing to a grandparent who offers satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. In *In re M.B.*, No. 09-19-00247-CV, at *3 (Tex. App.--Beaumont Oct. 3, 2019, no pet.) (mem. op.), the court held that the term "may" did not give the trial court discretion to dismiss a grandparent's intervention if satisfactory proof indicated significant impairment.

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

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

10. It is often a mistake for a grandparent to seek temporary managing conservatorship early in the case, because that forces a merits-related determination of whether the grandparent can overcome the parental presumption by proving significant impairment before the facts can be thoroughly developed. A more prudent approach would be to file the suit, use discovery to develop the facts, hire an expert and ask the court's permission for the expert to examine the parents and children, perhaps ask for the appointment of a guardian ad litem or an attorney ad

litem or amicus attorney, or request a court-ordered custody evaluation, in order to develop a robust case for significant impairment that can be presented in the context of a multi-day trial rather than an hours-long temporary hearing.

2. Will General Standing Support Intervention? In *In re H.R.L.*, 458 S.W.3d 23, 30 (Tex. App.--El Paso 2014, orig. proceeding), the court said: "As a general rule, an individual's standing to intervene is commensurate with that individual's standing to file an original lawsuit." However, in TFC §102.004(b) the Legislature has given trial courts the power to allow non-parents to intervene in SAPCRs if significant impairment is satisfactorily proven. *Id.* at 30. The courts of appeals disagree on whether a party with standing under the general standing provisions of Section 102.003(a) can intervene in a SAPCR without proving significant impairment as required by Section 102.004(b). In *In the Interest of A.T.G.*, No. 04-18-00208-CV, *2 (Tex. App.--San Antonio Sept. 26, 2018, no pet.) (mem. op.), the appellate court found that since the foster parents had standing to initiate a SAPCR under TFC §102.003(a)(12), it followed that the foster parents had standing to intervene in a pending SAPCR. *Accord*, *In re Shifflet*, 462 S.W.3d 528, 537 (Tex. App.--Houston [1st Dist.] 2015, no pet.); *In Interest of A.T.*, No. 14-14-00071-CV, *10 (Tex. App.--Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.); *In re S.B.*, No. 02–11–00081–CV, *2–3 (Tex. App.--Fort Worth Mar. 11, 2011, orig. proceeding) (mem. op.) (grandparents who satisfied TFC § 102.004(a)'s requirements for filing an original SAPCR also have the right to intervene). But other cases hold the opposite: *In re Nelke*, 573 S.W.3d 917, 921 (Tex. App.--Dallas 2019, orig. pet.) (standing to file initial suit does not apply to an intervention); *Interest of A.G.*, No. 05-18-00725-CV, *3 (Tex. App.--Dallas Dec. 12, 2018 no pet.) (standing under TFC § 102.004(a) not relevant to standing under TFC § 102.004(b)); *In Interest of E.C.*, No. 05-17-00723-CV,*4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.) (analyzing cases pro and con and deciding that standing to intervene must be shown without regard to standing under TFC § 102.003(a)). In *In re Schick*, No. 04-18-00839-CV (Tex. App.--San Antonio Dec. 19, 2018, orig. proceeding) (mem. op.), the Court of Appeals confined its analysis of standing to the standing to intervene under TRC § 102.004(b), and did not consider standing under § 102.004(a) for filing an original SAPCR. Apart from the foregoing, in *Shook v. Gray*, 381 S.W.3d 540 (Tex. 2012), the Supreme Court allowed a grandparent to intervene in a custody case based on standing under TFC § 102.003(a)(9). This decision by the Supreme Court should be enough to settle the issue.

3. What Constitutes Satisfactory Proof? The court in *In re K.D.H.*, 426 S.W.3d 879, 886 (Tex. App.--Houston [14th Dist.] 2014, no pet.), examined the "satisfactory proof to the court" component of TFC § 102.004(b). The term "satisfactory proof to the court" is not defined in the statute and has no technical meaning. *Id.* at 886-86. The San Antonio Court of Appeals, in *In re Schick* (cited above) held that "satisfactory proof" under § 102.004(b) means a preponderance of the evidence. The court went on to say that the question for the Court is whether a fact issue exists. The First Court of Appeals, in three cases, held that the "satisfactory proof to the court" component of TFC § 102.004(b) means a preponderance of the evidence. *Rolle v. Hardy*, 527 S.W.3d 405, 417 (Tex. App.--Houston [1st Dist.] 2017, no pet.) (appeal from dismissal); *Compton v. Pfannenstiel*, 428 S.W.3d 881, 885 (Tex. App.--Houston [1st Dist.] 2014, no pet.) (appeal from final trial); *Mauldin v. Clements*, 428 S.W.3d 247, 263 (Tex. App.--Houston [1st Dist.] 2014, no pet.) (appeal from final trial). The El Paso Court of Appeals agreed in *In re H.R.L.*, 458 S.W.3d 23, 30 (Tex. App.--El Paso 2014, orig. proceeding) (mandamus to set aside temporary orders), where it wrote: "Shumate was required to establish standing under Section 102.004(b) by a preponderance of the evidence." The Texarkana court

discounted this concern in *In re C.M.C.*, 192 S.W.3d 866, 870 (Tex. App.--Texarkana 2006, no pet.) (appeal from final trial), on the basis that a decision to dismiss a case for lack of standing is not a decision on the merits.

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

4. When Standing Implicates the Merits. Under TFC § 102.004(a), standing for a relative within the third degree of consanguinity exists when "the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development." Under TFC § 102.004(b), a court can allow a grandparent to intervene when "the child's present circumstances would significantly impair the child's physical health or emotional development." In both instances, the grounds for standing is very similar to the proof required to win custody at trial, that appointment of the parent or parents as managing conservators "would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development." TFC § 153.131(a) (the parental presumption). This issue was addressed in *In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.--Houston [14th Dist.] 2014, no pet.):

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

> Important Point: A grandparent-initiated SAPCR and a grandparent intervention filed under TFC § 102.004 should not be dismissed pre-trial where a plausible (or convincing) case of significant impairment has been presented. That then raised the question of whether the trial court should delay ruling on standing until after depositions and perhaps even a court-ordered custody evaluation.

5. Standing of Foster Parents to Intervene. It should be noted that foster parents can intervene in a SAPCR only if the requirements of Section 102.004(b) are met *and* the foster parents "would have standing to file an original suit." Tex. Fam. Code § 102.004(b-1). In *In the Interest of A.T.G.*, No. 04-18-00208-CV (Tex. App.--San Antonio Sept. 26, 2018, no pet.) (mem. op.), the appellate court

found that since the foster parents had standing to initiate a SAPCR under Tex. Fam. Code §102.003(a)(12), it follows that the foster parents had standing to intervene in a pending SAPCR. *Id*. at *2. However, in *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App.--Houston [1st Dist.] Mar. 12, 2019, no pet.) (mem. op.), the appellate court said that to intervene, foster parents must show substantial past contact, that the termination suit was filed by a party authorized to do so, and that appointing a parent as managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. *Id.* at *3.

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

D. STANDING WHERE LIVING PARENTS HAVE BEEN TERMINATED. TFC § 102.006 applies when the parent-child relationship has been terminated with every living parent. An original SAPCR cannot be filed by a terminated former parent, the father of the child, or a family member of a terminated prior parent. However, these prohibitions do not apply to a person who has a continuing right of possession of or access to the child under an existing court order. Nor do they apply when the person bringing the SAPCR has the consent of the child's MC, guardian, or legal custodian to bring the suit. Nor do the prohibitions apply to the child's adult siblings, grandparent, consanguineous aunt or uncle, provided they file the SAPCR within 90 days of the termination in a suit brought by the DFPS.

E. STANDING FOR TERMINATION AND ADOPTION. Standing to bring a suit for termination and adoption is addressed in TFC § 102.005:

> § 102.005. Standing to Request Termination and Adoption
>
> An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:
>
> (1) a stepparent of the child;
>
> (2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
>
> (3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
>
> (4) an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
>
> (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

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

TFC § 162.010(a) provides:

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

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

F. STANDING OF IV-D AGENCY TO SEEK CHILD SUPPORT. TFC §102.007 gives the Texas Attorney General providing child support-related services standing to file a child support action, or to seek to modify a child support order.

G. APPOINTMENT OF GRANDPARENT, AUNT OR UNCLE AS MANAGING CONSERVATOR. TFC § 153.431 applies when both parents of a child are deceased, and says that "the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court." While the statute does not explicitly say that the relative has standing to file or intervene i a SAPCR, this is the import of the statute.

H. STANDING TO SEEK GRANDPARENT POSSESSION OR ACCESS. TFC § 153.432 gives

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

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

TFC § 153.433 sets out certain conditions for a court to award possession or access to a grandparent or adoptive grandparent. Under Subsection (a)(1), at the time relief is requested, at least one parent must not have had parental rights terminated. Under Subsection (a)(2), the grandparent must "overcome[] the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being." Under Subsection (a)(3), that grandparent's child, who is parent of the child in question, must be in jail or prison during the three-month period preceding the filing of the petition; or must have been found by a court to be incompetent; or be dead; or does not have actual or court-ordered possession of or access to the child.

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

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

Note that a grandparent moving under Section 153.433(2) must show that the denial of possession or access would significantly impair the child's physical health or emotional well-being, both to establish standing and to win at trial. The court is not supposed to resolve fact issues on a motion to dismiss

for lack of standing that go to the merits of the case. However, in this instance standing under TFC § 153.432 is measured by an affidavit, or prima facie proof, meaning that the court must assume that the facts in the affidavit are true and see if they make a sufficient showing. So the proscription against weighing jurisdictional facts pre-trial is not violated. For a recent case granting mandamus to dismiss a grandparent access case, see *In re Turan*, No. 13-19-00124-CV, *5 (Tex. App.--Corpus Christi Oct. 2, 2019, orig. proceeding) (mem. op.).

Points to note about grandparent possession and access:

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

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

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

I. STANDING TO SEEK SUPPORT FOR ADULT DISABLED CHILD. TFC § 154.303 provides standing to bring a SAPCR seeking support for a minor or adult disabled child. Suit can be filed by the child's parent or other person with physical custody or guardianship under a court order. The child can file the suit if age 18 or older, not under a mental disabilty, and determined by the court to be capable of managing his or her own affairs. The claim cannot be assigned except to a Title IV-D agency.

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

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

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

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

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

"[A]ny person mentioned in the previous decree in the context of conservatorship is a 'party affected.'" *Watts v. Watts*, 573 S.W.2d 864, 868 (Tex. Civ. App.--Fort Worth 1978, no writ). The term "affected by an order" in the statute does not require that the party have been appointed a conservator of the child. Rather, a party is "affected by an order" if s/he is given important rights, or burdened with duties, regarding the children. *In re S.A.M.*, 321 S.W.3d 785, 791 (Tex. App.--Houston [14th Dist.] 2010, no pet.) (rejecting the contention that "party" means someone merely mentioned in a previous decree in the context of conservatorship, but applying a definition of "producing an effect on" the person, which was met by being awarded telephone access); *Moreno v. Perez*, 363 S.W.3d 725 (Tex. App.--Houston [1st Dist.] 2011, no pet.) (party who received visitation rights had standing).

Under TFC § 156.002(b), a modification proceeding can be filed by anyone meeting any of the standing requirements of TFC ch. 102.

Grandparents have standing to file a modification proceeding to gain possession or access under TFC § 153.432.

L. STANDING TO SEEK TO ESTABLISH PATERNITY. A proceeding to adjudicate parentage may be maintained by:

(1) the child;
(2) the mother of the child;
(3) a man whose paternity of the child is to be adjudicated;
(4) the support enforcement agency or another government agency authorized by other law;
(5) an authorized adoption agency or licensed child-placing agency;
(6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, is incapacitated, or is a minor;
(7) a person related within the second degree by consanguinity to the mother of the child, if the mother is deceased; or
(8) a person who is an intended parent.

After the date a child having no presumed, acknowledged, or adjudicated father becomes an adult, a proceeding to adjudicate the parentage of the adult child may only be maintained by the adult child.

V. PROCEDURAL ASPECTS OF STANDING DISPUTES.

A. PLEADING FACTS TO SUPPORT JURISDICTION. The party seeking relief must "allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause." *T.A.B.*, at 446. "[A] litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. See Tex.R.Civ.P. 80. Failing that, the suit is dismissed." *Id.* at 446. If a claim is dismissed on the pleadings, the appellate court must "'construe the pleadings in favor of the plaintiff and look to the pleader's intent.'" *Id.* at 446.

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

In *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.--San Antonio 2009, pet. denied) the court wrote:

> Whether a court has subject matter jurisdiction is a question of law. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The plaintiff has the burden to

> allege facts demonstrating jurisdiction and we construe the pleadings liberally in its favor. *Id.* When a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court reviews the relevant evidence to determine whether a fact issue exists. *See id.* at 227. If the evidence raises a fact question on jurisdiction, the trial court cannot grant the plea and the issue must be resolved by the trier of fact. *Id*. at 227–28. If the evidence is undisputed or fails to raise a fact question, the trial court must rule on the plea as a matter of law. *Id.* at 228. We review the trial court's ruling de novo. *Id.* We take as true all evidence favorable to the nonmovant and indulge every reasonable inference in its favor. *Id.* When the trial court makes and files findings of fact and conclusions of law, as in this case, we review the trial court's findings under the sufficiency of the evidence standard, and the trial court's conclusions of law are reviewed de novo. *Lonza AG v. Blum*, 70 S.W.3d 184, 189 (Tex. App.--San Antonio 2001, pet. denied).

C. INTERVENTION IN A SAPCR. The procedure for intervening in a SAPCR varies from other litigation.

1. The Rule. TRCP 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." "An intervenor is not required to secure the court's permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike." *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). "[A] person or entity has the right to intervene if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." *Id.* at 657.

2. Leave of Court Required in SAPCR. In *In Interest of A.T.*, No. 14-14-00071-CV, *8 (Tex. App.--Houston [14th Dist.] July 15, 2014, no pet.) (mem. op.), the court held that a person is required to ask the trial court for leave in order to intervene under TFC § 102.004(b), notwithstanding the language in TRCP 60 suggesting that you can file first, subject to being stricken later.

3. Late Intervention. The Court in *In the Interest of E.C.*, No. 05-17-00723-CV, *4 (Tex. App.--Dallas Dec. 20, 2017, no pet.) (mem. op.), held that a trial court may deny leave to intervene under TRC § 102.004(b) where the intervention occurs late in the case, or for other procedural reasons. "[T]rial courts [may] weigh the benefits of such interventions against the potential for disruption in a pending suit." *Id*. at *4. In *In the Interest of E.C.D.*, No. 01-18-00886-CV (Tex. App.--Houston [1st Dist.] Mar. 12, 2019) (mem. op.), a child's foster parents filed a petition to intervene in a termination case one week before trial. The trial court refused to strike the petition, and proceeded to trial. The lateness of the intervention was not put in issue in the appeal.

D. DIRECT AND COLLATERAL ATTACK. If a judgment is allowed to go final, can it be attacked later on the ground that the party bringing the lawsuit lacked standing, so that the court's order is void and subject to being set aside? In *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017), the court said that "[a] judgment rendered without subject-matter jurisdiction is void and subject to collateral attack."

A bill of review is an equitable proceeding brought by a party seeking to set aside a prior judgment

that is no longer subject to challenge by a motion for new trial or appeal. *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam). In *In re D.S.*, No. 05-17-01066-CV, at *4 (Tex. App.--Dallas Apr. 18, 2018, pet. pending) (briefs requested and submitted), the former husband and father of a child filed a bill of review to set aside his divorce decree. In the divorce, the father signed an affidavit of relinquishment or parental rights and an MSA saying that he would maintain life insurance payable to the child and would paid $3,500 per month for sixty months into a trust fund for the child's education. He also signed an agreed decree of divorce. The father later brought a bill of review to set aside the termination on the ground that the Texas court did not have jurisdiction under the UCCJEA because Massachusetts was the child's home state. The court explained, at pp. 310-11:

> A bill of review, when properly brought, is a direct attack on a judgment. *Fender v. Moss*, 696 S.W.2d 410, 412 (Tex. App.--Dallas 1985, writ ref'd n.r.e.). A direct attack is a proceeding brought for the purpose of changing a former judgment and securing the rendition of a correct judgment. *Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973). When a bill of review fails as a direct attack, it may instead constitute a collateral attack. *Fender*, 696 S.W.2d at 412; *Pursley v. Ussery*, 937 S.W.2d 566, 568 (Tex. App.--San Antonio 1996, no writ).
>
> A collateral attack does not attempt to secure a corrected judgment. *Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005). Rather, it is an attempt to avoid the effect of the former judgment in order to obtain specific relief the judgment currently impedes. *PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 272 (Tex. 2012). Only a void judgment may be collaterally attacked. *Browning*, 165 S.W.3d at 346. A judgment is void when "the court rendering judgment had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act." *PNS Stores, Inc.*, 379 S.W.3d at 272 (quoting *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 863 (Tex. 2010)).
>
> Collateral attacks on final judgments are "generally disallowed because it is the policy of the law to give finality to the judgments of the courts." *Browning*, 165 S.W.3d at 345. A collateral attack, which attempts to bypass the appellate process in challenging the integrity of a judgment, runs counter to the policy of finality. *Id*. at 346. Texas has a strong public interest in according finality to judgments involving the termination of parental rights. *See In re K.S.L.*, 538 S.W.3d 107, 115-16 (Tex. 2017).
>
> Our review of a collateral attack is limited to whether the record affirmatively and conclusively negates the existence of jurisdiction, not whether the trial court otherwise erred in reaching its judgment. *In re Blankenship*, 392 S.W.3d 249, 255 (Tex. App.--San Antonio 2012, no pet.). We presume the judgment is valid, *PNS Stores, Inc.*, 379 S.W.3d at 273; *Sun Tec Computer, Inc. v. Recovar Grp., LLC*, No. 05-14-00257-CV, 2015 WL 5099191, at *2 (Tex. App.--Dallas Aug. 31, 2015, no pet.) (mem. op.), unless the record affirmatively reveals a jurisdictional defect. *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (per curiam). The record affirmatively demonstrates a jurisdictional defect sufficient to void a judgment when it either: (1) establishes the trial court lacked subject matter jurisdiction over the suit or (2) exposes such personal jurisdictional deficiencies as to violate due process. *PNS Stores, Inc.*, 379 S.W.3d at 273; see also *White v. White*, 142 Tex. 499, 179 S.W.2d 503, 506 (1944) ("In

> order for a collateral attack to be successful the record must affirmatively reveal the jurisdictional defect").
>
> Extrinsic evidence generally may not be used to establish lack of jurisdiction in a collateral attack on a judgment. *York v. State*, 373 S.W.3d 32, 41 (Tex. 2012); *Alderson*, 352 S.W.3d at 879. If the record of the underlying proceeding does not affirmatively establish a lack of jurisdiction, "the law conclusively presumes" the existence of jurisdiction, and evidence outside the record "to the contrary will not be received." *Alfonso*, 251 S.W.3d at 55 (quoting White, 179 S.W.2d at 506). However, evidence outside the record may be used to collaterally attack a void judgment in:
>
> > [C]lasses of cases over which a court has not, under the very law of its creation, any possible power; e.g. an administration upon the estate of a living person, administration upon the estate of a deceased soldier when prohibited by statute, an administration in bankruptcy upon the estate of a person deceased before the institution of the proceedings, a suit for divorce in a foreign country in which neither of the parties is domiciled, or a suit to recover against a nonresident, upon service by publication, a purely personal judgment.
>
> *York*, 373 S.W.3d at 41 (quoting *Templeton v. Ferguson*, 89 Tex. 47, 33 S.W. 329, 332 (1895)); see also *S. Cty. Mut. Ins. Co. v. Powell*, 736 S.W.2d 745, 749 (Tex. App.--Houston [14th Dist.] 1987, no writ) (noting that in some cases extrinsic evidence may be used in collateral attack "to establish facts that show the reason the court had no jurisdiction over the subject matter involved in the judgment").

Treating the bill of review as a collateral attack on the decree, the Dallas Court of Appeals declared the termination decree to be void for lack of subject matter jurisdiction. The appellate court affirmed the denial of a bill of review on the divorce part of the decree. At the time this article is written, the case is pending review in the Supreme Court, which has requested briefing. [The petitioner in *D.S.* is represented in the Supreme Court by two former Supreme Court Justices and the former Chief Justice.]

While a collateral attack based on lack of subject matter jurisdiction is different from a claim of lack of standing, the language of cases saying that a SAPCR decree is void if the petitioner lacks standing suggests that a collateral attack by way of bill of review is available to attack a final SAPCR judgment. This makes it even more important to differentiate constitutional standing based on justiciable interest from the statutory standards on standing to bring or intervene in a SAPCR, if in fact constitutional standing is a non-waivable jurisdictional issue and statutory standing is waivable and non-jurisdictional.

E. APPELLATE REVIEW. The standard of appellate review of the grant or denial of leave to intervene in a SAPCR is abuse of discretion. *See Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982) (a non-family law case). A dismissal of a plea in intervention is reviewable by appeal from the order dismissing the intervention (if the intervention is severed so that it becomes a final judgment). *See In re L.S.B.*, No. 05-17-00929-CV (Tex. App.--Dallas July 27, 2018, no pet.) (mem. op.) (involving a distant relative). The granting of leave to intervene is reviewable by mandamus, but the issue can also

be raised on appeal from the final judgment. *Interest of A.R.*, No. 02-19-00031-CV, at *1 (Tex. App.--Fort Worth Apr. 11, 2019, no pet.) (appellate court dismissed a pre-judgment appeal from refusal to dismiss for lack of standing). An order denying a motion to dismiss for lack of standing in a SAPCR is not a final judgment or appealable interlocutory order. It must be challenged either by mandamus or by appeal from the final judgment.

A special rule arises if standing is attacked for the first time on appeal. Because the pleader cannot on appeal amend his pleadings to attempt to cure a lacking of jurisdictional facts, the appellate court must "construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing." *T.A.B.*, at 446.

VI. STANDING IN NATIVE AMERICAN SAPCRs. On August 19, 2019, the U.S. Court of Appeals for the Fifth Circuit issued a significant decision in *Bracken v. Bernhardt*, No. 18-11479, 2019 WL 3759491 (5th Cir. August 16, 2019) (rehearing en banc granted), relating to Native American Indian child litigation. In a 2-to-1 vote, Justice Priscilla Owen dissenting, the Panel held that the states of Texas, Indiana, and Louisiana had standing to challenge the constitutionality of the Indian Child Welfare Act of 1978 (ICWA), but the Panel Majority reversed the district court's ruling that the ICWA was unconstitutional. According to the Panel Majority Opinion, the ICWA was enacted because a disturbing number of ethnic Indian children were being removed from tribal families and placed in non-tribal foster homes or institutions. The ICWA defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). The ICWA gives the Indian custodian and Indian child's tribe standing to intervene in a state court parental termination or child custody proceeding. The ICWA also includes a requirement that notice of an involuntary removal proceeding be given to the Indian custodian, and the tribe or the Secretary of the Department of the Interior. The ICWA also sets out the following hierarchy of placement of a removed child: (i) member of the child's extended family; (ii) other members of the child's tribe; (iii) other Indian families. Department regulations provide that the state has the responsibility for determining whether the child in an Indian child. The Court of Appeals held that all plaintiffs had standing under Article III of the U.S. Constitution to challenge the constitutionality of the ICWA and department regulations. Individual plaintiffs had standing to assert that the ICWA denied them equal protection of the law implied under the Due Process Clause of Fifth Amendment to the U.S. Constitution. State plaintiffs had standing to assert that the ICWA violated the Tenth Amendment to the U.S. Constitution and the anticommandeering doctrine and the nondelegation doctrine. *Id.* at *8. The state plaintiffs also had standing to challenge the Interior Department "rules" under the Administrative Procedure Act. As to the merits, the Panel Majority disagreed with the District Court's ruling that the definition of "Indian Child" was race-based and therefore subject to strict scrutiny. The Panel Majority felt that the classification was political, not race-based, *Id*. at *8-11, and that rational basis review should be applied to the equal protection claim. *Id*. at *12. The Panel Majority also found that the ICWA did not improperly require states to apply Federal standards to state-created claims and did not improperly commandeer state agencies, but rather preempted state laws. *Id*. at 12-15. The Panel Majority also overruled the District Court's decision that the ICWA improperly delegated to Indian tribes the ability to establish child placement preferences that preempted state law, saying that tribal rules were the laws of another sovereign government. Finally, the Panel Majority overturned the District Court's decision that placement

contrary to the ICWA hierarchy of placements must be based on a preponderance of the evidence, and instead affirmed the Federal Regulation saying that the ICWA hierarchy should be followed unless there is clear and convincing evidence of good cause to depart from the placement preferences. *Id.* at 440. Chief Justice Priscilla Owen dissented. However, Justice Owen became Chief Justice on October 1, 2019, and on November 7, 2019, a majority of the Justices on the Circuit Court voted, on the Court's own motion, to rehear the case en banc.

VII. PRESUMPTIONS AND BURDEN OF PROOF IN SAPCRS. The role of a presumption is to assign the burden of presenting evidence and the burden of persuasion. There are a number of presumptions that can arise in a SAPCR. Also, the legislature has enacted several statutes that affect the burden of proof in SAPCRs.

A. BURDEN OF PROOF ON PARTY SEEKING JUDICIAL RELIEF. As in every other type of litigation, the initial burden of producing evidence to support a claim is on the party seeking judicial relief. The burden of producing evidence to support an affirmative defense or counterclaim is on the party asserting the defense or counterclaim. The burden of persuasion is allocated in the same way. In some instances, however, the evidence presented can cause one or both burdens to shift.

B. BURDEN OF PROOF ON BEST INTEREST. "When a child's parents each seek sole custody or together seek joint managing conservatorship, the trial court is to award custody based on the best interest of the child." *Brook v. Brook*, 881 SW 2d 297 (Tex. 1994). The burden of proving best interest can vary depending on the parties and the claims. In an initial placement custody dispute between just the parents, the petitioner has the initial burden of producing some evidence, but each party has the burden of persuasion on proving that the arrangement they want is in the child's best interest. Where a non-parent is seeking to deny sole MC or JMC to a parent, the non-parent has the burden to prove that appointment of one parent as sole MC or both parents as MC or JMC is not in the child's best interest. TFC § 153.131(a). Any litigant (including a parent) who opposes both parents being appointed JMC has the burden to prove it would not be in the best interest of the children. TFC § 153.131(b).

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

> § 153.131. Presumption That Parent to be Appointed Managing Conservator
>
> (a) Subject to the prohibition in Section 153.004,[4] unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent

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

> shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
>
> (b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Things to note about the parental presumption.

1. TFC §153.131 not only casts the burden of producing evidence and the burden of persuasion on the party seeking to keep a parent from being appointed managing conservator; it also alters the burden of persuasion from best interest to proving that the appointment of the parent as a managing conservator would significantly impair the child's physical health or emotional development. Several courts have called this a "heavy burden." *In re K.R.B.*, No. 02-10-00021-CV, *4 (Tex. App.--Houston [14th Dist.] Oct. 7, 2010, no pet.) (mem. op.); *Critz v. Critz*, 297 S.W.3d 464, 474-75 (Tex. App.--Ft. Worth 2009, no pet.). The court in *Critz* said: "Impairment must be proved by a preponderance of the evidence indicating that some specific, identifiable behavior or conduct of the parent, demonstrated by specific acts or omissions of the parent, will probably cause that harm. This is a heavy burden that is not satisfied by merely showing that the non-parent would be a better custodian of the child. 'Close calls' should be decided in favor of the parent." *Id.* at 474-75. [Footnotes omitted.] In *Whitworth v. Whitworth*, 222 S.W.3d 616, 623 (Tex. App.--Houston [1st Dist.] 2007, no pet.), the court said that the "evidence must support a logical inference that the parent's specific, identifiable behavior or conduct will probably result in the child being emotionally impaired or physically harmed. This link between the parent's conduct and harm to the child may not be based on evidence which merely raises a surmise or speculation of possible harm."

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

3. In *Brook v. Brook*, 881 SW 2d 297 (Tex. 1994), the Supreme Court held that where a non-parent is seeking to share custody with one parent as against the other (e.g., seeking JMC with daughter as against son-in-law), the parental presumption does not apply to the non-parent and the case must be determined based on the best interest standard.

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

5. In *In re S.C.L.*, 175 S.W.3d 555-559 (Tex. App.--Dallas 2005, no pet.), the court held that the parental presumption did not arise for an alleged father who was not a presumed parent.

In *In re F.R.N.*, No. 10-18-00233-CV (Tex. App.--Waco Aug. 7, 2019, no pet.) (mem. op.), the

appellate court affirmed the appointment of a mother and her mother-in-law as joint managing conservators of a child with the mother-in-law to establish the primary residence of the child. To overcome the strong presumption in favor of parental custody, the proponent must show that appointing the parent as managing conservator would significantly impair the child, physically or emotionally. *Id*. at *4. This can be shown by evidence of action or omissions, such as physical abuse, severe neglect, drug or alcohol abuse, immoral behavior, parental irresponsibility, and an unstable home environment. In this case, evidence of uncharacteristic behavior after the child's visits with the mother was held to be some evidence of significant impairment of emotional development. The child was diagnosed by a psychologist to have Reactive Attachment Disorder. *Id.* at *2. [Author's note: Reactive Attachment Disorder is a mental disorder listed in DSM-5 whose "essential feature is absent or grossly underdeveloped attachment between the child and putative caregiving adults." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 265-70 (5th ed. American Psychiatric Association 2013). The disorder is found in children exposed to severe neglect prior to placement in foster care, but in less than 10% of that population *Id*. at 266.].

D. PROHIBITIONS/PRESUMPTIONS BASED ON VIOLENCE OR SEXUAL CRIMES. The Texas Legislature has enacted a number of statutory provisions relating to the effect of family violence on custody, possession, and access. TFC §153.004, entitled "History of Domestic Violence or Sexual Abuse," contains significant (if confusing) terms. Subsection (a) says: "In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force, or evidence of sexual abuse, by a party directed against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit." It is doubtful that a court would not consider such evidence even without the statute. *See generally Lewelling v. Lewelling*, 796 S.W.2d 164, 167-169 (Tex. 1990).

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

Subsection (b) also introduces a "rebuttable presumption" that it would not be in the best interest of a child for the court to appoint a parent as sole managing conservator or to give that parent the exclusive right to determine a child's primary residence, when "credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child." So credible evidence of a history or pattern of neglect or violence or abuse reverses the parental presumption. If the counter-presumption falls away in the face of contrary evidence (as suggested first by Professor Thayer and later by Professors Wigmore and McCormick, sometimes called the "bursting bubble" view of presumptions), then the rebuttable presumption can vanish as easily as it arose, and in a swearing match there would be no presumption.

The better argument is that the statutory counter-presumption shifts the burden of persuasion, so that the alleged perpetrator must prove by a preponderance of the evidence that s/he did not do those bad things, or even if s/he did those bad things that awarding sole MC or JMC with primary residence is in the child's best interest.

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

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

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

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

In *C.C. v. L.C.*, No. 02-18-00425-CV, at *1 (Tex. App.--Fort Worth July 3, 2019, pet. denied) (memo. op.), the appellate court considered whether a single act of family violence removed the trial court's discretion to appoint the mother as a joint managing conservator. In this case, during an argument the mother drew a gun on the father, who grabbed for the gun, resulting in him being shot in the leg and her being grazed by a bullet. The appellate court waded into the confusion surrounding TFC § 153.004, saying:

> Section 153.004 gives trial courts specific direction in determining how abuse or violence impacts various conservatorship decisions. *Id*. § 153.004. In places, it instructs the trial court to consider evidence of specific types of conduct in making its decisions and in others, it prohibits actions if evidence is presented that meets certain standards. Compare *id*. §153.004(a), with *id*. § 153.004(b). Some provisions of the section direct the trial court to consider isolated incidents of conduct, while others direct the trial court to make its decisions based on whether a history or pattern of conduct exists. Compare *id*. § 153.004(b), (d–1), (e), with *id*. § 153.004(c). The section is also not consistent in its description of the conduct that impacts the trial court's decisions, with various sections defining the conduct that the trial court must consider in divergent terms. Compare *id*. § 153.004(a), and *id*. § 153.004(b), with *id*. § 153.004(d–1), (e). Because a part of our analysis revolves around the construction of the section as a whole, we will summarize the various determinations of conservatorship and

> access by a parent that the section governs and the various standards that the section instructs the trial court to use in making those determinations when there is evidence of abuse or violence.

Id. at *5. The appellate court then moved on to consider the "The Contorted History of the Interpretations of the Word 'History,' saying that "[m]ore than twenty years of case law is inconsistent in its interpretations of the phrase 'history or pattern' in general and the word 'history' in specific. The cases diverge in their holdings on whether a single incident can constitute a history." *Id*. at *8. The court concluded: "We do not interpret section 153.004(b) to mean that a single incident of physical abuse is automatically a history. Instead, the statute leaves it to the trial court's broad discretion to decide whether the act reaches the threshold of being a history." *Id*. at * 12.

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

1. The Pattern Jury Charge Instructions on Violence and Sex Crimes. The State Bar of Texas Pattern Jury Charges PJC 215.3 suggests that the instruction to the jury that a parent who has committed family violence or sex crimes cannot be appointed as joint managing conservator should be given only if "credible evidence" is admitted on the subject. The PJC Committee is thus expecting the trial court to make a preliminary determination whether evidence is credible. An argument can be made that the credibility determination should be made by the jury and not the judge. In that event, the instruction should go to the jury whenever *any* evidence is admitted showing violence or sex crimes. The poor wording of the statute causes this uncertainty, but when a jury is the fact finder it seems that the jury and not the judge should decide not only whether evidence of violence or sex crimes is credible, but more importantly whether it actually occurred. The PJC Committee advises that the instructions in PJC 215.2 (Evidence of Abusive Physical Force or Sexual Abuse) and PJC 215.4 (History or Pattern of Family Violence, History or Pattern of Child Abuse or Neglect, or Protective Order), are not properly submitted if there is no evidence of such behavior. It would be better to say that the instruction should be submitted if there is any evidence (legally sufficient, or more than a scintilla) that the behavior occurred. Note that these two instructions, coupled with the preponderance of the evidence burden in answering the custody questions, removes the issue from the realm of whether evidence is credible to the realm of whether the behavior actually occurred, thus curing the uncertainty created by the statutory language as to the burden of persuasion.

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

3. False Report of Child Abuse. TFC § 153.013 creates a sanction for a false report of child abuse. If a party who makes report of child abuse in a pending SAPCR knows that it lacks a factual foundation, the court "shall" deem it a knowingly false report. Evidence of the knowingly false report is admissible with regard to the *terms of conservatorship*. Note that the determination of *managing conservatorship* is not mentioned. Since the terms and conditions of conservatorship are not a jury

question, query whether this rule of admissibility allows the information to go to the jury. In the event that the court finds a knowingly false report, the court "shall" impose a civil penalty not to exceed $500.

E. BURDEN OF PROOF IN MODIFICATION PROCEEDINGS.

1. The Statutory Burden of Proof. TFC ch. 156 governs modification of SAPCR decrees. TFC § 156.101 for conservatorship, possession or access, permits modification when the circumstances of the child, conservator, or other party affected by the order have materially and substantially changed since the date the prior order was rendered, or the date of the mediated settlement agreement if the decree was based on an MSA. Independent grounds to modify exist where the child is at least 12 years of age and has expressed to the court in chambers the name of the person who the child wants to be primary custodian, and where the primary conservator temporarily relinquished primary care and possession of the child to another person for at least six months (other than for military deployment). In all instances, the modification must be in the child's best interest.

a. Within One Year. Under TFC § 156.102, if modification is sought within one year, the initial pleading must include an affidavit, the initial pleading must be supported by an affidavit alleging: that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development; or that the person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or that the person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished (other than for active duty military) the primary care and possession of the child for at least six months and the modification is in the best interest of the child. The court must review the affidavit, and deny a hearing unless the court determines that the facts are adequate to support one or more of the required allegations.

b. Temporary Orders Changing Custody or Geographical Restriction. Under TFC § 156.006, the court can issue temporary orders changing child custody or imposing or altering a geographical restriction only if the temporary order is in the child's best interest and the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or the child is 12 years or older and has expressed to the court in chambers the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child. A party claiming that the temporary order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development, must attach to the motion an affidavit based on personal knowledge, or belief based on statements made by a person with personal knowledge, containing facts that support impairment. If the affidavit states facts "adequate to support the allegation," the court must set a hearing. If not, the court must deny the request and decline to schedule a hearing.

2. Admissibility of Evidence of Events From Before the Prior Decree. In *Ogletree v. Crates*, 363 S.W.2d 431, 434 (Tex. 1963), the Supreme Court wrote: "A final judgment in a custody proceeding is res judicata of the best interests of a minor child as to conditions then existing.... The judgment of the Domestic Relations Court of Harris County was thus res judicata of the best interests of the child

as to conditions existing on July 15, 1960. To authorize a change of custody there must have been a material change of conditions since that date." In *Wilson v. Elliott*, 73 S.W. 946, 947 (Tex. 1903), the Court wrote:

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

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

F. PRESUMPTION OF PATERNITY. Under TFC § 160.204, a *man* is presumed to be the father of a child if he is married to the mother and the child is born during marriage or within 301 days after the marriage was terminated, even if the marriage is declared invalid. The presumption of paternity also arises when the man marries the mother after birth and voluntarily asserts paternity with the vital statistics unit or is voluntarily named as father in the child's birth certificate. The presumption of paternity also arises if, during the first two years of the child's life, a man continuously resided in the household in which the child resided and he represented to others that the child was his own. The presumption of paternity is rebuttable, but can be overcome only by (i) an adjudication of non-paternity, or (ii) the filing of a valid denial of paternity by the presumed father in conjunction with the filing by another person of a valid acknowledgment of paternity as provided by TFC § 160.305.

G. SPLITTING SIBLINGS. There is a question whether siblings should be kept together when deciding who should be the sole MC, or JMC with the right to establish the child's primary residence or in allocating periods of possession.

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

determinations of managing conservatorship. It does, however, reflect public policy in a general way.

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

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

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

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

H. GEOGRAPHICAL RESTRICTION. TFC § 153.132 implies that a court can restrict the right

of a sole MC to designate the primary residence of a child. TFC § 153.134(b)(i) permits a court in appointing joint managing conservators, to "establish...a geographic area within which the conservator shall maintain the child's primary residence." It is noteworthy that the Family Code provisions regarding geographical restriction relate only to joint managing conservators, but not sole managing conservators. Despite this statutory oversight, in *In re A.S.*, 298 S.W.3d 834, 836 (Tex. App.--Amarillo 2009, no pet.), the Amarillo Court of Appeals held that the trial court had the power to impose a geographical restriction on a sole managing conservator. Some states apply a presumption against the custodial parent moving the children to a new residence away from the visiting parent. Other states apply a presumption in favor of the custodial parent's choice. Other states have no presumption for or against moving away. Texas has no presumption, either way. *Bates v. Tesar*, 81 S.W.3d 411, 422 (Tex. App.--El Paso 2002, no pet.). *See Lenz v. Lenz*, 79 S.W.3d 10 (Tex. 2002). At the time of the initial custody determination, neither party has a burden of proof as to geographical restriction, but each party has the burden to prove his or her view of what is in the child's best interest. When a SAPCR order has been issued, either imposing or not imposing a geographical restriction, and suit is filed to modify that part of the order, the burden is on the party seeking modification to prove a material and substantial change of circumstances (or its substitutes) and best interest. A jury's verdict on geographical restriction is binding on the trial court. TRC § 105.002(c)(1) (E) & (F).

It should be noted that TFC § 156.006 prohibits a court from issuing temporary orders imposing or altering a geographical restriction unless the temporary order is in the child's best interest and the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development. A temporary modification is also permitted where the person designated to establish primary residence in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or the child is 12 years or older and has expressed to the court in chambers the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child. See Section VII.E.1.b. above.

I. SPOLIATION SANCTIONS. Where evidence has been spoliated, the court can impose sanctions that include shifting the burden of proof. In *Trevino v. Ortega*, 969 S.W.2d 950, 960 (Tex. 1998), the Supreme Court recognized two different levels of severity of such instructions:

> Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions.... The first and more severe presumption is a rebuttable presumption. This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence .... The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue.... This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the fact finder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires.... [Citations omitted.]

In *Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014), the Supreme Court articulated when actionable spoliation has occurred, and the appropriate remedy for spoliation. The Majority Opinion, authored by Justice Lehrmann, was released on July 3, 2014. The Supreme Court issued an opinion on December 19, 2014, in the case of *Petroleum Solutions, Inc. v. Head*, 454 S.W.3d 482 (Tex. 2014). This Opinion was also authored by Justice Lehrmann, and explained and extended *Brookshire Bros.* In the later *Petroleum Solutions* case, Justice Lehrmann wrote:

> In *Brookshire Brothers*, we adopted a framework governing the imposition of remedies for evidence spoliation. We explained that whether a party spoliated evidence and whether a particular remedy is appropriate are questions of law for the trial court. *Id.* at 20. Because the trial court bears this responsibility, evidence of the circumstances surrounding alleged spoliation is generally inadmissible at trial, as such evidence is largely irrelevant to the merits and unfairly prejudicial to the spoliating party. *Id.* at 26. We further held in *Brookshire Brothers* that, to find that spoliation occurred, the trial court must make affirmative determinations as to two elements. First, the party who failed to produce evidence must have had a duty to preserve the evidence. *Id.* at 20. "[S]uch a duty arises only when a party knows or reasonably should know that there is a substantial chance that a claim will be filed and that evidence in its possession or control will be material and relevant to that claim." *Id.* (citation and internal quotation marks omitted). Second, the nonproducing party must have breached its duty to reasonably preserve material and relevant evidence. *Id.* A party cannot breach its duty without at least acting negligently. *Id.* at 20–21 & n.8.
>
> Upon finding that spoliation occurred, the trial court must exercise its discretion in imposing a remedy. In determining what remedy, if any, is appropriate, the court should weigh the spoliating party's culpability and the prejudice to the nonspoliating party. *Id.* at 21. Prejudice is evaluated based on the spoliated evidence's relevancy to key issues in the case, whether the evidence would have been harmful to the spoliating party's case (or, conversely, helpful to the nonspoliating party's case), and whether the spoliated evidence was cumulative of other competent evidence that may be used in its stead. *Id.* at 21–22 (citing *Trevino v. Ortega*, 969 S.W.2d 950, 958 (Tex. 1998) (Baker, J., concurring)).
> * * *
> In *Brookshire Brothers*, we also articulated more specific restrictions on a trial court's discretion to issue a spoliation instruction to the jury. We held that a trial court may submit a spoliation instruction only if it finds (1) the spoliating party acted with intent to conceal discoverable evidence, or (2) the spoliating party acted negligently and caused the nonspoliating party to be irreparably deprived of any meaningful ability to present a claim or defense.[3] 438 S.W.3d at 23–26. We noted in imposing this strict limitation that a spoliation instruction "can, in some sense, be tantamount to a death-penalty sanction," in that such an instruction can remove the focus of the trial from the merits of the case and redirect it to the alleged conduct that gave rise to the sanctions. *Id.* at 23. It follows, and we hold today, that in the context of remedying spoliation, the restrictions articulated in *Brookshire Brothers* with regard to spoliation instructions also limit a trial court's discretion to issue other remedies akin to death-penalty sanctions, such as striking a party's claims or defenses.

Petroleum Sols., Inc. v. Head, 454 S.W.3d 482, 488–89 (Tex. 2014).

J. AGREEMENTS TO ALTER THE BURDEN OF PROOF. Occasionally parties attempt to alter the ordinary burden of proof by agreement, perhaps more often in premarital agreements than in custody matters. [The State Bar of Texas Family Law Section's Family Law Practice Manual has a section providing that "jointly acquired property may not be deemed to be community property," Form 63-3 ¶ 7.1; and a section providing how a spouse can and cannot prove interspousal gift, Form 63-3 art. 12; and providing that property held in an individual's name is presumed to be separate property, Form 63-3 ¶ 17.3.] In *Radtke v. Radtke*, 521 S.W.2d 749, 75-51 (Tex. Civ. App.--Houston [14th] Dis. 1975, no writ), the parents settled their divorce saying that "[a]t the age of 12½ years, said minor children shall have the right to decide with which party, either Mr. Radtke or Mrs. Radtke, with whom they wish to permanently reside. Their choice shall be binding and conclusive on both parties, and both parties agree to abide by said decision and further agree that such decision constitutes a general change of conditions authorizing and allowing the Court upon the Agreed Motion of both parties to change the legal status, if necessary, of the legal custody of said minor children." In a later modification proceeding, the trial court held that it was not bound by the agreement of the parties or choice of the child and ruled contrary to the agreement. The appellate court held that the parties' stipulation that a child's election will constitute a material and substantial change is not binding on the court, and further that the agreement of the parties was subject to an independent best interest determination by the court. This one case suggests that the parties cannot contractually alter the legal standards regarding the conduct of a SAPCR. Parties ordinarily can contract to choice of law or choice of forum but, when it comes to child custody and support, the parties are not offered as much freedom to contract. *See* TFC § 4.003(b) ("The right of a child to support may not be adversely affected by a premarital agreement"); TFC § 153.007 (court can reject an agreed parenting plan for JMC if not in the best interest of the child); TFC § 153.0071 (court can reject a non-revocable mediated settlement agreement due to family violence, or cohabitation with a sex offender coupled with a lack of best interest), TFC § 153.133 (court can reject an agreed parenting plan for JMC if not in the best interest of the child); *In re Calderon*, 96 S.W.3d 711, 715 (Tex. App.--Tyler 2003, orig. proceeding) (mediated settlement agreement prohibiting transfer of SAPCR to another county was void when mandatory transfer was required by the TFC). Non-revocable MSAs are handled differently. *See In re Lee*, 411 S.W.3d 445, 457–58 (Tex. 2013) (trial court may not deny a motion to enter judgment on a properly-executed MSA under TFC § 153.0071 based just on a broad best interest inquiry, but can do so based on endangerment of the child). *Myrick v. Myrick*, 478 S.W.2d 859, 860-61 (Tex. Civ. App.--Houston [1st Dist.] 1972, writ dismissed) (parents not permitted to contractually restrict the court's authority to order child support).