TEXAS CENTER FOR THE JUDICIARY

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

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Standing: Constitutional Principles

What is “standing”?

- “Standing” is a judicial construct that determines whether a litigant can bring a lawsuit, or can intervene in a lawsuit.
- Standing depends on whether a party has a sufficient relationship with the lawsuit so as to have a “justiciable interest” in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005).

Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993)

- The *T.A.B.* case involved "associational standing," the ability of a trade organization to bring suit on behalf of its member. However, the Court's Majority Opinion announced that standing is required for all litigation.
- The Court held that "[s]tanding is implicit in the concept of subject matter jurisdiction," and thus cannot be conferred by consent, cannot be waived, and can be raised for the first time on appeal.
- To issue a judgment when the petitioner has no standing would amount to an "advisory opinion" which is beyond the power of the judiciary.
- The standing requirement in Federal courts derives from the constitutional provision that courts can decide only "cases and controversies." The Texas Sup. Ct. likened that to the Open Courts provision of the Texas Constitution, which the Court said limited courts to redressing actual injuries suffered by the litigant.

General Principles of Standing

- Standing, which is a component of subject matter jurisdiction, is a constitutional prerequisite to maintaining a suit under Texas law.
- When a party lacks standing, the trial court has no subject matter jurisdiction and any trial court action is void.
- Standing cannot be conferred by consent or waiver and can be raised for the first time on appeal or by collateral attack.
- Whether a party has standing is a question of law that the appellate court reviews de novo.
- On appeal, a party can complain only about error that affects them.

Vulnerabilities of Standing

- No standing by consent, waiver, or estoppel.
- Case can be dismissed on pleadings.
- Case can be dismissed based on evidence at pretrial hearing.
- Refusal to dismiss pretrial is subject to mandamus review.
- Case can be reversed without regard to merits
- Standing can be raised for first time on appeal.
- Court can raise standing sua sponte.
- Without standing, the decree is void and subject to direct or collateral attack.

Distinguishing Constitutional vs. Statutory Standing

- The Texas Legislature chose to call the statutory prerequisites to filing and intervening in a SAPCR "standing" requirements.
- Some courts have carried over the features of constitutional standing to statutory standing.
- In Texas, constitutional standing rests on the twin requirements of adjudicating only true controversies where the plaintiff has a justiciable interest or an actual injury.
- Statutory standing is a question of public policy determined by the legislature, not deriving from the constitutional division of government into three branches.

Statutory Prerequisites to Suit

- Even when a party has constitutional standing to bring suit, the Legislature can enact statutory prerequisites to filing suit, so long as 14th Amendment due process and the Open Courts provision of the Texas Constitution are not violated.
- Sometimes statutory prerequisites to filing suit are phrased in terms of "standing" and sometimes they are not. In the Texas Family Code (TFC) they mostly are.
- When standing is controlled by statute, the statute itself serves as the proper framework for the standing analysis. The appellate court reviews the trial court's interpretation of applicable statutes de novo.

Difference of Opinion

- The 14th Court of Appeals has recognized the difference between constitutional standing and statutory standing.
- Some other courts of appeals and several Supreme Court justices see it differently.
- This disagreement is attributable to the assumption that the word “standing” means the same thing in both contexts.
- The rationales and policies for constitutional and statutory standing are different, and they should be evaluated differently.

Dismissal Based on Pleadings

- A party must plead facts showing standing.
- The pleaded allegations must be taken as true.
- If pleadings are insufficient to show standing, the case can be dismissed based on the pleadings alone.
- But the plaintiff must first be given the opportunity to replead.
- If the pleadings sufficiently allege standing, then the motion to dismiss should be denied, but if evidence is required the court must conduct an evidentiary hearing.

Dismissal Based on Evidence at Pre-Trial Hearing

- Sometimes evidence for and against standing can or must be presented at a pretrial hearing.
- What is the burden of persuasion at the pretrial hearing?
  - Prima facie (sufficient to be believed).
  - Prepondence (judge must believe the evidence).
- Discretionary whether to allow the facts to be further developed through discovery before ruling or dismissal.
- Where standing involves proof of the merits of the underlying claims, must wait until trial.

Statutory Prerequisites (Standing) to Participate in SAPCRs

Standing Provisions for SAPCRs

- § 102.003 General Standing to File SAPCR
- § 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

Standing to File a SAPCR Under § 102.003(a)

1) a parent[1] of the child;
2) the child through a representative authorized by the court;
3) a custodian or person having the right of visitation or access to the child by an out-of-state court order;
4) the child's guardian of the person or of the estate;
5) a governmental entity;

1 "Parent" means mother, man presumed or legally determined or adjudicated to be father, man who has acknowledge paternity under applicable law, an adoptive mother or father, but not terminated parent (unless ordered to pay child support after termination but before adoption). TFC § 101.024.

Standing to File a SAPCR Under § 102.003(a) (cont.)

6) an authorized agency;
7) a licensed child placing agency;
8) a man claiming paternity of the child (subject to the limitations of Ch. 160 [i.e., establishing parentage]);
9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least 6 months ending not more than 90 days preceding the date of the filing of the petition;
10) a person designated as managing conservator in an affidavit of relinquishment of parental rights;

Standing to File a SAPCR Under § 102.003(a) (cont.)

11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least 6 months ending not more than 90 days before suit is filed, if the guardian, managing conservator or parent has died;
12) a foster parent under Department of Family & Protective Services with whom the child was placed for at least 12 months ending not more than 90 days before suit if filed;
13) a person within the 3rd degree of consanguinity if both parents are deceased;

Standing to File a SAPCR Under § 102.003(a) (cont.)

14) A person designated by a pregnant mother or mother in a verified statement to confer standing under TFC § 102.0035.
15) A person who is an intended parent of a child or unborn child under a gestational agreement that complies with the requirements of TFC § 160.754, but only if the other intended parent is a co-petitioner or respondent.

Standing to File a SAPCR Under § 102.003(b)

(b) In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

- (a)(9) - “actual care, control, and possession for at least six months”
- (a)(11) - “resided for at least six months”
- (a)(12) - “in foster care placement for at least 12 months”

In re H.S., 550 S.W.3d 151 (Tex. 2018)

- What is "actual care, control & possession" under TFC § 102.003(a)(9)?
- Supreme Court divided 5-to-4.
- Father visited only occasionally.
- Mother was in a full-time substance abuse treatment facility.
- Majority opinion: "[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."

Foster Parents' Standing to File for Adoption Under § 102.003(c)

- TFC § 102.003(a)(12) requires that the child be placed in the foster parent's home for at least 12 months before they can bring a SAPCR.
- However, under TFC § 102.003(c), the 12-month minimum does not apply to filing an adoption proceeding for a child who is eligible to be adopted.

Grandparents' & Consanguinous Relatives' Standing Under § 102.004

(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.

Standing of Grandparent or Other Person to Intervene

- TFC §102.004(b) provides that the court **may** grant leave to intervene to:
  - a **blood-related grandparent** or
  - **other person** deemed by the court to have had **substantial past contact** with the child
  - 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**."
  - [At trial, the proponent must overcome the parental presumption in TFC § 153.131, by showing that appointing parent as MC would "**significantly impair the child's physical health or emotional development**."]

Standing Under § 102.0045 for Sibling to File a SAPCR

TFC § 102.0045. Standing for Sibling

(a) The **sibling** of a child may file an original suit requesting **access** to the child as provided by Section 153.551 if the sibling is at least 18 years of age.

Standing for Termination and Adoption

Under TFC §102.005, a suit for adoption, or termination and adoption, can be filed by a –

- step-parent of the child, or
- an adult with whom the child has been placed has had **actual possession and control** of the child at any time during the 30 days prior to filing the petition; or
- an adult having **actual possession and control** of the child for not less than 2 months during the 3-month period preceding the filing of the petition; or
- an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- another adult whom the court determines to have had **substantial past contact** with the child sufficient to warrant standing.

§ 102.006 Limitations on Standing Where Living Parents Have Been Terminated

When all living parents have been terminated, TFC § 102.006 denies SAPCR standing to any relative of the terminated parents, unless that relative has an existing court-ordered right to possession or access, or the party has the consent of the child's MC, guardian, or legal custodian.

The bar does not apply to a sibling, grandparent, aunt or uncle who files the SAPCR within 90 days of the date the parent-child relationship is terminated by request of the Dep't of Family and Protective Services.

IV-D Agency's Standing Under § 102.007 to File a SAPCR

A Title IV-D agency or political subdivision providing Title IV-D services may file suit to establish or modify or enforce a child support obligation.

After Death of Parents Under § 153.431

- Under TFC § 153.431, if both of the parents of a child are deceased, 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.
- Does this provision implicitly give those relatives standing to initiate or intervene in a SAPCR?
- If not a petitioner or intervenor, must the relative be joined as a respondent in the SAPCR before appointment as MC, JMC or PC?

Grandparent Possession or Access Under § 153.432

- 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**.
- Grandparent must attach an affidavit on information and belief, alleging and relating facts showing that denial of possession or access would "**significantly impair the child's physical health or emotional wellbeing.**"
- Court must dismiss the suit unless facts stated in the affidavit, **if true**, support possession or access.

Standing Under § 160.602 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;

Standing Under § 160.602 to Establish Paternity (cont.)

(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.

Indian Child Welfare Act (ICWA)

- The ICWA of 1978 applies to an "Indian child," which is any unmarried person under age 18 who is a member of an Indian tribe or is eligible for membership and is a biological child of a member.
- Under the ICWA, an Indian child's custodian or tribe can intervene in a custody or termination proceeding.
- *Bracken v. Bernhardt*, (5th Cir. 2019), upheld the constitutionality of the standing provisions and preemption of state law.
- Rehearing en banc has been granted in *Bracken*.

Standing for Modification Proceeding

- TFC § 156.002(a) says that "[a] **party affected by an order** may file a suit for modification in the court with continuing, exclusive jurisdiction.
- *Pratt v. Tex. Dep't of Human Resources*, 614 S.W.2d 490 (Tex. Civ. App.--Amarillo 1981, writ ref'd n.r.e.), held that the statutory term "party" included only persons who were a party to the order, while *Watts v. Watts*, 573 S.W.2d 864 (Tex. Civ. App.--Fort Worth 1978, no writ), held that the term included those persons plus persons with a "sufficient" interest in the child. *In re A.J.L.*, 108 S.W.3d 414 (Tex. App.--Fort Worth 2003, pet. struck), held that former stepfather who was not given parental rights, but who was enjoined from communicating with the children, did not have standing to modify, even though he was affected by the order.

Standing for Modification Proceeding (cont.)

- *In re S.A.M.*, 321 S.W.3d 785 (Tex. App.--Houston [14th Dist.] 2010, no pet.), agreed with *Pratt* that an intervenor was a party. The court also took a broad view that "affected" means any effect, including having the duty to report a change of address.
- Under TFC § 156.002(b), a person with standing under Ch. 102 may file a suit for modification. TFC § 156.002(c) says that a sibling of a child separated by action of the DF&PS can file suit for access.
- Thus, standing to seek a modification extends not only to parties affected by the order, but also to persons on the laundry list in §102.003, grandparents/aunts/uncles under §102.004, siblings under §102.0045, and a IV-D agency under §102.007.

Recap of Standing for Modification (cont.)

- "Party" does not necessarily mean a "conservator."
- A party is someone "by or against whom a lawsuit is brought."
- A party is "affected by an order" if they are given important rights, or burdened with duties, regarding the children.
- Standing exists for anyone meeting the standing requirements of TFC ch. 102.

Important Points About Blood Grandparents, Aunts and Uncles

- Grandparents, aunts, and uncles can meet the general test of standing under §102.003(9), by showing that they 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.
- Grandparents, aunts, and uncles can also establish standing to seek MC under § 102.004(a), by giving **satisfactory proof** that the relief they seek is **necessary** because the child's present circumstances would **significantly impair** the child's **physical health** or **emotional development**.
- **Step-grandparents** do not meet the criteria of § 102.004(a), because they are not grandparents or related within the 3rd degree of consanguinity.
- Where both parents are **dead**, grandparents, aunts and uncles automatically have standing to seek MC under TFC §153.431.

Important Points About Grandparents

- Grandparents (related by blood or adoption) can establish standing under TFC §153.432 to initiate a suit to gain possession of or access to a child by attaching an **affidavit** with supporting facts showing that the denial of possession or access would **significantly impair** the child's **physical health** or **emotional well-being**.

Conflicting Rules on Grandparents Filing Suit for Possession

- § 102.004. Standing for Grandparents or Other Person

  * * *

  (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. . . .

- § 153.432. Suit for Possession or Access by Grandparent

  (a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:

  (1) an original suit; or

  (2) a suit for modification as provided by Chapter 156.

  (b) A grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

A Recap of Important Points On Family Code Standing

- The Legislature now owns the issue of standing in SAPCRs.
- Justiciable interest has been replaced by a laundry list of included & excluded persons, with exceptions and counter-exceptions.
- There are persons who do not have statutory standing that have a justiciable interest and certainly can present a real case or controversy.
- Apart from specific categories of persons, the laundry list also includes objective time-related tests and sometimes subjective assessments.
- In addition to time-related tests, grandparents and close relatives can initiate or intervene by meeting the significant impairment test.
- Court "may" grant leave for grandparents or persons with substantial past contact to intervene in a pending lawsuit upon a showing of significant impairment. (Can it deny standing if the test is met?)

PROCEDURAL CONSIDERATIONS

In re S.M.D., 329 S.W.3d,8,13 (Tex. App.--San Antonio 2010, pet. dism'd)

- "When standing has been sufficiently alleged in the pleadings, and the jurisdictional challenge attacks the existence of jurisdictional facts, the trial court considers the evidence submitted by the parties to resolve the jurisdictional issues raised."
- "The burden of proof on the issue of standing is on the party asserting standing."
- "In a family law case, when the petitioner is statutorily required to establish standing with 'satisfactory proof,' the evidentiary standard is a preponderance of the evidence."
- "The petitioner must show the facts establishing standing existed at the time suit was filed in the trial court."

Dismissal Based on Proof

- As a practical matter, evidence for and against standing will probably arise in connection with a motion to dismiss, or in connection with a request for temporary custody or temporary possession.
- While proof of actual care, control, and possession of the child, will be readily available to the petitioner, proof that the child's present circumstances would significantly impair the child's physical health or emotional development may require depositions as well as investigation and analysis by expert witnesses.
- Where the standing requirements are the same as for winning the case on the merits, and a fact issue is presented at the pretrial hearing, the court should not dismiss pretrial, and let the fact-finder decide.

Proof for Standing vs. Merits-Related Proof

- TFC § 102.004(a)—to have standing to file an initial suit for MC, grandparent or relative must give **satisfactory proof** that 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**."
- TFC § 153.432 - for grandparent to have standing to seek possession or access, affidavit must show that denial would "significantly impair the child's physical health or emotional development."
- TFC § 102.004(b)-- to have standing to intervene, grandparent or other person must give **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.**"
- TFC § 153.131(a) provides:

  "[U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would **significantly impair the child's physical health or emotional development**, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child."

Ordinary Intervention vs. SAPCR Intervention

- 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."

SAPCR Intervention

- TFC § 102.004(b) provides:

  (b) 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.**

- In a SAPCR, leave to intervene must be granted **before** intervention.

Recap of Procedural Steps

1. Plead facts supporting standing.
2. Submit affidavits if required.
3. File motion to dismiss.
4. Court can delay hearing to allow discovery or appoint attorney ad litem, amicus attorney, or doctor or psychologist.
5. In hearing, offer proof supporting standing.
6. Court should not resolve disputed facts that go to the underlying merits.
7. Court grants or denies motion to dismiss.
8. Appeal for dismissal.
9. Mandamus for refusal to dismiss.

Presumptions & Burdens of Proof in SAPCRs

Party Seeking Judicial Relief

- The initial burden of producing evidence is on the petitioner or intervenor.
- The burden of producing evidence for defenses and counterclaims is on the respondent.
- The burden of persuasion is the same as above, unless facts presented trigger a presumption or shift the burden of proof.

Preponderance of the Evidence

- The ordinary burden of persuasion in civil litigation is a preponderance of the evidence.
- So too in SAPCRs, except:
  - B/P in parental termination is clear and convincing evidence.
  - B/P to place Native American children in contravention of the ICWA is clear and convincing evidence.

Native American Children

- *Bracken v. Bernhardt*, (5th Cir. 2019), under the ICWA an Indian child removed by a court from its family must be placed with (i) member of the child's extended family; (ii) other members of the child's tribe; (iii) other Indian families.
- Fed. Regs. say that this hierarchy must be following unless there is clear and convincing evidence to the contrary. *Bracken* agreed (but rehearing en banc is pending).

Proving Best Interest

- Under § TFC 153.002, the best interest of the child is always the primary consideration in determining conservatorship, possession, and access.
- In an initial placement between parents, each parent has the burden to prove best interest. A non-parent must overcome the parental presumption by proof of impairment.
- The burden to prove best interest is on:
  - the party seeking modification;
  - the party seeking to terminate the P-C relationship (by clear and convincing evidence);
  - the party seeking adoption;
  - the minor seeking to remove disabilities of minority;
  - the party seeking to change the name of a child.

The Parental Presumption (Parent as MC)

- TFC § 153.131(a) provides:

  [U]nless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would **significantly impair the child's physical health or emotional development**, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

The Parental Presumption (Both Parents as JMC)

- TFC § 153.131(b) provides:

  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.

When the Parental Presumption Does Not Apply

- 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. TFC § 153.373.
- The parental presumption does not apply in suits to modify a prior SAPCR decree. *In re V.L.K.* (Tex. 2000).

Prohibitions/Presumptions Based on Violence, Neglect, or Sexual Abuse

- TFC §153.004(a)

  "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."

- Applies only to appointment as sole MC & JMC.
- Only requires court to "consider evidence."

Prohibitions/Presumptions Based on Violence, Neglect, or Sexual Abuse (cont.)

- TFC §153.004(b) says that the court "**may not**" appoint a party as **JMC** 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.
- TFC §153.004(b) also creates a "**rebuttable presumption**" that it would not be in the best interest of a child for the court to appoint a parent as **sole MC** 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."

Prohibitions/Presumptions Based on Violence, Neglect, or Sexual Abuse (cont.)

- TFC §153.004(c) says that the court "**shall consider**" family violence or sexual abuse in deciding whether to deny or limit access by a parent possessory conservator.
- TFC §153.004(d) says that the court "may not allow" a parent to have access where a preponderance of the evidence shows a history or pattern of family violence within 2 years, or where the parent had illegal sexual relations causing pregnancy.
- TFC §153.004(d-1) creates exceptions to §153.004(d) if the court finds that granting access would not endanger the child's physical health or emotional welfare and would be in the child's best interest, and imposes restrictions to protect the child.
- TFC §153.004(e) creates a rebuttable presumption against unsupervised visitation if "credible evidence is presented" of a history or pattern of neglect, abuse, or family violence. [This probably shifts the burden of persuasion.]

Presumption of Paternity

- Under TFC § 160.204(a), 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;
  - He is married to the mother and the child is born within 301 days after the marriage ended;
  - He married the mother before birth in apparent compliance with law, even if the marriage could be invalidated, and the child is born during that marriage or within 301 days after the marriage ended.
  - He married the mother after birth in apparent compliance with law, even if the marriage could be invalidated, and voluntarily asserted paternity with the Bureau of Vital Statistics, or is voluntarily named as father on the child's birth certificate, or promised "in a record" to support the child.
  - He continuously resided in the household where the child resided during the first 2 years of life and represented to others he was the father.
- This presumption of paternity can be rebutted only by an adjudication of non-paternity or by filing a denial of paternity in conjunction with another person's valid acknowledgment of paternity. TFC § 160.204(b).

Burden of Proof for Grandparent Access

- TFC § 153.432(1) requires an affidavit alleging that denial of grandparent possession or access would significantly impair the child's physical health or emotional well-being.
- TFC § 153.433(a) requires that:
  - at least one parent must not have had parental rights terminated;
  - 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"; and
  - The grandparent's child who is parent of the child in question has been incarcerated for 3 months, or found by a court to be incompetent, or is dead, or does not have actual or court-ordered possession or access.

Burden of Proof for Termination

- The party seeking to terminate the parent-child relationship must prove that one or more of the statutory grounds for termination exist, and that termination would be in the child's best interest. TFC § 161.001.
- The statutory grounds are listed in TFC § 161.001(b). Termination cannot be based on home schooling, poverty, a non-violent misdemeanor other than offenses against the person or family, lawfully administering THC cannabis, or declining immunization. TFC § 161.001(c). However, the DFPS can offer such evidence in a termination proceeding. TFC § 161.001(e). A parent cannot be terminated for failing to comply with a court order if the parent proves inability to comply and good faith effort to comply and that the failure to comply is not the parent's fault. TFC § 161.001(d).
- Other provisions in Chapter 161 relate to terminating an alleged biological father, a mentally ill parent, the parent of a child born alive after an attempted abortion, and the biological father of a child conceived as a result of a sexual or assaultive offense.

Burden of Proof for Adoption

- To adopt a child, the petitioner must prove that the requirements for adoption have been met and that the adoption is in the child's best interest. TFC § 162.016(b).
- The petitioner must have lived with the child for at least 6 months, unless the court waives this requirement based on best interest. TFC § 162.009.
- The written consent of a managing conservator to the adoption must be filed, unless the court waives that requirement because consent is being refused without good cause. TFC § 162.010(a).
- Various other requirements, including investigations and reports, are listed in Chapter 162.

Burden of Proof for Removing Disabilities of Minority

- TFC ch. 31 permits a minor resident of Texas who is age 17, or who is age 16 and living apart from parents or MC and is self-supporting, to petition for removal of some or all of the disabilities of minority.
- A parent or MC must verify the petition, or if unavailable the verification can be by an amicus attorney or attorney ad litem.
- The disabilities can be removed if the court finds the removal to be in the best interest of the child. TFC § 31.005.

Burden of Proof to Change Name of Child

- TFC ch. 45 permits a parent, MC, or guardian of a child, to petition a court to change the name of a child.
- If the child is age 10 or older, his/her written consent must be attached to the petition. TFC § 45.002(b).
- The court can grant the name change if it is in the best interest of the child. TFC § 45.004(a)(1).
- If the child is a registered sex offender, that name change must be in the interest of the public. TFC § 45.004(a)(2).

Modification of Custody, Visitation, or Access (ch. 156)

To modify conservatorship, possession or access:

- Must show a material and substantial change (m&sc) in circumstances.
- The change must be from the date the order is **rendered**, or the date of the mediated settlement agreement (MSA) if the order was based on an MSA.
- Two alternatives to proving changed circumstances:
  - 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.
  - the primary conservator temporarily relinquished primary care and possession of the child to another person for at least six months (other than for military duty)
- Modification must be in the best interest of the child.

Modification of Support

- Under TFC § 156.401(a), child support can be modified upon a showing that:
  - the circumstances of the child or person affected by the other have materially and substantially changed since the earlier of the date the order was rendered or the date the mediated settlement agreement was signed; or
  - more than 3 years have expired since the last order and support under the current guideline would differ by more than 20% or $100.
  - If the support order was agreed to, the court can modify only for material and substantial change since the date of rendition. TFC § 156.401(a-1).
- A court order or administrative order in a IV-D case can be modified to provide for medical and dental support if lacking from prior order. TFC § 165.401(a-2).
- Appointment of JMC not alone grounds to modify support. TFC § 165.401(c).
- Release from incarceration is a M&SC if support was lowered or suspended due to incarceration.
- If support deviates from guidelines, can modify support to conform to the guidelines based on best interest. TFC § 165.402.

What Constitutes A Material and Substantial Change?

- The determination of m&sc is fact-specific and must be made according to the circumstances as they arise.
- Must demonstrate what conditions existed at the time of rendition of the prior order (or date of MSA) as compared to the circumstances existing at the time of the hearing on the motion to modify.
- "If a circumstance was contemplated at the time of an original agreement, its eventuality is not a changed circumstance, but is instead an anticipated circumstance that cannot be evidence of a material or substantial change of circumstances ...." *In re N.T.P.*, 402 S.W.3d 13, 19 (Tex. App.--San Antonio 2012, no pet.).
- Conviction for child abuse or family violence is a m&sc of circumstances. TFC §156.104 & 156.1045.
- Being assigned on military deployment is not a m&sc for permanent modification but will support temporary order.
- Expiration of 3 years since last child support order is a m&sc to modify support if the old order differs by 20% or $100 from the guideline applied to current income.
- Release from incarceration is a m&sc if support was reduced or suspended during incarceration.

Modification Within One Year
TFC § 156.102

Under TFC § 156.102, if modification is sought within one year, 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.

Temporary Orders Modifying 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.

Temporary Orders Modifying Custody or Geographical Restriction (cont.)

- 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.

Agreement to Alter the Burden of Proof

- In *Radtke v. Radtke*, 521 S.W.2d 749, 75-51 (Tex. Civ. App.--Houston [14th] Dis. 1975, no writ), the parents agreed that when a child turned age 12-1/2 it could choose its custodial parent and that would be a material and substantial change.
- The trial court disregarded the agreement and ruled contrary to the child's wishes.
- The appellate court held that the trial court was not bound by the agreement, and must make its own decision about best interest.

The End