# Chapter 4
# Suits Affecting the Parent-Child Relationship

*Read* Texas Family Code Chapters 101 through 111.

## A. Introduction

> "Trial courts are vested with broad discretion in suits affecting the parent child relationship for one very important reason. Parents get divorced. They are often angry, bitter, vengeful, and hostile toward one another. Sometimes they act in their own best interest rather than in the best interest of their child. The child may become a ping pong ball in a game of which parent can hurt the other more, even if the child gets hurt in the process. The trial court has the ability to gauge parental behavior and absorb the subtle nuances of righteous indignation played out in the judicial spotlight. That judge has the ability to see the fire in the eyes, hear the anger in the voice, and feel the sincerity in the heart. We do not have that luxury."

The foregoing quote is set forth as the Prelude to an opinion authored by Justice Ann McClure in what was clearly a particularly contentious case. *In the Interest of B.A.W.*, 311 S.W.3d 544 (Tex. App.—El Paso 2009, no pet.). By this quote, Justice McClure explains the role of the trial court and the appellate court in suits affecting the parent child relationship. She also most eloquently describes how parents—both usually good people—can sometime lose sight of the best interest of their own child. Justice McClure's observations should be considered as you read each case in this and subsequent chapters.

SAPCR—"Sapker" or "Sapser"—no matter how you pronounce it, in the Texas family law community means, "Suit Affecting the Parent Child Relationship." With this chapter of the text, the course now enters the realm of relationships complicated, at least legally, by children. This chapter focuses on the introductory chapters of Title V of the Texas Family Code, 101 through 111, which provide basic definitions and procedures. Do not overlook these chapters as being merely introductory or definitive, as the statutes found therein will impact legal strategy and case structure. In most instances, legal analysis will begin with statutes found in one of these chapters.

The 2017 legislative session resulted in a substantial number of changes to code sections relevant to this chapter, some of which were minor, other changes were more extensive.

Chapter 101 governs definitions and the legislature made some relatively minor changes to the statutory definitions for: Foster Care, TEX. FAM. CODE § 101.0133; Licensed Child Placing Agency, TEX. FAM. CODE § 101.017; and Title IV-D Cases, TEX. FAM. CODE § 101.034. All of these changes affect actions under Chapters 231, or 262, or 263 of the Texas Family Code, which are outside the scope of study of this course.

Of more relevance to this course, is the amendment to TEXAS FAM. CODE § 102.004(b-1), governing standing for grandparents and other persons, which now provides that "[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)." Also amended were, TEX. FAM. CODE § 102.008(b), (c) and (d) governing contents of petition in a SAPCR, now requiring disclosure of existing protective orders regarding a party or a child of a party to the suit and further requires copies of the relevant orders to be attached to the petition.

Perhaps in light of the frequent challenges to broad form submission of jury issues, the legislature added section TEX. FAM. CODE § 105.002(d), providing: "The Department of Family and Protective Services in collaboration with interested parties, including the Permanent Judicial Commission for Children, Youth and Families, shall review the form of jury submissions in this state and make recommendations to the legislature not later than December 31, 2017, regarding whether broad-form or specific jury questions should be required in suits affecting the parent-child relationship filed by the department." As with the changes to Chapter 101, this change affects actions under Chapters 262, or 263, which are outside the scope of study of this course.

The legislature made ten amendments to chapter 107 governing special appointments, child custody evaluations, and adoption evaluations. First, child custody evaluators were added to the list of appointees excluded from liability for civil damages arising from actions taken in their appointed capacity. TEX. FAM. CODE § 107.009(4)(a). Second, volunteer advocates are now authorized to serve as a surrogate parent provided that "the volunteer advocate completes a training program for surrogate parents that complies with minimum standards established by rule by the Texas Education Agency within the time specified by Section 29.015(b), Education Code." TEX. FAM. CODE § 107.031(c). Third, the child custody evaluation must include a list of certain basic and additional elements pursuant to Sections 107.109(c) and 107.109(d). TEX. FAM. CODE § 107.103(a) and (c). Fourth, the legislature modified the list of elements, basic and additional, that must be included in a child custody evaluation, and notably imposes a minimum age limit of four years for child interviews. TEX. FAM. CODE § 107.109(a), (c) and (d). The legislature also made minor changes to the provisions: governing psychometric testing, TEX. FAM. CODE § 107.110(d); effect of potentially undiagnosed serious mental illness, TEX. FAM. CODE § 107.1101(b); introduction and provision of child custody evaluation report, TEX. FAM. CODE § 107.114(a); and, the applicability provisions TEX. FAM. CODE § 107.152(c). Seventh, and finally, the legislature added TEX. FAM. CODE § 107.1111, a section governing a child custody evaluator's access to other records.

The 2017 legislative session yielded a number of changes to Texas Family Code, Chapter 109, Appeals. First and most importantly, the legislature omitted the initial requirement that the court issue temporary orders pending appeal, "[n]ot later than the 30th day after the date an appeal is perfected." TEX. FAM. CODE § 109.001(a). Pursuant to the 2017 amendments, "[t]he trial court retains jurisdiction to conduct a hearing and sign a temporary order under this section until the 60th day after the date any eligible party has filed a notice of appeal from final judgment under the Texas Rules of Appellate Procedure. TEX. FAM. CODE § 109.001(b-2). TEX. FAM. CODE § 109.001(b), underwent substantial revisions with the addition of several new subsections concerning temporary orders enjoining "a party from molesting or disturbing the peace of the child or another party," as well as the requisites for obtaining and modifying such protective orders. TEX. FAM. CODE § 109.001(b), (b-1) - (b-5). The legislature also added that TEX. FAM. CODE § 109.001(e) which provides that the remedies provided "are cumulative of all other remedies allowed by law."

TEX. FAM. CODE § 109.002(a), as amended, clarifies that appeals "from a final order rendered under Subchapter D, Chapter 152 [UCCJEA], must comply with Section 152.314. [UCCJEA Appeals]."

And, in TEX. FAM. CODE § 109.003(a)-(b), the legislature made a minor change by substituting the phrase "court reporter's record" for "statement of facts" in the title and text of this section. This change makes the Texas Family Code consistent with the "words of art" used in the Texas Rules of Appellate Procedure to describe the court reporter's transcription of the trial record. The archaic term, "statement of facts" was often misconstrued as "findings of fact" and this change is no more than a clarification making appellate matters more consistent and understandable to the trial attorney.

The cases in this chapter of the text serve as an introduction to SAPCRs; it is comprised of cases from a variety of substantive areas, but each case addresses a basic principle found in Chapters 101-111. The substantive aspects of the cases will receive more focused coverage in later chapters of this text. Topics that will be touched upon in this chapter of the text include: SAPCRs defined; parental rights; parental duties; standing; subject matter jurisdiction; personal jurisdiction; venue; the record; ad litems; guardians; and, orders pending appeal.

Standing as regards grandparent rights and the United States Constitution has already been touched upon in Chapter 1 with *Troxel v. Granville*, 530 U.S. 57 (2000). Grandparents rights, a hot topic of late, is addressed in Chapter 9. In addition to general standing to file suit as provided in 102.003, grandparent standing for managing conservatorship is also established in TEX. FAM. CODE § 102.004 (a). If possessory conservatorship is sought, grandparents may intervene under TEX. FAM. CODE § 102.004 (b). In very limited circumstances, grandparents, along with other specified relatives, may seek access and possession via an original suit. See TEX. FAM. CODE §§ 153.431 - 153.434.

Likewise, the jurisdictional issues addressed in this chapter will not include an in depth review of jurisdiction under the Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA) or under the Uniform Interstate Family Support Act (UIFSA); such will be addressed in Chapter 10.

Many of the cases that follow reference statutes before the recent re-codification of the Texas Family Code. In some instances the re-codification was non-substantive and only the section number of the statute has changed. **Make sure that you find the currently applicable statute and are able to identify it in class.**

## B. SAPCR Defined; Venue Mandatory

**LEONARD**
**v.**
**PAXSON**
654 S.W.2d 440
(Tex. 1983)

MCGEE, JUSTICE.

Relator, Sheryl Leonard, seeks a writ of mandamus directing the Honorable Sam Paxson, Judge of the 210th District Court of El Paso County, to transfer proceedings on her motion to modify the child support provisions of a previous divorce decree to Galveston County. We conditionally grant the writ.

In 1981, Sheryl and her former husband, Morton Leonard, entered into an "Agreement Incident to Divorce" which was approved by Judge Paxson and was incorporated into the court's final decree of divorce. Paragraph 6.09 of the Agreement states that the child support provisions contained therein are to be considered as a binding contract. Paragraph 11.02 of the Agreement provides as follows:

> *Venue of Suits*. All acts contemplated by this Agreement shall be performed in El Paso County, Texas, and all sums of money payable under this Agreement shall be payable in El Paso, Texas.

In 1982, Sheryl instituted a proceeding to modify the child support provisions of the divorce decree. *See* TEX. FAM. CODE ANN. § 14.08(a). In addition, she filed a motion to transfer the proceeding to Galveston County on the grounds that the children had resided in Galveston County for more than six months prior to the institution of the motion to modify. *See id.* §§ 11.04(a), 11.06(b).1 Morton contested the motion to transfer and filed a controverting affidavit, alleging that venue was proper in El Paso County based on paragraph 11.02 of the Agreement. *See* TEX. REV. CIV. STAT. ANN. art. 1995(5). Following a hearing on the motion to transfer, Judge Paxson found that the children had indeed resided in Galveston County for more than six months, but concluded that venue was nonetheless proper in El Paso County by virtue of the parties' agreement. Accordingly, Sheryl's motion to transfer was denied.

The question before us is whether the proceeding filed by Sheryl in Judge Paxson's court is a "suit affecting the parent-child relationship" under section 11.01(5) of the Family Code. We conclude that it is, and hold that it was Judge Paxson's mandatory duty under section 11.06(b) of the Family Code to transfer the proceeding to Galveston County. *Arias v. Spector*, 623 S.W.2d 312 (Tex. 1981) (per curiam); *Brines v. McIlhaney*, 596 S.W.2d 519 (Tex. 1980); *Brod v. Baker*, 591 S.W.2d 457 (Tex. 1979); *Cassidy v. Fuller*, 568 S.W.2d 845, 847 (Tex. 1978).

The venue provisions of the Family Code remove suits affecting the parent-child relationship from the operation of the general venue statute, TEX. REV. CIV. STAT. ANN. art. 1995, and the transfer provisions set forth in section 11.06(b) supplant the Rules of Civil Procedure governing pleas of privilege. *Rogers v. Rogers*, 536 S.W.2d 442, 443-44 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ). Section 11.01(5) of the Code defines a "suit affecting the parent-child relationship" as, among other things, "a suit . . . in which . . . support of a child . . . is sought. Sheryl's motion, which seeks modification of the child support provisions of the decree, is clearly a "suit affecting the parent-child relationship."

Morton's reliance on paragraph 11.02 of the Agreement is misplaced. In *Fidelity Union Life Insurance Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972), we held "that the fixing of venue by contract, except in such instances as permitted by Article 1995, § 5, is invalid and cannot be the subject of private contract. Our holding in *Fidelity Union* controls the instant case.

The underlying proceeding is a motion to modify the child support provisions of a divorce decree, not a suit on a contract. Sheryl does not allege that Morton has breached the Agreement, nor does she seek a money judgment for support payments due her under the contract. In this situation, the provisions of article 1995(5) are not applicable. Instead, the mandatory venue and transfer provisions of the Family Code control and cannot be negated by contract. To hold otherwise would defeat the legislature's intent that matters affecting the parent-child relationship be heard in the county where the child resides, and would promote forum shopping by contract. *Cassidy v. Fuller*, 568 S.W.2d at 847.

It is expected that Judge Paxson will transfer the proceeding in accordance with this opinion. The writ of mandamus will issue only in the event he does not do so.

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[1] Section 11.04(a) provides that "a suit affecting the parent-child relationship shall be brought in the county where the child resides." Section 11.06(b) provides:

> If . . . a motion to modify or enforce a decree is filed in a court having continuing jurisdiction of the suit, on the motion of any party, the court shall transfer the proceeding to the county where venue is proper on the basis of either a supporting uncontroverted affidavit or after a hearing when a controverting affidavit contesting the venue has been filed. . . . If the child has resided in another county for six months or longer, the court shall transfer the proceeding to that county.

**Notes, Comments & Questions**

1. Which section of the Texas Family Code defines a SAPCR?
2. What types of actions are explicitly included in the definition of a SAPCR?
3. What types of actions are explicitly excluded from the definition of a SAPCR?
4. Do the venue and transfer provisions found in Chapter 103 of the Family Code control, or must we look to another chapter of the Code?
5. Summarize the most important holding of *Leonard v. Paxson*.

## C. Standing Denied—No Actual Care

One of the most troublesome questions regarding the issue of standing is whether TEX. FAM. CODE § 102.003(9) requires "legal" or "actual" control, leading to the further question, 'what is actual control?" The Texas Supreme Court has not yet provided guidance on this issue and the courts of appeal are widely divided on the issue. The following cases provide varying perspectives on the issue of "control," each arising from relatively diverse facts.

**In the Interest of C.T.H.S. and C.R.H.S.**
311 S.W.3d 204
(Tex. App.—Beaumont 2010, pet. denied)

KREGER, JUSTICE.

Sheila R. Haley appeals the dismissal of her petition to be appointed sole managing conservator with the right to designate the primary residence of the twin children of Charlena Renee Smith. In two issues, Haley contends the trial court erred in determining that Haley lacked standing to pursue an original suit affecting the parent-child relationship ("SAPCR") and in considering affidavits offered by Smith. Because Haley did not establish she has standing, and because we presume the trial court ignored all incompetent evidence in reaching its conclusion, the order of the trial court is affirmed.

Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.,* 852 S.W.2d 440, 444-44 (Tex. 1993). A person who seeks conservatorship of a child must have standing to file suit. *In re K.K.C.,* 292 S.W.3d 788, 790 (Tex. App.—Beaumont 2009, orig. proceeding). "Whether a trial court has subject-matter jurisdiction is a question of law subject to *de novo* review." *Tex. Natural Res. Conservation Comm'n v. IT-Davy,* 74 S.W.3d 849, 855 (Tex. 2002).

In an original suit affecting the parent-child relationship in which the petitioner seeks managing conservatorship, the question of standing is a threshold issue. *In re M.P.B.,* 257 S.W.3d 804, 808 (Tex. App.—Dallas 2008, no pet.). The Texas Legislature has provided a comprehensive statutory

framework for conferring standing in the context of suits involving the parent-child relationship. *See* TEX. FAM.CODE ANN. §§ 102.003, .0035, .004, .0045 (Vernon Supp. 2009), § 102.006 (Vernon 2008). A petitioner seeking managing conservatorship has the burden to prove standing. *In re Smith,* 262 S.W.3d 463, 465 (Tex. App.—Beaumont 2008, orig. proceeding [mand. denied]).

In an earlier mandamus proceeding, this Court held that a 2002 agreed order naming Haley as joint managing conservator of C.T.H.S. and C.R.H.S. was void. *Id.* at 466-67. We identified two reasons why the trial court lacked jurisdiction in 2002. First, the twins were only four months old at the time the suit was commenced, and, therefore, Haley lacked standing. *Id.* at 465; *see* TEX. FAM.CODE ANN. § 102.003(a)(9) (conferring standing on "a person, other than a foster parent, who has had actual care, control, and possession of the child[ren] for at least six months ending not more than 90 days preceding the date of the filing of the petition"). Second, in 2002 there was no real controversy between Haley and Smith to be resolved by the court. *Smith,* 262 S.W.3d at 466. We held that the temporary orders arising out of the motion to modify the void order must be vacated. *Id.* at 467. The trial court vacated its prior orders on August 19, 2008.

Haley's 2008 petition seeking to be named sole managing conservator is an original petition under Chapter 153 of the Texas Family Code. Haley argues she has standing to file suit under section 102.003(a)(9). *See* TEX. FAM.CODE ANN. § 102.003(a)(9). At the request of the trial court, the parties briefed the issue of whether Haley had standing to maintain an original SAPCR action and presented supporting affidavits to the trial court. The trial court conducted a hearing at which it initially stated that there were outstanding fact issues with regard to the allegations of whether the parent was unfit.[1] However, after consideration of trial counsel's arguments and the parties' affidavits, the trial court dismissed Haley's SAPCR petition for lack of standing. The trial court made written findings of fact and conclusions of law, as follows:

> 1. There is no evidence that, during the relevant time period, the parent Ms. Smith totally abdicated her parental responsibilities over the children to the non parent Ms. Haley.
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> 2. There is no evidence that, during the relevant time period, the parent Ms. Smith did not exercise some care for, some control over or some supervision over the children at the same time that the non parent Ms. Haley exercised some care for, some control over and some supervision over the children.
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> 3. There is no evidence that, during the relevant time period, the non parent Ms. Haley exercised exclusive care for, control over and supervision over the children to the exclusion of the parent Ms. Smith.
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> 4. A parent must totally abdicate their parental responsibilities to another person during the relevant time period before that other person can acquire standing to file an original SAPCR with respect to that parent's child.
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> 5. A parent's allowing of a non parent to have some care for, some control over and some supervision over the parent's child during the relevant time period is insufficient for the non parent to acquire standing to file an original SAPCR with respect to that child.

[1] Oral statements by the trial judge may not be considered as a substitute for findings of fact or conclusions of law. See In the Interest of W.E.R., 669 S.W.2d 716, 716 (Tex. 1984); Tate v. Tate, 55 S.W.3d 1, 7 n. 4 (Tex. App.—El Paso 2000, no pet.). Furthermore, when a trial court issues findings that conflict with an initial finding, the later findings control over the earlier findings. Jefferson County Drainage Dist. No. 6 v. Lower Neches Valley Auth., 876 S.W.2d 940, 960 (Tex. App.—Beaumont 1994, writ denied).

6. If a parent, to any extent whatsoever, retains or exercises any care for, any control over or any supervision over their child during the relevant time period, then a non-parent cannot as a matter of law acquire standing to file an original SAPCR with respect to that child.

7. During the relevant time period, a non-parent must exercise exclusive care for, control over and supervision over a child (not necessarily continuous for the entire time period, but during the relevant time period) to the exclusion of the child's parent in order to acquire standing to file an original SAPCR with respect to that child.

On appeal, Haley argues that the trial court's conclusions of law are erroneous. She states she "does not necessarily disagree with the factual findings," but "the factual findings have no effect as applied, because they are based on the erroneous conclusions of law."

We are to consider the findings as a whole and adopt the construction that gives effect to all material findings. *See generally De Llano v. Moran,* 160 Tex. 490, 333 S.W.2d 359, 360 (1960). When the findings are "subject to more than one reasonable construction, they should be given that meaning which will support the action of the court" as expressed in the order. *Id.* We conclude the trial court determined Smith was a fit parent adequately caring for her children. *See* TEX.R. CIV. P. 299.[2] Although Haley challenges the court's conclusions of law, she does not argue on appeal that Smith does not adequately care for her children.

This Court stated as follows in *K.K.C.:*

The interest of parents in the "care, custody, and control" of their children "is perhaps the oldest of the fundamental liberty interests" recognized by the United States Supreme Court. (*Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). Furthermore, this State has long recognized that the "natural right which exists between parents and their children is one of constitutional dimensions." *See Wiley v. Spratlan,* 543 S.W.2d 349, 352 (Tex. 1976); *see also Holick v. Smith,* 685 S.W.2d 18, 20 (Tex. 1985); *In re Pensom,* 126 S.W.3d 251, 254 (Tex. App.—San Antonio 2003, orig. proceeding).

*In re K.K.C.*, 292 S.W.3d at 792 (footnote omitted). "These parental interests are a fundamental right protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *In re Pensom,* 126 S.W.3d 251, 254 (Tex. App.—San Antonio 2003, orig. proceeding) (citing *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)). "Texas statutes are intended by the Legislature to be in compliance with the Constitutions of this State and the United States." *In re K.K.C.,* 292 S.W.3d at 792 (citing TEX. GOV'T CODE ANN. § 311.021(1)(Vernon 2005)) (footnote omitted). "A court construes a statute to give effect to the Legislature's intent as expressed in the actual language used in the statute." *Id.* (citing *Osterberg v. Peca,* 12 S.W.3d 31, 38 (Tex. 2000) and *In re Pensom,* 126 S.W.3d at 255-56).

The power of a trial court to adjudicate disputes between a parent and a non-parent, and to enforce its own orders contrary to a parent's decisions concerning her children, constitutes state involvement that implicates the parent's fundamental liberty interests in the care, custody, and control of her

[2]Rule 299. Omitted Findings

When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment....

children. *See Troxel,* 530 U.S. at 65-76, 120 S.Ct. 2054. The jurisdictional requirement of standing helps ensure that a parent's constitutional rights are not needlessly interfered with through litigation. *See generally In re Pensom,* 126 S.W.3d at 255 ("[J]urisdictional prerequisite of standing [in grandparent access context] serves to ensure that the statutory scheme is narrowly tailored so that a parent's personal affairs are not needlessly intruded upon or interrupted by the trauma of litigation by any third party seeking access."). As the United States Supreme Court explained in *Troxel,* "[S]o 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel,* 530 U.S. at 68-69, 120 S.Ct. 2054 (citing *Reno v. Flores,* 507 U.S. 292, 304, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)).

The standing statutes should be construed in a manner consistent with the constitutional principles stated in *Troxel. See In re Pensom,* 126 S.W.3d at 255-56. In the provision at issue here, the Legislature chose the words "actual care, control and possession." TEX. FAM.CODE ANN. § 102.003(a)(9). We presume each word was used for a purpose, and give each word effect if it is reasonable and possible to do so. *Tex. Workers' Comp. Ins. Fund v. Del Indus., Inc.,* 35 S.W.3d 591, 593 (Tex. 2000). The law recognizes that a parent has the responsibility to care for her children. *See* TEX. FAM.CODE ANN. § 151.001(a)(2) (Vernon 2008). The words "actual care" must be given effect in the context of the responsibilities of the parent and the parent's liberty interests. *See generally In re K.K.C.,* 292 S.W.3d at 792-93 (meaning of "control" in section 102.003(a)(9)).

We note that section 102.003(a)(11) separately provides standing to a person with whom the child and a parent have resided for at least six months if the "parent is deceased at the time of the filing of the petition[.]" TEX. FAM.CODE ANN. § 102.003(a)(11). Presumably, a person residing with a parent and child may care for the child over the course of time, yet that person would not have standing simply by the care that would normally be exercised when residing in the same household with the parent and the child. If the same degree of care, control, and possession that would accompany living with the parent and child were sufficient to establish standing under section 102.003(a)(9), the requirement that the parent be deceased in section 102.003(a)(11) would be without effect, because standing would separately exist under section 102.003(a)(9). We should not construe section 102.003(a)(9) so broadly that section 102.003(a)(11) is rendered meaningless. *See Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 441-42 (Tex. 2009) (noting that a statute should not be interpreted in a manner that renders parts of it meaningless).

The Fort Worth Court of Appeals in the case of *In re M.J.G.,* 248 S.W.3d 753, 757-59 (Tex. App.—Fort Worth 2008, no pet.), considered the "actual care" requirement in section 102.003(a)(9). In *M.J.G.,* the court held that grandparents who alleged "M.J.G. had lived with them since she was born[,] with the exception of one two-week period when she stayed with her parents in another town[,]" nevertheless lacked standing under section 102.003(a)(9). *Id.* at 757, 759. Even though M.J.G. and her brother lived with the grandparents, and the grandparents performed day-to-day caretaking duties for the children, the children's parents were also living with the children in the home, and there was no evidence that the parents did not care for the children or that the parents had abdicated their parental duties and responsibilities to the grandparents. *See id.* at 758-59. Haley argues that "the decision reached in [*M.J.G.*] incorrectly construes TEX. FAM.CODE § 102.003(a)(9)." She argues that a parent often lives with others, and that the best interest of the children should be considered.

The holding in *M.J.G.* appears to be consistent with the meaning of the language used by the Legislature, the constitutional liberty interests retained by a fit parent adequately caring for her children, and the statutory scheme for standing set forth in the Family Code. *See In re K.K.C.,* 292

S.W.3d at 793. Standing does not turn on whether a trial court agrees or disagrees with a parent's decision concerning the best interest of her children, or a parent's decision regarding who may associate with her children. Specifically, when someone other than a parent claims standing under the "actual care" requirement of section 102.003(a)(9), the court considers whether the parent is adequately caring for her children. *See* TEX. FAM.CODE. ANN. § 102.003(a)(9); *In re M.J.G.,* 248 S.W.3d at 757-59; *see also Troxel,* 530 U.S. at 68-69, 120 S.Ct. 2054 (presumption that fit parents act in the best interest of their children); *see generally In re Pensom,* 126 S.W.3d at 255 (considering limitations of intrusion into the parent-child relationship in the grandparent access context). Although Haley lived with the children, Smith also lived with her children in the home, and the record does not establish that Smith failed to adequately care for her children or that she abdicated her parental duties and responsibilities. *See In re M.J.G.,* 248 S.W.3d at 757-59; *see also In re K.K.C.,* 292 S.W.3d at 792-94.

In issue two, Haley complains about the affidavits Smith submitted to the trial court. Haley filed a motion to strike Smith's affidavits. The trial court stated generally that the court was granting proper objections and overruling improper ones. Haley did not request clarification. We presume the trial court disregarded incompetent evidence. *See Gillespie v. Gillespie,* 644 S.W.2d 449, 450 (Tex. 1982).

Haley had the burden to establish standing. *See In re Smith,* 262 S.W.3d at 465. The trial court could reasonably conclude she failed to meet her burden. We overrule issues one and two. The trial court's order is affirmed.

AFFIRMED.

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**Notes, Comments & Questions**

1. Consider the appellate court's analysis of the meaning of TEX. FAM. CODE § 102.003(a)(9) in light of TEX. FAM. CODE §102.003(a)(11). What is your opinion of that analysis?

2. What is your opinion of the appellate court's statement that, ". . . when someone other than a parent claims standing under the "actual care" requirement of section 102.003(a)(9), the court considers whether the parent is adequately caring for her children.

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## D. Another Look at Actual Control

**JASEK**
**v.**
**TEX. DEPT. FAMILY & PROTECTIVE SERVICES**
348 S.W.3d 523
(Tex. App.—Austin 2011, no pet.)

***OPINION***

BOB PEMBERTON, JUSTICE.

The principal issue presented in this appeal is what constitutes the "actual control" of a child that is required to establish standing to bring a suit affecting the parent-child relationship (SAPCR) under family code section 102.003(a)(9). *See* TEX. FAM.CODE Ann. § 102.003(a)(9) (West 2008). Appellants Philip and Lorine Jasek[1] assert that they had "actual control" of the two children affected by this case where appellee, the Texas Department of Family and Protective Services (DFPS), placed the children with the Jaseks and the children lived with the Jaseks for more than two years thereafter. DFPS argues that "actual control" turns on whether one has the legal right of control over the children, and the district court was persuaded to render an order predicated on that conclusion. We disagree with that conclusion, hold that the Jaseks satisfied the "actual control" requirement as a matter of law, and will reverse and remand.

**BACKGROUND**

The material facts are undisputed. In February 2007, DFPS filed a SAPCR against the biological parents of two children, K.E. and T.E., seeking to terminate the parent-child relationship. The district court issued an order of termination in January 2008 and named DFPS as K.E. and T.E.'s sole managing conservator.

In April 2007, two months after filing the termination proceeding, DFPS had placed K.E. and T.E. with the Jaseks, who were friends of the children's family according to the record. The placement was made pursuant to a DFPS "Placement Authorization" agreement that required the Jaseks to "provide for the child [ren's] daily care, protection, control, and reasonable discipline," "enroll them in public school," and "provide routine transportation." The placement authorization did not allow the Jaseks to travel with the children outside of Texas or for longer than seventy-two hours without first notifying DFPS, and it required the Jaseks to "give DFPS access to information about the child[ren] at all times." It also advised that "DFPS, at its sole discretion, may remove the child[ren] from the care giver at any time, subject to applicable court orders."

In October 2009, Philip Jasek tested positive for marijuana. Not long thereafter, DFPS removed the children from the Jaseks' home. Before that positive drug test, both the DFPS and the Jaseks had intended to have K.E. and T.E. stay with the Jaseks permanently.

Two months later, the Jaseks filed what they styled as a "Petition in Intervention in Suit Affecting the Parent-Child Relationship" in the same cause number as the termination proceedings that had concluded in January 2008. DFPS filed a motion to strike, asserting that the Jaseks lacked standing to

[1] Pronounced "Ya-shek."

intervene in the termination proceeding or to file an original SAPCR regarding K.E. and T.E. After a hearing on the motion to strike, at which evidence was introduced, the district court found that—

- K.E. and T.E. had lived with the Jaseks between April 2007 and October 13, 2009;
- the Jaseks were "Fictive Kin, not a parent, foster parent, or otherwise" to the children;
- the "[p]arental rights to K.E. and T.E. were terminated on January 10, 2008";
- DFPS had removed K.E. and T.E. from the Jaseks' home on October 13, 2009 as a result of Philip Jasek's positive marijuana test; and
- the Jaseks had filed a "Petition for Intervention in a Suit Affecting Parent-Child Relationship" on December 17, 2009, asserting standing under family code sections 102.004(b), 102.003(a)(9), and 102.005.

However, concluding that the Jaseks lacked standing under section 102.004(b) because their petition was not filed during a pending suit and that they lacked standing under section 102.003(a)(9) because they did not have "control" of the children, the district court granted DFPS's motion and struck the Jaseks' petition. The Jaseks appeal from this judgment.

**DISCUSSION**

In two issues, the Jaseks assert that the district court erred in granting DFPS's motion to strike because (1) they had standing to bring an original SAPCR under family code section 102.003(a)(9) and (2) they had standing to intervene in the termination case under family code section 102.004(b).

**Standard of review**

Standing is a component of subject-matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law. *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 443-44 (Tex. 1993). As with other issues implicating subject-matter jurisdiction, analysis of whether a party has standing begins with the plaintiff's live pleadings. *See Good Shepherd Med. Ctr., Inc. v. State,* 306 S.W.3d 825, 831 (Tex. App.—Austin 2010, no pet.) (citing *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225-26 (Tex. 2004)). The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Miranda,* 133 S.W.3d at 225-26 (citing *Texas Ass'n of Bus.,* 852 S.W.2d at 446). We must also consider evidence the parties presented below that is relevant to the jurisdictional issues, *Bland Independent School District v. Blue,* 34 S.W.3d 547, 555 (Tex. 2000), including any evidence that a party has presented to negate the existence of facts alleged in the plaintiff's pleading. *See Miranda,* 133 S.W.3d at 227; *see also Combs v. Entertainment Publ'ns, Inc.,* 292 S.W.3d 712, 719 (Tex. App.—Austin 2009, no pet.) (summarizing different standards governing evidentiary challenges to the existence of pleaded jurisdictional facts where such facts implicate both jurisdiction and the merits versus where they implicate only jurisdiction). If the facts relevant to jurisdiction are undisputed, as they are here, the jurisdictional determination is a matter of law. *See Miranda,* 133 S.W.3d at 228; *Combs,* 292 S.W.3d at 719.

"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, 124 (Tex. App.—San Antonio 2008, no pet.) (*citing* TEX. FAM.CODE Ann. §§ 102.003, .004, .0045, .005, .006 (West 2008)). When standing to bring a particular type of lawsuit has been conferred by statute, we use that statutory framework to analyze whether the petition has been filed by a proper party. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex. 1984). The party seeking relief must allege and establish standing within the parameters of the statutory language. *In re H.G.,* 267 S.W.3d at 123.

To the extent that the parties' issues turn on the construction of a statute, we review these questions de novo. *State v. Shumake,* 199 S.W.3d 279, 284 (Tex. 2006). Our primary objective in statutory construction is to give effect to the Legislature's intent. *See id.* We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn,* 209 S.W.3d 83, 85 (Tex. 2006). "Where text is clear, text is determinative of that intent." *Entergy Gulf States, Inc. v. Summers,* 282 S.W.3d 433, 437 (Tex. 2009) (op. on reh'g) (citing *Shumake,* 199 S.W.3d at 284; *Alex Sheshunoff Mgmt. Servs. v. Johnson,* 209 S.W.3d 644, 651-52 (Tex. 2006)). We consider the words in context, not in isolation. *State v. Gonzalez,* 82 S.W.3d 322, 327 (Tex. 2002). We rely on the plain meaning of the text, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. . . . However, only when the statutory text is ambiguous "do we 'resort to rules of construction or extrinsic aids.' " *Entergy Gulf States, Inc.,* 282 S.W.3d at 437 (quoting *In re Estate of Nash,* 220 S.W.3d 914, 917 (Tex. 2007)).

* * *

**Standing to bring original SAPCR under family code section 102.003(a)(9)**

Although the Jaseks have styled their pleading as a "Petition in Intervention" in the SAPCR that was concluded by the 2008 final order, this inaccurate nomenclature is not singularly fatal. Texas follows a "fair notice" standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *See Horizon/CMS Healthcare Corp. v. Auld,* 34 S.W.3d 887, 897 (Tex. 1999). The Jaseks' petition asked the court to appoint them as K.E. and T.E.'s managing conservators and, in addition to seeking to "intervene," asserted that the Jaseks had "general standing under section 102.003(a)(9) to file an original SAPCR." Section 102.003(a)(9) confers standing to bring an original SAPCR to "person[s], other than a foster parent, who [have] had actual care, control, and possession of the child[ren] for at least six months ending not more than 90 days preceding the date of the filing of the petition." *See* TEX. FAM.CODE Ann. § 102.003(a)(9). Thus, by requesting appointment as the children's managing conservators, referencing an original SAPCR—as opposed to an intervention in a pending matter—and invoking a provision governing standing to bring an original SAPCR (and section 102.003(a)(9) specifically), the Jaseks provided DFPS and the district court adequate and fair notice of their intent to bring an original SAPCR under section 102.003(a)(9) to modify K.E. and T.E.'s conservatorship. *See Horizon/CMS Healthcare Corp.,* 34 S.W.3d at 897. "A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim" such that "the opposing party has information sufficient to enable him to prepare a defense." *Roark v. Allen,* 633 S.W.2d 804, 810 (Tex. 1982). "A pleading that gives adequate notice will not fail merely because the draftsman named it improperly." *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.,* 809 S.W.2d 577, 586 (Tex. App.—Dallas 1991, writ denied) (citing TEX.R. CIV. P. 71). Further, because the district court had acquired continuing exclusive jurisdiction over K.E. and T.E. as a result of the final order of termination, it would have been proper for the Jaseks to file an original proceeding there. *See* TEX. FAM.CODE Ann. § 155.001 (West 2008) (providing that a court who has issued a final order in an earlier SAPCR proceeding has jurisdiction over future SAPCR proceedings involving the same child).

The district court found, and it is undisputed, that the two children lived with the Jaseks for more than two years. Consequently, they would satisfy section 102.003(a)(9)'s requirements if such care and possession constituted "actual care, control, and possession of the child[ren]," as the district court found they were "person[s], other than a foster parent," the period of care and possession was "at least six months," and the period ended "not more than 90 days preceding the date of the filing of the petition." *See id.* § 102.003(a)(9). DFPS, while acknowledging that the Jaseks cared for and possessed K.E. and T.E. for more than two years within the relevant time period, argues that the Jaseks

failed nonetheless to establish standing under section 102.003(a)(9) because they (1) did not properly plead that they had "care, control, and possession" of K.E. and T.E. and (2) could not establish that they had "actual control" over the children because, at all relevant times, DFPS had sole legal control over the children.

***Pleadings***

As to DFPS's challenge to the Jaseks' pleadings, we note that the Jaseks' petition asserted that "the Jaseks have general standing under section 102.003(a)(9) to file an original SAPCR . . . . Therefore, as a matter of law, the Jaseks satisfy the legal requirements to intervene in this case." . . . Although the Jaseks' petition did not quote the text of section 102.003(a)(9), "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" is the only basis for standing provided in that section. *See id.* § 102.003(a)(9). Thus, by specifically referring to section 102.003, subsection (a)(9), alleging that the children had lived with them for more than two years ending in October 2009, and filing their petition in December 2009, the Jaseks gave DFPS and the district court adequate and fair notice of their contention that they had exercised "actual care, control, and possession" of K.E. and T.E. sufficient to confer standing under family code section 102.003(a)(9). . . .

***"Actual control"***

DFPS contends that regardless of whether the Jaseks properly pleaded standing under section 102.003(a)(9), they could not establish that they had the requisite "actual control" over K.E. and T.E. DFPS does not dispute that Jaseks had "actual care" and "actual possession" of the children for the requisite time period. However, it argues that the Jaseks could not have had "actual control" during that time because that requires having the "authority to make legal decisions, decisions of legal significance and including the responsibilities of a legal parent." DFPS insists that only DFPS had "actual control" over the children because, as the district court found, DFPS was vested with the ultimate legal authority to make decisions for the children, including the discretion to remove them from the Jaseks' home at any time. We disagree that "actual control" under section 102.003(a)(9) hinges on whether a care giver possesses this sort of legal authority.

* * *

"Actual" is a commonly used word that means "existing in fact or reality." *Webster's Third New Int'l Dictionary* 22 (2002) (contrasting it with "ideal and hypothetical" and distinguishing it from "apparent and nominal"). In legal contexts, the word "actual" is most often used in juxtaposition with the word "constructive"—i.e., something that exists by virtue of a legal imputation or fiction, but not existing in fact. *See Black's Law Dictionary* 40 (9th ed. 2009) (defining "actual" as "existing in fact; real" and comparing it with "constructive"). . . . For example, in the context of premises-liability cases, the law distinguishes between actual knowledge of a dangerous condition—i.e., when a person directly knows of the dangerous condition, . . . The family code recognizes the same distinction between actual knowledge and constructive knowledge. *See* TEX. FAM.CODE Ann. § 34.007 (West Supp. 2010).

Similarly, the law distinguishes between constructive and actual notice. "Actual notice rests on personal information or knowledge . . . . Constructive notice is notice that the law imputes to a person not having personal information or knowledge." . . .

We need not further belabor the point—the law uses the term "actual" to indicate something that exists in fact, as opposed to something that is a function of legal duties or imputation. And we are to presume that the Legislature was aware of such usage and connotation, and deliberately intended that

meaning, when it made "actual" care, control, and possession the basis for standing under family code section 102.003(a)(9). . . .

As for "control"—a word which the Legislature included in seventy-three provisions of the family code but did not specifically define—it means the "power or authority to guide or manage: directing or restraining domination." *Webster's Third New Int'l Dictionary* 496 (2002); *see Black's Law Dictionary* 378 (9th ed. 2009) (defining control as the "power to govern the management and policies of a person"); . . . Accordingly, "actual . . . control . . . of the child," as used in section 102.003(a)(9), means the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child. In sum, these words reflect the Legislature's intent to create standing for those who have, over time, developed and maintained a relationship with a child entailing the actual exercise of guidance, governance and direction similar to that typically exercised by parents with their children. *See Coons-Andersen v. Andersen,* 104 S.W.3d 630, 636 (Tex. App.—Dallas 2003, no pet.).

Several courts, including this Court, have previously addressed section 102.003(a)(9)'s requirement that a person have "actual care, control, and possession" of the child to have standing to bring an original SAPCR. But in doing so, most of these courts considered all three elements—care, control, and possession—collectively, without distinguishing them.[2] . . . The common threads running through the cases in which the court found actual care, control, and possession collectively to be established, however, were that the person asserting standing (1) lived in the same home as the child or lived in a home where the child stayed overnight on a regular and frequent basis, (2) made financial contributions benefitting the child, (3) was involved with the child's education, and (4) was involved in matters involving the child's general upbringing, like health care, feeding, and clothing. *See, e.g., In re M.K.S.-V.,* 301 S.W.3d at 463-65; *In re M.P.B.,* 257 S.W.3d at 809; *Smith,* 2010 WL 3718546, at *3.

In contrast, we found only two cases that have addressed "actual control" separately in this context. *See In re K.K.C.,* 292 S.W.3d 788, 792-93 (Tex. App.—Beaumont 2009, no pet.); *In re Kelso,* 266 S.W.3d 586, 590 (Tex. App.—Fort Worth 2008, no pet.). Both held that the parties lacked standing because they did not have "actual control" over the children at issue in the cases.

* * *

To the extent that these two cases construe section 102.003(a)(9) to require that either (1) a parent or conservator have relinquished rights over a child or (2) that the person seeking standing have ultimate legal authority to control a child, we respectfully disagree. First, nothing in section 102.003(a) requires that a parent or other conservator have "voluntarily relinquished permanent care, control, and possession" or that the person seeking standing have legal control over the child. *See* TEX. FAM.CODE Ann. § 102.003(a)(9); *see also Smith,* 2010 WL 3718546, at *3 ("Nothing in section 102.003(a)(9) requires that care, custody [sic], control and possession be exclusive."). We cannot add words to a statute; that is solely the Legislature's prerogative. *See Lee v. City of Houston,* 807 S.W.2d 290, 295 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.").

[2] *See, e.g.,* In re M.K.S.-V., 301 S.W.3d 460, 463-65 (Tex. App.—Dallas 2010, pet. denied); Coons-Andersen v. Andersen, 104 S.W.3d 630, 634 (Tex. App.—Dallas 2003, no pet.); Williams v. Anderson, 850 S.W.2d 281, 284 (Tex. App.—Austin 1993, writ denied); In re Fountain, No. 01-11-00198-CV, 2011 WL 1755550, at *3-4 (Tex. App.—Houston [1st Dist.] May 2, 2011, no pet.) (mem. op.); Smith v. Hawkins, No. 01-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, pet. filed) (mem. op.).

Second, requiring that the person seeking standing under section 102.003(a)(9) have the ultimate legal right to control a child, in addition to reading words into the text that are not there, would render the word "actual" superfluous at best and meaningless at worst. As discussed, "actual" is used in legal contexts to distinguish between something that exists in fact rather than as a function of legal implication. If the Legislature wanted to tie standing to persons with the legal right to control a child, it would have either omitted the word "actual" or included the word "legal." But by using "actual" to modify "care, control, and possession," the Legislature manifested its intent to confer standing on a person who had developed and maintained a relationship, of at least six months duration, with the child by virtue of that person's actual care, control, and possession of the child, as distinguished from a bare legal right of care, control, and possession.

* * *

Based on the statutory text and the foregoing analysis, we hold that to establish standing under section 102.003(a)(9), the Jaseks had to show that they had actual control over K.E. and T.E.—meaning the actual power or authority to guide or manage K.E. and T.E. without regard to whether they had the legal or constructive power or authority to guide or manage K.E. and T.E.—for at least six months ending not more than 90 days preceding the date of the filing of their petition. *See* TEX. FAM.CODE Ann. § 102.003(a)(9). The Jaseks' pleadings and the evidence introduced at the hearing on DFPS's motion to dismiss established that they did. [Consult full copy of opinion for listing of all such facts].

* * *

We hold that, as a matter of law, the Jaseks had standing under family code section 102.003(a)(9) to file a suit affecting the parent-child relationship.

Finally, in its brief to this Court, DFPS emphasizes various unflattering facts and accusations regarding the Jaseks, including Philip Jasek's positive marijuana test and alleged instances where the Jaseks subjected K.E. and T.E. to "extreme forms of punishment." While these allegations may prove to be relevant to the district court's ultimate decision on the merits of their petition to modify managing conservatorship, they are not relevant to whether the Legislature has given the Jaseks standing to bring their petition in the first place. Likewise, our holding that the Jaseks have standing to bring a case does not mean or imply that they will ultimately prevail.

We sustain the Jaseks' first issue.

**CONCLUSION**

We reverse the district court's judgment striking the Jaseks' petition and remand the case to the district court for further proceedings consistent with this opinion.

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**Notes, Comments & Questions**

1. What do you think of the appellate court's collective consideration of "actual care, control and possession?"

2. Do you think that to consider "actual care" separately necessarily requires legal control?

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## E. Care, Custody, Control Need Not be Exclusive for Standing

**In re FOUNTAIN**

No. 01_11_00198_CV
(Tex. App. - Houston [1st Dist.] 2011)
(Original Proceeding)
May 2, 2011.

Original Proceeding on Petition for Writ of Mandamus.

Panel consists of JUSTICES KEYES, MASSENGALE, and BROWN.

**MEMORANDUM OPINION ON REHEARING**

MASSENGALE, JUSTICE.

Relator Tammy Fountain has filed a motion for en banc reconsideration of our March 25, 2011 memorandum order denying her petition for writ of mandamus without opinion. *See* TEX.R.APP. P. 52.8(d), 52.9. Having received a response from real party in interest Kathy Katcher, we withdraw our prior order and issue this opinion in its stead, rendering the motion for en banc reconsideration moot. *See Brookshire Bros., Inc. v. Smith,* 176 S.W.3d 30, 33 (Tex. App.—Houston [1st Dist] 2004, pet. denied). By her petition, Fountain seeks a determination that Katcher lacks standing to seek appointment as a managing conservator of Fountain's child. Our disposition remains the same. On this record, we conclude that Fountain is not entitled to mandamus relief from the trial court's conclusion that Katcher has standing to file her petition.

**Background**

As required under the applicable standard of review, we accept as true the jurisdictional fact allegations of the real party in interest for purposes of our standing analysis in this original proceeding. [FN 1 deleted]. Our recitation of the factual allegations is not intended to suggest anything about what the appropriate factfinder should determine for purposes of future proceedings in this matter.

One year ago, Tammy Fountain and Kathy Katcher ended a relationship that lasted approximately seven years. Beginning in April 2008, before their separation, the two women began caring for an infant boy at the request of his biological father. According to the father's affidavit testimony, he initially agreed to share possession of and responsibility for the child with Katcher and Fountain. The arrangement was that the child, S.J.F., would spend the first half of the week with the biological father and his family, and he would spend the second half of the week at Katcher's house with her and Fountain. This arrangement continued for some time, but the father eventually became "comfortable with the idea" that Katcher would legally adopt S.J.F.

In October 2009, a change in circumstance prompted the two women to seek adoption of the child. S.J.F.'s biological mother gave birth to another child, and drugs were found in the newborn's system. Child Protective Services intervened. Fearing that S.J.F. would be placed in foster care, Fountain and Katcher sought an adoption. According to Katcher, Fountain proposed that an adoption could be finalized more expeditiously if she were named the sole adoptive parent. Katcher contends that the

two women agreed to add Katcher as a second adoptive parent at a later date.[2] Katcher paid some or all of the attorney's fees incurred during the adoption proceedings. When the adoption became final in December 2009, Fountain was the only adoptive parent listed on the certificate of adoption.

Both women claim to have been the child's primary caretaker. During their relationship, Fountain and Katcher maintained separate residences located approximately three and one half miles apart. Though living separately, they often spent evenings and nights together with S.J.F. at the home of one or the other. Katcher testified that because she worked from home, she assumed primary responsibility for S.J.F.'s care for a substantial amount of the time she and Fountain were together. Specifically, she stated that S.J.F. was in her care 95 percent of the time and that she paid most of his expenses. Katcher bought food, clothing, toys, and medicine for S.J.F., all of which were kept at her house. She made improvements to her home to make it safe for the child, and she had a place for him to sleep there. In preparation for the adoption home study, Katcher also paid for improvements to Fountain's home. Katcher asserts that without such improvements Fountain's home would not have been suitable for a child.[3]

Katcher claims that she acted as a parent to S.J.F. by locating, investigating, and selecting his daycare provider. She also attended medical appointments with him. Katcher testified that the time she spent with S.J.F. increased in the months following the adoption due to Fountain's heavy workload. A friend and professional colleague of Katcher testified by affidavit that Katcher "cared for the child several days a week through 2008, the entire year of 2009 and in 2010 on an almost daily basis." A neighbor of Fountain who sometimes performs work on Katcher's home testified that between September 2009 and April 2010, he observed Katcher caring for S.J.F. five or six days per week. According to Katcher, all of this evidence demonstrates that she developed a significant relationship with S.J.F. between April 2008 and April 2010.

The nature of the women's former relationship is disputed. Katcher asserts that the women enjoyed a committed relationship, pointing to Fountain's own testimony that the two women spent most evenings and nights together. Katcher also presented evidence that, for a period of time before S.J.F.'s adoption, she was listed as a domestic partner on Fountain's health insurance policy. The two women had considered adopting other children together in the past. After the adoption of this child, Fountain wrote to her attorney to inquire about the process of adding Katcher as an adoptive parent.[4] The child's biological father testified that the two women were in a committed relationship and that he intended that they would both become S.J.F.'s parents.

The couple's permanent separation in April 2010 gave rise to the underlying suit. Katcher filed suit on May 21, 2010, alleging that Fountain began denying access to S.J.F. almost immediately after their break-up. Katcher's pleadings do not raise any issue relating to the result of the adoption

[2] According to Fountain, there was no agreement to add Katcher as an adoptive parent. Fountain denies that the two women intended to co-parent or share periods of possession and access to S.J.F.

[3] In contrast, Fountain maintains that her home was S.J.F.'s primary residence. She acknowledges that, prior to the adoption, S.J.F. spent equal amounts of time in the two women's homes. But she testified that she provided S.J.F.'s health insurance and made all decisions concerning his welfare. She also testified that she took S.J.F. to and from daycare 90 percent of the time, but that on occasion Katcher would either take S.J.F. to daycare or care for him at home while Fountain worked. Although Fountain conceded that the two women cared for S.J.F. together for a period of time and that Katcher paid the majority of S.J.F.'s daycare expenses, she characterized Katcher's role in S.J.F.'s life as that of a "fun-loving aunt."

[4] Fountain testified that she and Katcher separated on 20 to 25 occasions and declined to characterize their relationship as serious. Fountain blamed the problems in their relationship on Katcher's drug use. Katcher disputes the allegations of drug use and recalled only two breakups.

proceedings, nor does she contend Fountain is an unfit parent. Instead, Katcher asserts her own claim of rights with respect to S.J.F., and she asks to be named sole managing conservator of the child. *See* TEX. FAM.CODE ANN. § 153.371 (West 2008). Alternatively, she seeks to establish a joint managing conservatorship with Fountain. *See id.* § 153.372 (West 2008).

Fountain responded by filing a motion to dismiss, challenging Katcher's standing to initiate an original suit affecting the parent-child relationship. An associate judge denied Fountain's jurisdictional challenge by written order on October 8, 2010. The order provides in pertinent part:

> 5. The Court finds that **KATHY KATCHER** has developed a significant relationship with the child;
>
> 6. The Court finds that **KATHY KATCHER** has invested significant time raising and caring for the child;
>
> 7. The Court finds that **KATHY KATCHER** and **TAMMY FOUNTAIN** have both had the care, control and possession of the child for a period of 6 months not ending 90 days prior to the filing of **KATHY KATCHER'S** Original Suit Affecting Parent Child Relationship; and
>
> 8. The Court finds that it is in the child's best interest for **KATHY KATCHER** to be able to proceed with her Original Suit Affecting Parent Child Relationship.

Fountain appealed the associate judge's ruling to the trial court. After a de novo hearing, including four days of testimony and argument, the trial court orally adopted the associate judge's ruling on December 28, 2010. It is this ruling that Fountain challenges in her petition for mandamus. [FN 5, deleted].

**Analysis**

**I. Standard of review**

Mandamus relief is available if the relator establishes a clear abuse of discretion for which there is no adequate remedy at law. *In re AutoNation, Inc.,* 228 S.W.3d 663, 667 (Tex. 2007) (orig. proceeding). A trial court has no discretion in determining what the law is or applying the law to the facts. *Walker v. Packer,* 827 S.W.2d 833, 840 (Tex. 1992) (orig.proceeding). If the trial court fails to analyze or apply the law correctly, the trial court abuses its discretion. *Id.* With respect to the resolution of factual issues, however, the reviewing court may not substitute its judgment for that of the trial court. *Id.* at 839. The relator must establish that the trial court could have reasonably reached only one conclusion. *Id.* at 840.

**II. Standing**

Standing, which is implicit in the concept of subject-matter jurisdiction, is a threshold issue in a child custody proceeding. *See In re SSJ-J,* 153 S.W.3d 132, 134 (Tex. App.—San Antonio 2004, no pet.); *see also Tex Ass'n of Bus. v. Tex. Air Control Bd,* 852 S.W.2d 440, 443-44 (Tex. 1993). Whether a party has standing to pursue a cause of action is a question of law. *See SSJ-J,* 153 S.W.3d at 134. In our de novo review of the trial court's determination of standing, we must take as true all evidence favorable to the challenged party and indulge every reasonable inference and resolve any doubts in the challenged party's favor. *See Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 228 (Tex. 2004); *Hobbs v. Van Stavern,* 249 S.W.3d 1, 3 (Tex. App.—Houston [1st Dist] 2006, pet. denied); *Smith v. Hawkins,* No. 01-09-00060-CV, 2010 WL 3718546, at *3 (Tex. App.—Houston [1st Dist.] Sept. 23, 2010, no pet. h.) (memo.op.).

When standing to bring a particular type of lawsuit has been conferred by statute, we use that statutory framework to analyze whether the petition has been filed by a proper party. *See Hunt v. Bass,* 664 S.W.2d 323, 324 (Tex. 1984); *Atty. Gen. of Tex. v. Crawford,* 322 S.W.3d 858, 862 (Tex.

App.—Houston [1st Dist.] 2010, pet. filed). In an original suit affecting the parent-child relationship, the Texas Family Code governs the standing question. Section 102.003(a)(9) grants standing 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." TEX. FAM.CODE ANN. § 102.003(a)(9) (West 2008). A determination of standing under section 102.003(a)(9) is necessarily fact specific and determined on a case-by-case basis. *See In re M.P.B.,* 257 S.W.3d 804, 808-09 (Tex. App.—Dallas 2008, no pet.). In computing the time necessary for statutory standing, "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." TEX. FAM.CODE ANN. § 102.003(b) (West 2008).

Fountain is S.J.F.'s only legal parent. She thus contends that Katcher, as a non-parent, lacks standing under section 102.003(a)(9) to seek appointment as sole managing conservator of S.J.F. absent any evidence that the legal parent abdicated her parental responsibility to care for the child, and in the absence of any legal document evidencing the parties' intention to share parenting responsibilities. Fountain's argument relies upon cases suggesting that for purposes of the standing determination, a parent and a non-parent cannot both exercise actual care, control, and possession of a child at the same time without the consent of a parent.[6] That notion, however, reads into the statute additional requirements not imposed by the Legislature. To the contrary, this Court and others have previously held that "[n]othing in section 102.003(a)(9) requires that care, custody, control and possession be exclusive." *Smith,* 2010 WL 3718546, at (rejecting father's challenge to standing of aunt who consistently exercised care, custody, control, and possession along with grandmother who had previously been named managing conservator of child); [FN 7, deleted] *see also M.P.B.,* 257 S.W.3d at 809 (rejecting father's challenge to standing of grandmother who had been consistently and significantly involved in raising child along with child's deceased mother over substantial period of time); *In re J.J.J.,* No. 14-08-01015-CV, 2009 WL 4613715, at *2 (Tex. App.—Houston [14th Dist] Dec. 8, 2009, no pet.) (mem.op.).

In the absence of any requirement that a person with standing exercise exclusive care, control, or possession, the question of Katcher's statutory standing hinges on whether she exercised "actual" care, control, or possession of the child. Taking as true all evidence favorable to Katcher, and indulging every reasonable inference and resolving any doubts in her favor, we conclude that statutory standard was satisfied. The trial court was presented with evidence that, although Katcher's care, control, and possession of S.J.F. was not exclusive, she provided the child with a place to sleep, food, clothing, toys, and medicine. Both women cared for him most nights. Katcher made improvements to both women's homes to make them suitable for a small child. She participated in important decisions related to S.J.F.'s welfare, including attending medical appointments and providing for his daycare. Viewed as a whole, the evidence does not suggest that, prior to the dissolution of the relationship, Katcher's pattern of care and possession was intended to be temporary. Fountain testified that Katcher possessed and cared for S.J.F. at times during their relationship, and she even discussed with a lawyer the possibility of Katcher adopting the child. Therefore, the trial court could reasonably conclude that

[6] *See* In re K.K.C., 292 S.W.3d 788, 793 (Tex. App.—Beaumont 2010, orig. proceeding) (rejecting standing of person who cohabited with parent and participated in supporting child, yet "had no legal right of control over the child and no authority to make decisions on behalf of the child"); *M.J.G.,* 248 S.W.3d at 758-59 (affirming rejection of grandparents' standing, even though children lived in their home and they "performed day-to-day caretaking duties for the children," because "parents were also living with the children in the home," there was no evidence that parents "did not also care for the children," or that parents "had abdicated their parental duties and responsibilities to the grandparents").

the women shared parenting responsibilities, including the "actual care, control, and possession" of S.J.F., until their separation in April 2010.

On this record, the trial court did not clearly abuse its discretion in concluding that, for purposes of the statute, Katcher is a person, other than a foster parent, who had actual care, control, and possession of S.J.F. for at least six months ending not more than 90 days preceding the date of the filing of her petition to establish a managing conservatorship. *See* TEX. FAM.CODE ANN. § 102.003(a)(9). [FN 8 deleted]

* * *

**Conclusion**

We hold that the trial court did not clearly abuse its discretion in denying Fountain's motion to dismiss the underlying suit or in entering agreed temporary orders affording Katcher visitation with S.J.F. Accordingly, Fountain's petition for writ of mandamus is denied.

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## F. Standing and the Surviving Step-Parent

**DONCER**
**v.**
**DICKERSON**
81 S.W.3d 349
(Tex. App.—El Paso 2002, no pet.)

**OPINION**

MCCLURE, JUSTICE.

This case involves a suit affecting the parent-child relationship brought by a stepmother for possessory conservatorship of a six-year-old boy following the death of the child's father. The trial court dismissed the suit for lack of standing. We must decide whether "principal residence" as used in Section 102.003(b) of the Family Code (in computing the time necessary for standing, the court shall consider the child's principal residence during the relevant time) carries the same connotation as "primary residence" as used in Section 153.134(b)(1)(in rendering an order appointing joint managing conservators, the court shall designate the conservator who has the exclusive right to determine the primary residence of the child). *See* TEX. FAM. CODE ANN. § 102.003(b)(Vernon Supp.2002); § 153.134(b)(1)(Vernon 1996). Finding that the phraseology carries different connotations, we reverse and remand.

**FACTUAL SUMMARY**

Appellant Deborah Doncer is the widow of Ray Doncer, who died on January 5, 2000. Appellee Shelly Dickerson is Ray's former wife. Pursuant to an agreement, Ray and Dickerson were named joint managing conservators of their son, Mikey, with Dickerson having the right to establish the primary residence of the child within the boundaries of Collin County. Shortly after Ray's death, Dickerson terminated contact between Doncer and Mikey and Doncer filed suit. At a hearing to determine whether Doncer had standing to seek possessory conservatorship, Doncer testified that pursuant to the joint conservatorship, she and Ray had possession of Mikey 51 percent of the time in

even-numbered years and nearly 48 percent in odd-numbered years. Doncer had lived with Ray for over three years at the time of his death and the approximately 50-50 custody arrangement had basically been the same for this three-year period. Doncer explained that her relationship with Mikey was like a parent-child relationship and that her daughter, Mikey's half-sister, was important to Mikey. Doncer volunteered for school activities and was active in Mikey's sporting events.

Dickerson argued that Mikey's primary residence was with her and that Doncer lacked standing because Mikey never resided in her home for a period of six consecutive months. The trial court entered the following findings of fact:

- pursuant to the joint conservatorship, Mikey resided with Ray and Doncer for nearly, but less than, half the time;
- the joint conservatorship had been in effect for approximately a year and a half at the time of Ray's death;
- Ray and Doncer had a child with whom Mikey had a brother-sister relationship;
- Dickerson stopped all contact between Mikey and Doncer shortly after Ray's death;
- Mikey's principal residence was with Dickerson;[1]
- Doncer never had actual care, control, and possession of the child for a period of six months; and
- Doncer never resided with the child for a period of six months.

The trial court concluded that Doncer lacked standing and dismissed the suit. This appeal follows.

**TERMS OF THE JOINT MANAGING CONSERVATORSHIP**

Dickerson and Ray Doncer entered into an agreed order following a hearing on July 31, 1998. By its terms, Ray had possession of Mikey every other Friday from 11 a.m. until the following Wednesday at 9 a.m., beginning Friday, August 7, 1998.[2] He also had possession on alternate Tuesdays beginning Tuesday, August 18, 1998. During even-numbered years, he was entitled to the first half of the Christmas school vacation, spring break, and fall vacation. In odd-numbered years, he had the second half of Christmas vacation and the Thanksgiving holidays. He was granted summer access during the entire month of June, subject only to one weekend during which Dickerson would be able to visit Mikey. Likewise, although Dickerson had possession for the month of July, Ray received one weekend with the child. Mikey spent Mother's Day with Dickerson and Father's Day with Ray. The parent not having possession on Mikey's birthday [August 30th] was granted possession from 6 p.m. to 8 p.m. that evening.

The agreed order was in effect for roughly seventeen months before Ray's death. Plotting the possession exchanges on the calendar, and giving Doncer credit for days in which Mikey spent a portion of his time with his father, there were seven months during which Mikey spent more than 50 percent of his time with the Doncers, the last of which was November 1999, well within the ninety day period before Doncer brought suit on January 19, 2000. With the exception of March 1999 [Dickerson's spring break] and July 1999 [Dickerson's summer vacation] Mikey never spent less than

[1] The trial court defined "principal residence" as "primary residence:"

> Well, let me say. It really is apparent to me that Mr. Doncer and Ms. Doncer were—well, Mr. Doncer was a joint managing conservator; primary conservatorship—primary custody, primary residence was with the now Ms. Dickerson, and that I frankly think that the statute is—it's clear. It's clear to me that Ms. Doncer is not a person addressed by subparagraph (11).

[2] The agreed order was reduced to writing and signed by the trial court and the parties on October 6, 1998.

fourteen days each month with his father. Over the intended course of a two-year visitation cycle, the Doncers had Mikey with them more than 50 percent of the time in even-numbered years and 47 percent or 48 percent in odd-numbered years. Suffice it to say that broadly speaking, the Doncers had possession of Mikey half the time.

## STANDARD OF REVIEW

Standing is implicit in the concept of subject matter jurisdiction. *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993). Standing presents a question of law. *Brunson v. Woolsey*, 63 S.W.3d 583, 587 (Tex. App.—Fort Worth 2001, no pet. h.). The standard of review of an order of dismissal for lack of standing is the same as that for an order of dismissal for lack of subject matter jurisdiction. *Texas Ass'n of Business*, 852 S.W.2d at 446. We "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Id.*, *quoting Huston v. Federal Deposit Insurance Corporation*, 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e.). When considering a plea to the jurisdiction, the trial court should look solely at the pleadings and must take all allegations in the pleadings as true. *Washington v. Fort Bend Independent School District*, 892 S.W.2d 156, 159 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Consequently, we review the issue *de novo.*

## A CHILD'S BEST INTERESTS

The best interest of the child is always the primary consideration of the court in determining issues of conservatorship and possession of or access to a child. *See* TEX. FAM. CODE ANN. § 153.002. It is presumed to be in a child's best interest for his parents to be appointed joint managing conservators. *See* TEX. FAM. CODE ANN. § 153.131(b). It is the public policy of this state to assure that children have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, and to encourage parents to share in the rights and duties of raising their children after the parents have separated or dissolved their marriage. *See* TEX. FAM. CODE ANN. § 153.001. The trial court here indicated his concern for Mikey's best interest at the outset:

> I can't imagine why it would be in the best interest of the child to have the contact cut off. So . . . if there's good cause shown by the mother why it should be cut off, I certainly would be interested in that; but, otherwise, I can't imagine why there would just be a—an arbitrary cutting off of that relationship. Obviously, we'll have to be guided by the statute and the case law, the Code and the case law, but as a general proposition, if there was a stepparent who was married to the father and the father had normal possession, normal visitation—I mean, I can't imagine why it would be a good thing just to terminate the relationship. So to the extent that there is wiggle room for [Doncer] here to seek some continued relationship, I'd be inclined to grant it. You know, all things being equal.

He later commented if the court of appeals "wants my recommendation on the matter, I'd say I recommend that [Doncer] be treated the same as the mother's husband." On these facts, and for the reasons that follow, we wholeheartedly agree.

## DEVELOPMENT OF THE "STANDING" STATUTE

Pertinent to this appeal, the Texas Family Code provides:

**§ 102.003. General Standing to File Suit**

(a) An original suit may be filed at any time by:

* * *

(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;

* * *

(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 Department of Protective and Regulatory Services 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;

* * *

(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.

TEX. FAM. CODE ANN. § 102.003(a).

* * *

**PRINCIPLES OF STATUTORY CONSTRUCTION**

The Code Construction Act requires a presumption that a statute was enacted in compliance with both the United States and Texas Constitutions, that the entire statute is intended to be effective, and that a just and reasonable result is intended. TEX. GOV'T CODE ANN. § 311.021 (Vernon 1998). The Supreme Court has emphasized that our objective when construing a statute is to determine and give effect to the Legislature's intent. *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). To ascertain legislative intent, we look first to the statute's plain language. *Id.* We must review the terms of the statute in context. *Id.* Further, in construing a statute, we may consider the object sought to be attained, the circumstances under which the statute was enacted, the legislative history, common law or former statutory provisions, and the consequences of a particular construction. TEX. GOV'T CODE ANN. § 311.023. Finally, we presume that the Legislature acted with knowledge of the common law and court decisions. *Phillips*, 995 S.W.2d at 658.

**SO WHAT DOES IT MEAN?**

We agree with Professor Sampson that Subsection 102.003(a)(11) was designed as a "stepparent" statute, affording standing to, among others, a stepparent who helps raise a child when the stepparent's spouse—one of the child's parents—dies. A traditional application would indicate that upon the death of the mother, as a sole managing conservator of the child, her current husband would have standing. In her first issue for review, Doncer contends this section should apply equally to the surviving spouse of the parent who, as a joint managing conservator of the child, does not have *de jure* primary possession but has *de facto* possession for approximately 50 percent of the time.

As we have noted, the cases that have interpreted the six-month time span have done so in connection with Subsection 102.003(a)(9). *T.W.E. v. K.M.E.*, 828 S.W.2d 806 (Tex. App.—San Antonio 1992, no writ)(petitioner was child's presumed father who resided with child for six years); *Williams v. Anderson*, 850 S.W.2d 281 (Tex. App.—Austin 1993, writ denied)(petitioner was family friend who cared for child); *see also In the Interest of Garcia*, 944 S.W.2d 725 (Tex. App.—Amarillo 1997, no writ)(petitioners were child's baby-sitters). Texas courts struggled with the consecutive

nature of the time span until the Legislature addressed the problem in 1999 by enacting Section 102.003(b), which we reiterate:

> (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.

*See* TEX. FAM. CODE ANN. § 102.003(b). Doncer contends this provision is meant to be used offensively by a person seeking standing, not defensively by someone attacking standing. She argues the phrase "principal residence" is a general provision meant to be used by a parent or other care giver against a person with whom a child temporarily or occasionally resided, not as between parents or joint managing conservators with whom a child shares his time. She submits that had the Legislature intended otherwise, it would have included the phrase it has always used to define such joint managing conservator: the one having the right to determine the "primary residence" of the child. *See* TEX. FAM. CODE ANN. §§ 153.133(a)(1); 153.134(b)(1). This is particularly true since Subsection 102.003(b) applies to a variety of circumstances—third-party caretakers and foster parents as well as stepparents.

If a child's primary residence as defined by a joint managing conservatorship were dispositive of standing, persons exercising actual care, control and possession of the child under Subsection (a)(9) and foster parents under Subsection (a)(12) might qualify in terms of duration of possession but would never qualify as the child's principal residence in a suit against the primary joint managing conservator parent. "Principal residence" must mean something more. The Legislature has used the phrase three times in the Family Code. Two of these relate to jurisdictional issues; one relates to venue. Chapter 155 addresses continuing, exclusive jurisdiction in suits affecting the parent-child relationship. Subchapter C involves intrastate transfers. Pursuant to Section 155.201, transfer of a suit to modify or a motion to enforce an order from the court of continuing, exclusive jurisdiction is mandatory if the child has resided in another county for six months or longer. TEX. FAM. CODE ANN. § 155.201 (Vernon Pamph.2002). Section 155.203 contains the magic language "principal residence":

> **§ 155.203. Determining County of Child's Residence**
>
> In computing the time during which the child has resided in a county, the court may not require that the period of residence be continuous and uninterrupted but shall look to the *child's principal residence* during the six-month period preceding the commencement of the suit. [Emphasis added].

TEX. FAM. CODE ANN. § 155.203 (Vernon 1996). This language is remarkably similar to the standing statute in issue. The same language appears in Section 155.003, relating to the exercise of continuing, exclusive jurisdiction in a modification proceeding:

> **§ 155.003. Exercise of Continuing, Exclusive Jurisdiction**
>
> * * *
>
> (c) A court of this state may not exercise its continuing, exclusive jurisdiction to modify possessory conservatorship or possession of or access to a child if:
>
> (1) the child's home state is other than this state and all parties have established and continue to maintain their *principal residence* outside this state. . . . [Emphasis added].

TEX. FAM. CODE ANN. § 155.003(c)(1). We also look to legislative references concerning a determination of where a child "resides":

**§ 103.001. Venue for Original Suit**

(a) Except as otherwise provided by this title, an original suit shall be filed in the county where the child resides, . . . .

* * *

(c) A child resides in the county where the child's parents reside or the child's parent resides, if only one parent is living, except that:

(1) if a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;

(2) if the parents of the child do not reside in the same county and if a managing conservator, custodian, or guardian of the person has not been appointed, the child resides in the county where the parent having actual care, control, and possession of the child resides;

(3) if the child is in the care and control of an adult other than a parent and a managing conservator, custodian, or guardian of the person has not been appointed, the child resides where the adult having actual care, control, and possession of the child resides;

(4) if the child is in the actual care, control, and possession of an adult other than a parent and the whereabouts of the parent and the guardian of the person is unknown, the child resides where the adult having actual possession, care, and control of the child resides;

(5) if the person whose residence would otherwise determine venue has left the child in the care and control of the adult, the child resides where that adult resides;

(6) if a guardian or custodian of the child has been appointed by order of a court of another state or country, the child resides in the county where the guardian or custodian resides if that person resides in this state; or

(7) if it appears that the child is not under the actual care, control, and possession of an adult, the child resides where the child is found.

TEX. FAM. CODE ANN. § 103.001(c). This statute is significant not only because it attempts to define a child's residence but also because it references "actual care, control, and possession. That phrase is used in Section 102.003(a)(9). Subsection (a)(11) refers to a person with whom the child and the child's managing conservator "have resided. It thus appears to us that the Legislature's usage of "principal residence" was deliberate. Had it intended to rely on the premise that a child's "residence" for standing purposes should equate to "primary residence," it would have used the phrase, since it did so in eleven sections of the Code.[7]

[7] *See* TEX. FAM. CODE ANN. § 105.002(c)(1)(D) (party entitled to jury verdict on primary residence); § 153.004(b)(rebuttable presumption that appointment of parent with history of domestic violence as conservator with exclusive right to determine primary residence of the child is not in child's best interest); § 153.132(1)(sole managing conservator has exclusive right to establish the primary residence of the child); § 153.133(a)(1)(an agreement for joint managing conservatorship must designate the conservator having the exclusive right to establish the primary residence of the child); § 153.134(b)(1)(court-ordered joint managing conservatorship shall designate the conservator with exclusive right to determine the primary residence of the child); § 153.312(a)(provisions of standard possession order if possessory conservator resides 100 miles or less from the primary residence of the child); § 153.371(10)(right of nonparent appointed as sole managing conservator to establish the primary residence of the child); § 156.006(b)(limited prohibition against entry of temporary orders pending modification which have the effect of changing the designation of the person having the exclusive right to determine the primary residence of the child); § 156.101(3)(court may modify an order or decree providing for the appointment of a conservator of a child,

"Primary residence" as used throughout the Family Code is necessary for two reasons. When a child is spending time in the households of both parents—and in many cases, the time may be divided evenly between the two households—one parent must have the ability to determine residency for purposes of public school enrollment if the parents reside in different districts. And given the heightened mobility of modern society, the right to establish the primary residence of the child factors significantly in the power of relocation. A parent given unfettered discretion to establish the primary residence of the child can move away from the other parent without court approval. Frequently, a parent is authorized to determine the primary residence of the child within a designated geographical area. Here, Dickerson was given the right to determine the primary residence of Mikey, but only within the confines of Collin County.

In determining the elements of residency, we also look for guidance to case law. *See In the Interest of S.D. and K.D.*, 980 S.W.2d 758, 760 (Tex. App.—San Antonio 1998, pet. denied). The Supreme Court has articulated the elements of residency under the general civil venue statute: (1) a fixed place of abode within the possession of the party; (2) occupied or intended to be occupied consistently over a substantial period of time; (3) which is permanent rather than temporary. *Snyder v. Pitts*, 150 Tex. 407, 241 S.W.2d 136, 140 (1951). An element of permanency is necessary before a party can be considered a resident of a particular county. *In re S.D.*, 980 S.W.2d at 760-61. For example, in a modification case, "permanency may be shown either by presence in the county for an extended period of time or by some agreement, explicit or implied, by the party with a right to control the child's residence, for the child to stay in the new county for an extended period of time." *In re S.D.*, 980 S.W.2d at 761, *quoting Martinez v. Flores*, 820 S.W.2d 937, 940 (Tex. App.—Corpus Christi 1991, no writ).

**CALCULATING DONCER'S POSSESSION**

For purposes of our review, we have studied the court order and reviewed Doncer's testimony.[8] Over the course of a two-year visitation cycle, Mikey spent approximately half of his time in each household. If we focus only on one particular year, the overall picture is distorted. For example, Dickerson focuses on calendar year 1999—immediately preceding Ray's death in January 2000—which, as an odd-numbered year, accorded her possession of the child slightly in excess of half the time. Yet during even-numbered years, she had possession of Mikey less than half the time. Does this mean Mikey's stepfather would have no standing if Dickerson were to die in early 2003? A determination of standing based upon the timing of a parent's death leads to an illogical and unreasonable result.

The statute calculates standing by requiring Doncer to demonstrate that she lived with Mikey and Ray for at least six months ending not more than ninety days before she filed suit. The six months' possession need not be continuous and uninterrupted and the court shall[9] consider the child's principal

providing the terms and conditions of conservatorship or providing for the possession of or access to a child if the conservator having the exclusive right to establish the primary residence of the child has voluntarily relinquished the primary care and possession of the child to another person for at least six months); § 156.102 (requirements for modification of exclusive right to determine primary residence of child within one year of order); § 156.409(a)(change in physical possession of child authorizes modification of recipient of child support).

[8] Dickerson complains in her brief that she was prepared to present testimony to controvert Doncer's statements but that the trial court ruled before she had the opportunity to call any witnesses. However, the record does not indicate that she objected, asked for an opportunity to present testimony, or offered a bill of exceptions.

[9] We pause to note that the digest of the House bill analysis does not speak in mandatory terms: "These time periods would not have to be continuous and uninterrupted, and a court *could* consider the child's principal residence during

residence during that time frame. Doncer filed suit on January 19, 2000. Based upon the record before us, Doncer has established that there were at least six months between August 1, 1998 and January 19, 2000 when Mikey's principal residence was the Doncer home: (1) a fixed place of abode; (2) occupied consistently over a substantial period of time; (3) which is permanent rather than temporary. By virtue of the joint managing conservatorship agreement, Dickerson and Ray Doncer intended Mikey to occupy the Doncer home *consistently*, over a *substantial* period time, at least until he attained majority. It was not intended to be a temporary arrangement to facilitate momentary housing difficulties, inconvenient travel schedules, the pursuit of higher education, or the inability to provide child care. We do not paint with so broad a brush as to suggest that in every joint managing conservatorship, the standing requirements can be met by sheer virtue of the standard possession order. In the absence of legislative clarification, these cases will necessarily be fact specific and resolved on an *ad hoc* basis.

**CONCLUSION**

Section 102.003(a)(11) applies to a spouse of a deceased joint managing conservator where, as here, the child spent half his time with the stepparent over the intended course of a two-year visitation cycle. Because Doncer has standing to bring suit, we sustain Issue One. We need not address the remainder of the issues presented for our review.

We recognize that during the pendency of this cause, the United States Supreme Court issued its opinion in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). As the trial court has not addressed whether *Troxel* impacts Doncer's suit,[10] we do not consider it here. Neither the Texas Constitution nor our State Legislature has vested this court with the authority to render advisory opinions. TEX. CONST. art. II, § 1; *Speer v. Presbyterian Children's Home and Service Agency*, 847 S.W.2d 227, 229 (Tex.1993); *In re Salgado*, 53 S.W.3d 752, 757 (Tex. App.—El Paso 2001, orig. proceeding).

The judgment of the trial court is reversed and remanded.

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**Notes, Comments & Questions**

1. Justice Ann McClure of the El Paso Court of Appeals has vast experience in and a deep understanding of Texas Family Law. Justice McClure is Board Certified in both Family Law and Civil Appeals. Although her opinions are lengthy, reading the intact version is its own reward. The historical perspective that she provides in most of her opinions, *Doncer v. Dickerson* included, can be invaluable when presenting a case. Should you ever have to argue an issue that requires an in depth and perhaps historical understanding of the law, a good place to start is with a Justice McClure opinion.

2. What do you think about the court's explanation of "primary residence" and standing in *Doncer*?

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the relevant time frame." [Emphasis added]. *See* House Research Organization Bill Analysis, HB 1622, *Daily Floor Report*, April 15, 1999.

[10] In *Troxel*, the court concluded that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 73, 120 S.Ct. at 2064. The trial court here clearly understood that *Troxel* was pending and may become relevant when he noted, "[b]ut, of course, [the] United States Supreme Court is going to weigh in on this matter with respect to grandparents anyway."

3. Do you agree with the explanation in *Doncer*? Consider the interplay between the standard possession order and primary residence in reaching your conclusion.

## G. Legal Control vs Actual Control in Light of the Parental Presumption & *Troxel*

**In re LANKFORD**
501 S.W.3d 681
(Tex. App.—Tyler 2016, orig. proceeding)

**OPINION**

JAMES T. WORTHEN, CHIEF JUSTICE

Charles Dwayne Lankford and Roberta Gresham seek mandamus relief from the trial court's May 12, 2015 orders overruling their pleas to the jurisdiction and Lankford's motion to dismiss, and designating Stephanie Smith as a joint managing conservator of T.D.L. [footnote deleted] We deny the petition.

**Background**

T.D.L. is the fourteen year old biological child of Charles Dwayne Lankford and Karla Frith, who were divorced in 2003. T.D.L. started living with Lankford when she was three months old after Lankford and her biological mother separated. From 2003 until sometime in 2007, Lankford worked "outside of the States." During that time, Roberta Gresham, who is Lankford's mother and T.D.L.'s grandmother, lived in Lankford's house with T.D.L.

Lankford and Stephanie Smith married in 2008, but had been together since sometime in 2007. T.D.L. was approximately five years old when the relationship began. From 2007 to 2012, Lankford worked out of town, and was away from home between fifty and eighty percent of the time. Smith and T.D.L. remained in the family home. In July 2012, Lankford began working in Afghanistan. [footnote deleted] According to Lankford, this was "a decision by [him] that [he and Smith] discussed and agreed upon." Lankford elected expatriate status, which prohibits him from being in the United States more than thirty-five days a year. Smith and T.D.L. again remained in the family home.

In November 2014, Smith filed for divorce at Lankford's request. Her petition included a motion to modify the existing conservatorship order to appoint Smith and Lankford as joint managing conservators of T.D.L. Smith also requested that she be designated as the conservator having the exclusive right to designate T.D.L.'s primary residence. She alleged that she has standing under TEXAS FAMILY CODE Section 102.003(a)(9) to seek modification of the order.

Through various errors and misunderstandings that occurred in prior proceedings, the existing conservatorship order, which was rendered in 2004, made Gresham managing conservator and Lankford and Frith possessory conservators. However, Lankford believed the three were joint managing conservators. He also believed that he had the right to designate T.D.L.'s residence.

In December 2014, Lankford and Gresham filed a motion to modify the 2004 order to make them joint managing conservators. [footnote deleted] Additionally, they asserted that Smith's motion to modify must be filed in the pre-existing suit affecting the parent-child relationship (SAPCR). Smith moved to sever the conservatorship issue and consolidate it with the SAPCR. The trial court granted the motion. Lankford filed a plea to the jurisdiction and motion to dismiss alleging Smith lacked

standing. Gresham raised the issue in her answer. After a hearing, the trial court concluded that Smith has standing under section 102.003(a)(9) and, by written order, overruled the pleas to the jurisdiction and the motion to dismiss. The trial court also rendered temporary orders designating Smith as a joint managing conservator of T.D.L. This original proceeding followed.

**Prerequisites to Mandamus**

* * *

The improper denial of a plea to the jurisdiction is generally not reviewable by mandamus because it involves a question of law that can be addressed by ordinary appeal. See *In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding). However, mandamus review is appropriate when there is a jurisdictional dispute in a proceeding involving conservatorship issues. See *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding); *In re Green*, 352 S.W.3d 772, 774 (Tex. App.—San Antonio 2011, orig. proceeding). This is due to the unique and compelling circumstances presented when the trial court decides issues of conservatorship. See *Geary*, 878 S.W.2d at 603. Because temporary orders are not appealable, mandamus is an appropriate remedy when a trial court abuses its discretion in issuing temporary orders in a SAPCR. See *In re Derzapf*, 219 S.W.3d 327, 335 (Tex. 2007) (orig. proceeding).

**Standing**

A party seeking conservatorship of a child must have standing to do so. *In re McDaniel*, 408 S.W.3d 389, 396 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding). Because standing is implicit in the concept of subject matter jurisdiction, it is a threshold issue in a conservatorship proceeding. *In re N.L.D.*, 344 S.W.3d 33, 37 (Tex. App.—Texarkana 2011, no pet.). A party's lack of standing deprives the court of subject matter jurisdiction and renders subsequent trial court action void. *In re Smith*, 260 S.W.3d 568, 572 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding).

Whether a trial court has subject matter jurisdiction is a question of law, which we review de novo. *In re K.D.H.*, 426 S.W.3d 879, 882 (Tex. App.—Houston [14th Dist.] 2014, no pet.). In our review, we must take as true all evidence favorable to the challenged party, indulge every reasonable inference, and resolve any doubts in the challenged party's favor. *McDaniel*, 408 S.W.3d at 397.

The Texas Legislature has provided a comprehensive framework for standing in the context of suits involving the parent-child relationship. *See* TEX. FAM. CODE ANN. §§ 102.003-.007 (West 2014 & Supp. 2016). When standing has been statutorily conferred, the statute itself serves as the proper framework for the standing analysis. *In re H.G.*, 267 S.W.3d 120, 123 (Tex. App.—San Antonio 2008, pet. denied). Thus, the party seeking relief must allege and establish standing within the parameters of the language used in the relevant statute. *Id.* at 124.

We review the trial court's interpretation of the applicable statutes de novo. *In re Russell*, 321 S.W.3d 846, 856 (Tex. App.—Fort Worth 2010, orig. proceeding [mand. denied]). We must give effect to the legislature's intent from the language used in the statute and not look to extraneous matters for an intent the statute does not state. *In re Shifflet*, 462 S.W.3d 528, 536 (Tex. App.—Houston [1st Dist.] 2015, orig. proceeding). We presume that the legislature chooses a statute's language with care, and includes each word chosen for a purpose while purposefully omitting words not chosen. *In re M.N.*, 262 S.W.3d 799, 803 (Tex. 2008). We use definitions prescribed by the legislature and any technical or particular meaning the words have acquired. TEX. GOV'T CODE ANN. § 311.011(b) (West 2013). Otherwise, we construe the statute's words according to their plain and common meaning. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008). If the meaning

of the statutory language is unambiguous, the interpretation supported by the plain meaning must be adopted. *Shifflet*, 462 S.W.3d at 536.

**TEXAS FAMILY CODE Section 102.003(a)(9)**

A person who, at the time of filing, has standing to sue under Chapter 102 of the family code may seek modification of an existing conservatorship order. TEX. FAM. CODE ANN. § 156.002(b) (West 2014). A person has standing to sue under Chapter 102 if, as alleged here, she is not a foster parent and "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." *Id*. § 102.003(a)(9) (West Supp. 2016). A determination of standing under subsection (a)(9) is necessarily fact-specific and must be made on a case-by-case basis. *Shifflet*, 462 S.W.3d at 538; *In re M.P.B*., 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008). The purpose of subsection (a)(9) is to create standing for those who have developed and maintained a relationship with a child over time. *In re E.G.L.*, 378 S.W.3d 542, 547 (Tex. App.—Dallas 2012, pet. denied); *In re Y.B*., 300 S.W.3d 1, 4 (Tex. App.—San Antonio 2009, pet. denied); see also *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ) (explaining that purpose of former version of section 102.003(a)(9) was to "create standing for those who have developed and maintained a relationship with the child over time").

**Actual Control—The Split of Authority**

Lankford and Gresham do not dispute that Smith had care and possession of T.D.L. for the required time period. Nor do they argue that Smith lacks standing under the trial court's construction of the statute. Instead, they assert that the trial court applied an incorrect definition of "control" as that term is used section 102.003(a)(9). As a result, they maintain, the trial court abused its discretion when it ruled that Smith has standing under subsection (a)(9).

"Control" is not defined in the family code, and neither the Texas Supreme Court nor this Court has defined the term in this context. Consequently, Lankford and Gresham have surveyed the cases defining or applying the term as used in section 102.003(a)(9). They inform us that the cases are sometimes said to represent two lines of authority among the courts of appeals, differing principally on what constitutes "control" over the child.

**Legal Control Required**

Lankford and Gresham insist that to have standing under subsection (a)(9), Smith must establish that she has had "legal control" over T.D.L. They urge that she has not met this burden. As support for their position, they cite *In re K.K.C.*, 292 S.W.3d 788 (Tex. App.—Beaumont 2008, orig. proceeding).

In *K.K.C*., a nonparent filed an original SAPCR asserting standing under subsection (a)(9). *K.K.C*., 292 S.W.3d at 791.

* * *

[This case was discussed fully in an earlier case in the text, *In the Interest of C.T.H.S. and C.R.H.S*.]

**Legal Control Not Required**

A case decided by the Austin court of appeals represents the contrary line of authority. See generally *Jasek v. Tex. Dep't of Family & Protective Servs*., 348 S.W.3d 523 (Tex. App.—Austin 2011, no pet.).

* * *

[The *Jasek* case can be found *supra* at D., within this Chapter.]

**Lankford and Gresham's Arguments**

Lankford and Gresham maintain that the *K.K.C.* "legal control" standard is necessary to protect a parent's liberty interest in the care, custody, and control of his children. They also argue that if the Jasek definition of "control" is correct, section 102.003(a)(11)'s requirement that the parent be deceased would be superfluous.

**Protection of parental constitutional rights**

Lankford and Gresham point out that, in a proceeding to modify a managing conservatorship order, there is no presumption that appointment of a parent is in the best interest of the child. Thus, they characterize standing as "the one bulwark Texas law affords" to protect a parent's fundamental constitutional right to direct the upbringing of his children. Accordingly, they conclude that in the absence of the parental presumption, the "legal control" requirement must be imposed to protect the parent's rights when modification of a conservatorship order is sought. They maintain further that section 102.003(a)(9) cannot be in compliance with the United States and Texas Constitutions, as intended by the legislature, unless it complies with *Troxel v. Granville*.

**1. The parental presumption.**

The presumption that the best interest of the child is served by awarding conservatorship to the child's parent is deeply embedded in Texas law. *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). This presumption is based upon the natural affection usually flowing between parent and child. *Id*. (citing *Taylor v. Meek*, 154 Tex. 305, 276 S.W.2d 787, 790 (1955)). The presumption is codified in the chapter of the family code that governs original SAPCRs, but not in the chapter that governs modification suits. See TEX. FAM. CODE ANN. §§ 153.131(a) (West 2014), 156.001-.105 (West 2014 & Supp. 2016). The Texas Supreme Court has determined that, because the legislature did not express its intent to apply the presumption in modification suits, courts should not apply the presumption in those cases. *V.L.K.*, 24 S.W.3d at 343.

By requiring application of the parental presumption in original SAPCRs but not in modification suits, the legislature balanced the rights of the parents "in the care, custody and control of their child" and the best interest of the child, which includes the child's interest in stability. See *In re C.A.M.M.*, 243 S.W.3d 211, 216 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citation omitted). When those two interests compete and the legislature has authorized modification in the circumstances presented, the child's interest in stability prevails over the parent's right to primary possession. *See id*. Lankford and Gresham argue, in substance, that because this balance favors the child, Troxel mandates a narrow construction of section 102.003(a)(9), i.e., the "legal control" requirement, to protect the parent.

**2. *Troxel v. Granville.***

The dispute in *Troxel* arose between a mother and her children's paternal grandparents after the mother sought to limit the grandparents' visitation with the children. The grandparents petitioned for visitation rights under a Washington state statute allowing "[a]ny person" to petition the court for visitation rights "at any time." *Troxel v. Granville*, 530 U.S. 57, 61, 120 S.Ct. 2054, 2057, 147 L.Ed.2d 49 (2000). A court could grant the requested visitation rights "whenever visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id*., 530 U.S. at 61, 120 S.Ct. at 2057-58. Ultimately, a plurality of the Court held that, as applied, the statute violated the Due Process Clause because it infringed on a parent's right to make decisions concerning the care, custody, and control of the parent's children. *Id*., 530 U.S. at 66-67, 120 S.Ct. at 2061.

The Court described the Washington statute as "breathtakingly broad." *Id*., 530 U.S. at 67, 120 S.Ct. at 2061. Moreover, the Court expressed concern that the language "effectively permit[ted] any third party seeking visitation to subject any decision by a parent about visitation of the parent's children to state-court review." *Id*. As one of a combination of factors that compelled its conclusion, the Court noted that the grandparents did not allege, and no court had found, that the children's mother was an unfit parent. *Id*., 530 U.S. at 68, 120 S.Ct. at 2062. This was important, the Court explained, because "there is a presumption that fit parents act in the best interests of their children." *Id*.

The Court then made the statement quoted in *K.K.C.*: "[S]o 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 to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.*, 530 U.S. at 68, 120 S.Ct. at 2016; see *K.K.C*., 292 S.W.3d at 792. According to Lankford and Gresham, this statement supports their conclusion that section 102.003(a)(9) cannot pass constitutional muster if the *Jasek* definition of "control" is correct.

We note, however, that the order under review in *Troxel* was an original determination of grandparent visitation rights. Thus, the Court did not address modification of conservatorship orders. Additionally, the parental presumption applied in *Troxel*. But when modification of conservatorship is sought, Texas courts do not apply the parental presumption, and no finding of parental unfitness is required. See TEX. FAM. CODE ANN. § 156.101(a) (West 2014); *V.L.K*., 24 S.W.3d at 343. The statement in *Troxel* explains the effect of the parental presumption absent a finding that a parent is unfit. It does not call into question the legislature's decision not to apply the parental presumption in suits to modify conservatorship orders. And the Court did not issue any directives or formulate any general guidelines for conferring standing when the parental presumption does not apply. [footnote deleted] Therefore, *Troxel* does not inform our analysis.

**"Stepparent Standing"**

A person has standing under family code section 102.003(a)(11) to request modification of a conservatorship order if the child and her parent resided with the person for at least six months ending not more than ninety days preceding the date the petition is filed and the parent is deceased when the petition is filed. TEX. FAM. CODE ANN. §§ 102.003(a)(11) (West Supp. 2016), 156.002(b) (West 2014). Lankford and Gresham point out that under subsection (a)(11), a stepparent can obtain standing only if the child's parent is deceased. They argue that if Smith's interpretation of section 102.003(a)(9) (the *Jasek* definition of "actual control") is correct, stepparents will always rely on (a)(9) instead of (a)(11) to establish standing when a child's parent dies. Lankford and Gresham conclude their argument with the following statement from *K.K.C.*: "We doubt the Legislature would have intended section 102.003(a)(9) to permit an 'end run' around specific restrictions in the Code." See *K.K.C*., 292 S.W.3d at 794.

Subsection (a)(11) was designed as a "stepparent" statute, affording standing to a stepparent who has helped raise a child and the stepparent's spouse (the child's parent) dies. *Doncer v. Dickerson*, 81 S.W.3d 349, 358 (Tex. App.—El Paso 2002, no pet.). As enacted, however, subsection (a)(11) is not limited to stepparents and, instead, confers standing on "a person" with whom the child and the parent resided for the requisite time prior to the parent's death. See TEX. FAM. CODE ANN. § 102.003(a)(11). See *id*. Nothing in (a)(11) makes this the exclusive subsection under which standing can be obtained after the death of a child's parent. See *id*.

Subsection (a)(9) affords standing for those who have developed and maintained a relationship with a child over time. *E.G.L*., 378 S.W.3d at 547; *In re Y.B.*, 300 S.W.3d at 4. This relationship comprises "actual care, control, and possession of the child." See TEX. FAM. CODE ANN. §

102.003(a)(9). Stepparents are not excluded from this subsection, and the fact that the child's parent is deceased does not disqualify "a person" from seeking standing under this subsection. See *id.*

Based upon the plain language of subsections (a)(9) and (a)(11), a stepparent or any other person can assert standing to seek modification of a conservatorship order under (a)(9), (a)(11), or both when a parent is deceased. In other words, (a)(9) and (a)(11) are not mutually exclusive. See *Jasek*, 348 S.W.3d at 535.

A person seeking standing when a child's parent has died must show only that the child and the child's parent resided with the person for the required time period. See TEX. FAM. CODE ANN. § 102.003(a)(11). Lankford and Gresham implicitly argue that the residence requirement of (a)(11) is more restrictive than *Jasek's* "actual control" requirement, but do not explain how. Further, they do not provide any substantive analysis to support their conclusion that application of the *Jasek* definition of "actual control" in (a)(9) will render subsection (a)(11)'s death requirement superfluous. Therefore, we do not address this argument. See TEX. R. APP. P. 52.3(h); *In re Fitzgerald*, 429 S.W.3d 886, 897 (Tex. App.—Tyler 2014, orig. proceeding) (holding issue waived for inadequate briefing and stating that Rule 52.3(h) "requires that the relator provide substantive legal analysis as well as citations to authority supporting his legal arguments and conclusions").

**Summation**

*Troxel* does not cast doubt on the constitutionality of section 102.003(a)(9) if the *Jasek* definition of "actual control" is applied. And we do not address Lankford and Gresham's argument relating to the effect on subsection (a)(11) if the *Jasek* definition of "actual control" applies. Further, we conclude that, had the legislature intended "control" to mean "legal control" instead of "control" in its ordinary sense, it could easily have defined it as such. Or it could have defined "actual control" to mean "legal control." But it did neither. Therefore, we agree with the reasoning in *Jasek* and hold that its definition of "actual control" reflects the legislature's intent when it enacted the "control" requirement of section 102.003(a)(9). Accordingly, we also hold that the trial court did not abuse its discretion in applying the *Jasek* definition of "actual control" to determine whether Smith had standing under subsection (a)(9). And Lankford and Gresham do not alternatively contend that, if the Jasek definition is correct, the trial court misapplied it to the facts at hand.

**Conclusion**

Lankford and Gresham have not established that the trial court incorrectly determined the law or misapplied the law to the facts. Therefore, they have not shown that the trial court abused its discretion by denying the pleas to the jurisdiction and motion to dismiss or in rendering temporary orders appointing Smith as a joint managing conservator of T.D.L. Accordingly, we deny Lankford and Gresham's petition for writ of mandamus.

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**Notes, Comments & Questions**

1. What do you think of the appellate court's assessment that TEX. FAM. CODE §§ 102.003(a)(9) and (11) "are not mutually exclusive?"

2. With which analysis of TEX. FAM. CODE §§ 102.003(a)(9) and (11), that of the appellate court in, *In the Interest of C.T.H.S. and C.R.H.S.* or of the appellate court in *In re Lankford*, do you agree? Why?

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## H. Standing in the Face of a Denial of Paternity

**T.W.E.**
**v.**
**K.M.E.**
828 S.W.2d 806
(Tex. App.—San Antonio 1992, no writ)

PEEPLES, JUSTICE.

In this divorce case we consider the standing and the parental rights of a putative father whose biological paternity was refuted by blood tests. T.W.E. (Tommy) appeals an order dismissing his counterclaim for custody of a six-year-old child born during his ten-year marriage to K.M.E. (Karen). Because medical evidence refuted the possibility that Tommy is the child's biological father, the trial court held that he has no standing to seek appointment as managing conservator. We hold that even though Tommy is not the child's biological father, his six months' possession of the child before suit gave him standing to seek custody, and therefore we reverse and remand.

The parties were married in 1979. Four years later Karen gave birth to a boy, L.W.E. The evidence suggests that both Tommy and Karen knew that the child was the result of Karen's adulterous relationship with another man. Nevertheless, Tommy accepted the child as his own, and together the couple reared him for more than six years, always holding out to the public that Tommy was the father. Then, in December 1989 Karen took the child and left. She filed for divorce about three weeks later, alleging in her sworn petition that Tommy was the child's father. Tommy counterclaimed for appointment as managing conservator, also pleading he was the child's father. In response to that counterclaim, Karen amended her petition and denied Tommy's parentage, which § 12.06(a) of the family code permitted her to do.[1] After a hearing the trial court found clear and convincing evidence—in particular, blood tests and evidence of sterility at the relevant time—that Tommy was not the father, and dismissed his custody claim for lack of standing under § 11.03 of the Family Code.

Section 11.03 of the family code lists the classes of persons who have standing to seek custody of a child:

**§ 11.03. Who May Bring Suit**

(a) An original suit affecting the parent-child relationship may be brought at any time by:

(1) a parent of the child; [or]

* * *

[1] Section 12.06(a) provides,

> In any suit affecting the parent-child relationship . . . a husband or wife is entitled to deny the husband's paternity of the child who is the subject of the suit and who was born or conceived during the marriage of the parties.

TEX. FAM. CODE ANN. § 12.06(a) (Vernon Supp.1992).

(8) a person who has had actual possession and control of the child for at least six months immediately preceding the filing of the petition

* * *

TEX. FAM. CODE ANN. § 11.03 (Vernon Supp.1992). The term "parent" is defined as "the mother, a man presumed to be the biological father or a man who has been adjudicated to be the biological father. . . ." *Id.* § 11.01(3).

Tommy does not contest the evidence of his nonpaternity, but in his first point of error he claims standing under § 11.03(a), either because he is the child's psychological father, or because he had actual possession and control of the child for more than the six months immediately preceding the filing of the petition. We note that this is not a case in which a biological father asserts parental rights concerning a child whose mother he impregnated during her marriage to another man. *See*, *e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989); *Gibson v. J.W.T.*, 815 S.W.2d 863 (Tex. App.—Beaumont 1991, writ requested).

In view of the blood tests and other evidence, we cannot hold that Tommy has standing as a parent under § 11.03(a)(1) because blood tests can constitute clear and convincing evidence to rebut the presumption of paternity. *See In re S.C.V.*, 750 S.W.2d 762, 764 (Tex.1988); TEX. FAM. CODE ANN. § 12.02(b) (Vernon Supp.1992). But even though Tommy is not a biological parent, we conclude that he has standing to sue for appointment as managing conservator under § 11.03(a)(8) because he had actual possession and control of the child for six months immediately before the suit was filed.

Karen argued in the court below that Tommy did not have actual possession and control of the child during the three weeks after she took the child and left, and therefore he does not have standing under § 11.03(a)(8). We reject that contention.

The plain purpose of paragraph (a)(8) is to create standing for those who have developed and maintained a relationship with a child over time. Six months is, in the judgment of the legislature, the minimum span of time needed to develop a significant relationship for purposes of standing to seek custody. The term "immediately preceding" insures that the relationship exists at the time of the court action, to prevent persons who no longer have a current relationship with a child from disrupting its life, and that of its family, with stale claims.

* * *

It would not serve the purposes of the statute to allow a brief, involuntary interruption in actual possession to destroy a putative father's standing to counterclaim for custody of a child whom all the world has considered for six years to be his own. If the three weeks' interruption in this case—which happened because Karen abruptly left home with the child— destroys Tommy's standing, we see no reason why three days' interruption by one party's unilateral act would not do the same thing. We cannot attribute such an intention to the legislature. *See Green v. State*, 773 S.W.2d 816, 818 (Tex. App.—San Antonio 1989, no pet.). We therefore hold that Tommy had had six months' actual possession of the child within the meaning of the statute at the time the original petition was filed, and that he has standing to maintain his claim for custody under TEX. FAM. CODE ANN. § 11.03(a)(8).

In his final point, Tommy argues that he equitably adopted the child, and that Karen should be estopped from questioning his right to be appointed as managing conservator. The trial court correctly rejected that argument because equitable adoption in Texas does not create the legal status of parent and child in these circumstances:

The descriptive phrases, "equitable adoption," "adoption by estoppel," and "adoptive status," are used in decided cases strictly as a shorthand method of saying that because of the

> promises, acts and conduct of an intestate deceased, those claiming under and through him are estopped to assert that a child was not legally adopted or did not occupy the status of an adopted child.

*Heien v. Crabtree*, 369 S.W.2d 28, 30 (Tex. 1963); *see also Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W.2d 972, 973-74 (1951); *K.B. v. N.B.*, 811 S.W.2d 634, 639 (Tex. App.—San Antonio 1991, writ denied).

We are aware that our holding today does not put Tommy on equal footing with Karen *as a parent.* Family code § 14.01(b)(1) mandates appointment of a parent as managing conservator unless it "would not be in the best interest of the child *because the appointment would significantly impair the child's physical health or emotional development.*" TEX. FAM. CODE ANN. § 14.01(b)(1) (Vernon Supp.1992) (emphasis added). But we cannot ignore the legislature's twofold decision (1) to define "parent" in biological terms, and (2) to require nonparents, including the psychological father, to prove that granting custody to the mother would significantly impair the child's health or emotional development, not merely that it would be in the child's best interest to live with him. If the statute did not include this provision, a stepfather or live-in boyfriend of six months might litigate custody against the mother on equal terms. Section 14.01(b)(1) properly puts an added burden on such a claimant.

But when there are *long-standing* ties between the child and a putative father, one might well question the wisdom of a standing rule that credits biological ties exclusively and minimizes real human relationships by allowing either spouse to deny paternity after many years have passed. There will be cases in which it would be in a child's best interest to live with the nonbiological psychological father, but the evidence does not establish that granting custody to the mother would "significantly impair the child's physical health or emotional development. In such cases § 14.01(b)(1) may require the trial judge to ignore genuine, long-term relationships between a child and the only father it has ever known.

The statutory scheme puts a dangerous weapon in the legal arsenal of parents who are willing, during the stress of divorce litigation, to sacrifice a child's best interest for their own personal reasons. Section 12.06 enables the psychological *father* of many years who suspects spousal unfaithfulness to shirk his parental responsibilities, such as child support, by denying genetic paternity and proving it through blood tests. The statute also enables the unfaithful *mother* to challenge genetic paternity and thereby deprive the child of its psychological father if the tests show nonpaternity, unless he can establish a right to custody under § 14.01(b)(1) or visitation under § 11.03(c).[2]

A statute of limitations for the denial of paternity would solve many of these problems. Texas has not enacted a specific statute of limitations that limits a parent's ability to destroy a psychological father-child relationship by denying paternity. By its own terms, § 13.01's limitations period (two years after adulthood) applies only to suits to *establish* paternity. Before this provision was enacted, the courts applied the residual four-year statute of limitations to a mother's suit to establish paternity, the period being tolled during the child's minority because the suit was for his benefit. *See*, *e.g.*, *Perry v. Merritte*, 643 S.W.2d 496 (Tex. App.—Houston [14th Dist.] 1982, no writ); *Texas Dep't of Human Resources v. Delley*, 581 S.W.2d 519 (Tex. App.—Dallas 1979, writ ref'd n.r.e.); TEX. CIV. PRAC. & REM. CODE 16.051 (Vernon 1986).

Whether the four-year statute applies to suits to *deny* paternity under § 12.06 has not been decided. We express no opinion about whether the residual four-year limitations period applies to Karen's

[2] Standing to seek *custody* is of course distinct from standing under § 11.03(c) to seek *visitation*, as a "person deemed by the court to have had substantial past contact with the child."

effort to deny that Tommy is the child's father because that question is not preserved for review. Tommy's brief hints at a limitations defense by suggesting that Karen should be estopped from denying his parentage because she waited more than six years to do so. But that contention was not presented in the trial court and therefore we may not consider it. *See* TEX. R. APP. P. 52(b).

The judgment of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

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**Notes, Comments & Questions**

1. Which argument of Karen's is obliterated by the current version of the standing statute?
2. In *T.W.E. v. K.M.W.* the court mentions the psychological father. What is meant by this term?
3. What is the current statute of limitations for a denial of paternity?

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## I. A Successful Special Appearance

**In the Interest of T.J.W.**
336 S.W.3rd 267
(Tex. App.—San Antonio 2010, no pet.)

SPEEDLIN, JUSTICE.

Timothy Washington appeals the trial court's orders denying his special appearance and confirming an arrearage judgment against him. Because we conclude the trial court erred in denying Washington's special appearance, we reverse the trial court's order and dismiss the underlying cause.[1]

**BACKGROUND**

Timothy Washington and Zina Shellman are the parents of T.J.W., who was born in Louisiana on February 28, 1991. Washington and Shellman were never married. Washington, who is in the military, has never resided in Texas. Shellman moved to Texas with T.J.W. in 2006. In March of 2007, Shellman filed a petition to adjudicate T.J.W.'s parentage and requested the court to enter an order for child support, including retroactive child support. Washington was served with process in July of 2008. After denying Washington's special appearance in September of 2008, the trial court signed an order confirming that Washington owed $25,000 in child support arrearages.

**DISCUSSION**

In his third issue, Washington contends the trial court erred in denying his special appearance because the evidence did not show that he had sufficient minimum contacts with Texas to support the exercise of personal jurisdiction over him. Whether a court has personal jurisdiction over a defendant is a question of law. *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 794 (Tex. 2002).

[1] Because Washington's third issue is dispositive of the appeal, we do not address any of the other issues raised in his brief. *See* TEX.R.APP. P. 47.1.

However, the trial court frequently must resolve questions of fact before deciding the jurisdiction question. *Id.* When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied. *Id.* at 795. When the appellate record includes the reporter's and clerk's records, these implied findings are not conclusive and may be challenged for legal and factual sufficiency in the appropriate appellate court. *Id.*

Federal constitutional requirements of due process limit the power of a state to assert personal jurisdiction over a nonresident defendant. *In re S.A.V.,* 837 S.W. 2d 80, 85 ( Tex. 1992); *In re Barnes,* 127 S.W.3d 843, 848-49 (Tex. App.—San Antonio 2003, orig. proceeding). To satisfy due process, the plaintiff must first show that the nonresident defendant has purposely established "minimum contacts" with the forum state. *In re S.A.V.,* 837 S.W. 2d at 85; *In re Barnes,* 127 S.W.3d at 849. The plaintiff must then show that the assertion of jurisdiction comports with fair play and substantial justice. *In re S.A.V.,* 837 S.W. 2d at 85; *In re Barnes,* 127 S.W.3d at 849.

In order for a nonresident defendant to have purposely established "minimum contacts" with Texas, a substantial connection must exist between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. *In re S.A.V.,* 837 S.W. 2d at 85. The contacts between the nonresident defendant and Texas must be continuous and systematic. *Id.* This requires a showing of substantial activities by the nonresident defendant in Texas.[2] *Id.*

The evidence presented at the special appearance hearing established the following contacts between Washington and Texas. First, Washington contacted the military services in Texas on one occasion to request information as to whether T.J.W. was being mentally and physically abused, and the military services subsequently contacted child protective services. Second, Washington established a joint bank account in his and T.J.W.'s names at USAA Federal Savings Bank in Texas. Washington deposited money into the account which was spent by T.J.W. Third, Washington completed a form on two occasions that was faxed to Texas in order for T.J.W. to obtain a military ID card. Finally, Washington paid Shellman child support payments while Shellman was residing in Texas.

We initially note that a nonresident mailing checks in payment of an obligation to a person or company in Texas is not a sufficient contact to establish personal jurisdiction. *See U-Anchor Advertising, Inc. v. Burt,* 553 S.W.2d 760, 763 (Tex. 1977); *Alenia Spazio, S.p.A. v. Reid,* 130 S.W.3d 201, 213 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). In addition, making deposits into a Texas bank account, if considered in isolation, has also been held insufficient to establish purposeful availment. *Haddad v. ISI Automation Intl., Inc.,* No. 04-09-00562-CV, 2010 WL 1708275, at *6 (Tex. App.—San Antonio Apr. 28, 2010, no pet.) (mem.op.). Moreover, faxing a form to Texas does not establish minimum contacts. *See Reid,* 130 S.W.3d at 213. Even when all of Washington's contacts are considered together, we hold that there are not sufficient purposeful, continuous, and systematic contacts between Washington and Texas to establish personal jurisdiction. *See In re S.A.V.,* 837 S.W. 2d at 85. We note that several cases have held that visits by a nonresident father with a child in Texas were insufficient to establish personal jurisdiction. *See In re Henderson,* 982 S.W.2d 566,

[2] Although minimum contacts analysis has been refined into specific and general jurisdiction, we agree with Washington that only general jurisdiction applies in this case. When specific jurisdiction is asserted, the alleged injuries must arise out of or relate to the nonresident defendant's contacts with the forum state, and a substantial connection must exist between those contacts and the operative facts of the litigation. Burger King Corp. v. Rudzewicz*,* 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); Spir Star AG v. Kimich*,* 310 S.W.3d 868, 874 (Tex. 2010). Because Shellman has pled no injuries or cause of action related to or arising out of Washington's contacts with Texas, specific jurisdiction is inapplicable.

567 (Tex. App.—Amarillo 1998, no pet.); *Cunningham v. Cunningham,* 719 S.W.2d 224, 228 (Tex. App.—Dallas 1986, writ dism'd); *Ford v. Durham,* 624 S.W.2d 737, 740 (Tex. App.—Fort Worth 1981, writ dism'd). The contacts by Washington in the instant case are far less substantial than the contacts in those cases. Because the evidence fails to establish a substantial connection between Washington and Texas arising from actions Washington purposefully directed toward Texas, the trial court erred in denying the special appearance.

**CONCLUSION**

The trial court's order denying Washington's special appearance is reversed, and the underlying cause is dismissed.

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## J. Personal Jurisdiction—Special Appearance Denied

**FLORES**
**v.**
**MELO-PALACIOS**
921 S.W.2d 399
(Tex. App.—Corpus Christi 1996, writ denied)

YANEZ, JUSTICE.

Appellant, Blanca Flores, filed an action against Rafael Melo-Palacios to register, enforce, and modify a Mexican decree for child support. The Attorney General, also an appellant and as the Texas agency providing child support services, filed a petition in intervention. Melo-Palacios filed a special appearance as to both appellants' pleadings challenging the trial court's personal jurisdiction. The trial court denied the Attorney General's intervention. Additionally, the trial court dismissed the action with prejudice, finding it had no personal jurisdiction over Melo-Palacios and no subject matter jurisdiction over the suit. The Attorney General appeals from the court's order denying his intervention and both appellants appeal from the dismissal of the action with prejudice.

We reverse and remand.

Flores and Melo-Palacios were divorced on October 19, 1981, in Monterrey, Mexico. The divorce decree provided that Flores would have custody of Ricardo, the child who is the subject of this suit, and ordered Melo-Palacios to pay 15% of his earnings for the support of Ricardo. All parties are citizens of Mexico. Flores and Ricardo have lived in Hidalgo County since 1986. Melo-Palacios obtained a United States L-1 business visa in December 1989.

On July 19, 1991, in Dallas, Texas, Melo-Palacios received service of Flores' original pleading which was an action to modify and enforce the Mexican divorce decree. Melo-Palacios filed a special appearance and a response to the motion subject to the special appearance. The court denied the special appearance. Flores subsequently filed a first amended suit affecting the parent-child relationship in which she sought a Texas order establishing the parent-child relationship between Melo-Palacios and Ricardo and requiring paternity tests. Flores also requested that appropriate orders be made for support of the child. Melo-Palacios filed an answer and moved for dismissal because he

had never contested the issue of paternity. The trial court denied Melo-Palacios' motion to dismiss the paternity action.

On February 9, 1993, Flores filed a motion seeking to register the Mexican divorce decree in Texas. On April 6, 1993, the parties purportedly agreed to the entry and registration of the foreign decree. Although an entry on the docket sheets shows an agreement as to the registration of the foreign decree, the record shows no court order confirming the registration. Flores filed a second amended original petition on April 23, 1993, alleging that the Mexican divorce decree had already been registered by agreement of the parties, and requested enforcement and an upward modification of the foreign order. Flores did not reassert the paternity action in her second amended petition.

On February 11, 1993, the Attorney General filed a petition in intervention in a suit affecting the parent-child relationship. The Attorney General sought to establish a Texas child support order. Melo-Palacios filed a special appearance in response. He also filed a motion for reconsideration of his special appearance to Flores' action. The court disallowed the Attorney General's intervention. Moreover, ruling that it lacked jurisdiction over Melo-Palacios and the lawsuit, the court dismissed the suit with prejudice. The appeal arises from these two rulings.

By point one, Flores contends that the trial court erred in dismissing the action for want of jurisdiction because the court obtained personal jurisdiction over Melo-Palacios once he received service of process while physically present in Texas. The Attorney General makes the same challenge in point 2B. Similarly, by her second point, Flores asserts that the trial court had personal jurisdiction over Melo-Palacios because he was a Texas resident at the time he was served with process. A trial court's refusal to exercise its jurisdiction over a suit affecting the parent-child relationship will not be disturbed on appeal absent a clear abuse of discretion. *Creavin v. Moloney*, 773 S.W.2d 698, 702 (Tex. App.—Corpus Christi 1989, writ denied).

After a review of the facts, we find that Melo-Palacios was a resident of Texas when Flores served him with process seeking enforcement and modification of his child support obligations. In order to establish residency, a person must be living and physically present in a particular locality. *San Patricio County v. Nueces County Hosp.*, 721 S.W.2d 375, 377 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.). Residence simply requires bodily presence as an inhabitant in a given place. *Holt v. Drake*, 505 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1973, no writ).

Melo-Palacios rented a Dallas apartment for at least one year. His Texas driver's license shows the Dallas apartment as his address. He and his current wife lived in Dallas with their daughter while she attended a school in Dallas for one year. They attended a Dallas church and his wife applied for membership with the church. These facts demonstrate that Melo-Palacios was a Texas resident and was amenable to service of process when Flores sought enforcement and modification of child support. The trial court should not have dismissed the action for lack of personal jurisdiction over Melo-Palacios.

Moreover, even if Melo-Palacios was not a Texas resident at the time he received service of process on Flores' motion to modify, he still would have come within the purview of the Texas courts' in personam jurisdiction. Texas Family Code § 11.051, which governs suits affecting the parent-child relationship, provides:

> The court may also exercise personal jurisdiction over a person on whom service of citation is required . . . , although the person is not a resident or domiciliary of this state, if:
>
> (4) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

TEX. FAM. CODE ANN. § 11.051 (Vernon 1986) (currently codified at TEX. FAM. CODE ANN. § 102.011 (Vernon Supp.1996)).

A trial court has authority to exercise in personam jurisdiction over a nonresident where the court's jurisdiction grew out of the personal service of citation upon the nonresident within the state. *Brown v. Brown*, 520 S.W.2d 571, 574-75 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ dism'd). A nonresident, merely by reason of his nonresidence, is not exempt from a court's jurisdiction if he voluntarily comes to the state and thus is within the territorial limits of such jurisdiction and can be duly served with process. *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S.W. 1049, 1050 (1904, no writ); *see also Banco Minero v. Ross & Masterson*, 138 S.W. 224, 237 (Tex. Civ. App.—San Antonio 1911), *aff'd*, 106 Tex. 522, 172 S.W. 711 (1915). * * *

This issue was extensively addressed by the Supreme Court in *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990). In a plurality opinion, Justice Scalia stated that it is a firmly established principle of personal jurisdiction that the courts of a state have jurisdiction over nonresidents who are physically present in the state. *Id.* at 610, 110 S.Ct. at 2110; *see also id.* at 628, 110 S.Ct. at 2119 (White, J., concurring) (the rule allowing jurisdiction to be obtained over a nonresident by personal service in the forum state has been and is widely accepted throughout this country). Each state has the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the state could retain jurisdiction to enter judgment against him, no matter how fleeting his visit. *Id.* at 610-11, 110 S.Ct. at 2110. Personal service upon a physically present defendant suffices to confer jurisdiction, regardless of whether the defendant was only briefly in the state or whether the cause of action was related to his activities there. *Id.* at 612, 110 S.Ct. at 2111. The in-state service rule meets the requirements of the Due Process Clause because it comports with "traditional notions of fair play and substantial justice." *Id.* at 622, 110 S.Ct. at 2116. The Supreme Court therefore concluded that the California courts had personal jurisdiction over a New Jersey resident who was served with process while temporarily in California for activities unrelated to the suit. *Id.* at 628, 110 S.Ct. at 2119.

JUSTICE BRENNAN, joined by three other justices, concurred in the judgment. JUSTICE BRENNAN agrees that the Due Process Clause generally permits a state court to exercise jurisdiction over a defendant if he is served with process while voluntarily present in the forum state. *Id.* at 628-29, 110 S.Ct. at 2119-20. However, JUSTICE BRENNAN disagrees with JUSTICE SCALIA'S analysis that the jurisdictional rule automatically comports with due process simply by virtue of its long historical and traditional practice. JUSTICE BRENNAN'S concurrence states that, although history is an important factor in determining whether a jurisdictional rule satisfies due process requirements, it is not the only factor. *Id.* at 629, 110 S.Ct. at 2120. Thus, JUSTICE BRENNAN undertook an independent inquiry into the fairness of the prevailing in-state service rule. *Id.* The rule must comport with contemporary notions of due process. *Id.* at 632, 110 S.Ct. at 2122. A defendant who visits another state knowingly assumes some risk that the state will exercise its power over his person while there. *Id.* at 637, 110 S.Ct. at 2124. By visiting the forum state, a transient defendant actually avails himself of significant benefits provided by the state. *Id.* JUSTICE BRENNAN proceeded to list the benefits defendant derived from the state of California while he visited the state on business and to visit his children. His health and safety are guaranteed by the state's police, fire, and emergency medical services; he is free to travel on the state's roads; and he likely enjoys the fruits of the state's economy. "Without transient jurisdiction, an asymmetry would arise [wherein a] transient would have the full benefit of the power of the forum State's courts as a plaintiff while retaining immunity from their authority as a defendant." *Id.* at 638, 110 S.Ct. at 2125. JUSTICE BRENNAN concluded that for these reasons, the exercise of

personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process. *Id.* at 639, 110 S.Ct. at 2125.

It is clear from the cases cited above that the trial court had personal jurisdiction over Melo-Palacios based on his voluntary presence in Texas where he received service of process. Melo-Palacios testified that he stayed in an apartment in Dallas whenever he traveled to the United States for business. His company rented an apartment in Plano for him for four months. In August 1990, he rented his own apartment in Dallas. His second wife and daughter also stayed in the apartment. His daughter attended school in Dallas for one year. Additionally, he received mail at the Dallas address, had a Texas driver's license, had two bank accounts in Texas, and filed tax returns in the U.S. Melo-Palacios unquestionably availed himself and derived significant benefits from the state of Texas. Because Flores served Melo-Palacios with a citation while he was physically present in Texas, the trial court may properly exercise personal jurisdiction over him.

In summary, we hold that Melo-Palacios was a Texas resident at the time Flores sought enforcement and modification of child support. Therefore, the trial court had personal jurisdiction over him. Even if he was a nonresident, his receipt of service of process while he was physically present in Texas made him amenable to service; therefore, the trial court had authority to exercise personal jurisdiction over him. We sustain Flores' points one and two and the Attorney General's point 2B.

Having disposed of the personal jurisdiction issue, we need not reach Flores' point three concerning the Texas courts' jurisdiction over Melo-Palacios.

Flores, by points four and five, and the Attorney General, by point 2C, assert that the trial court erred in dismissing their suit to register, enforce, or modify a Mexican child support order, or to establish a Texas order for child support in a suit affecting the parent-child relationship for lack of subject matter jurisdiction. We agree. The imposition of child support obligations is included within a suit affecting the parent-child relationship. TEX. FAM. CODE ANN. § 11.01(5) (Vernon 1986) (currently codified at TEX. FAM. CODE ANN. § 101.032 (Vernon Supp.1996)). Texas asserted its particularized interest in adjudicating child support by enacting a special jurisdictional statute, Texas Family Code § 11.051. *In re S.A.V. & K.E.V.*, 837 S.W.2d 80, 87 (Tex. 1992). Section 11.051 provides that

> [i]n a suit affecting the parent-child relationship, the court may exercise status or subject matter jurisdiction over the suit as provided by Subchapter B [Uniform Child Custody Jurisdiction Act] of this chapter. [footnote omitted]. The court may also exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident or domiciliary of this state, if [one of several conditions is satisfied].

TEX. FAM. CODE ANN. § 11.051 (Vernon 1986) (currently codified at TEX. FAM. CODE ANN. § 102.011 (Vernon Supp.1996)).

However, the status or subject matter jurisdiction permitted by § 11.051 for suits affecting the parent-child relationship is merely an alternative means of obtaining jurisdiction when the court is unable to obtain personal jurisdiction over the nonresident party. *Creavin*, 773 S.W.2d at 703. There is simply no requirement that there be both status and personal jurisdiction before a court may entertain a suit for child support. *Little v. McAninch*, 896 S.W.2d 199, 202 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Creavin*, 773 S.W.2d at 703; *see also In re S.A.V. & K.E.V.*, 798 S.W.2d 293, 299 (Tex. App.—Amarillo 1990), *rev'd on other grounds*, 837 S.W.2d 80 (Tex. 1992) (Texas order modifying child support provisions of Minnesota decree was valid where trial court had personal

jurisdiction over defendant obligor). A claim for child support is closely analogous to a claim for debt in that it seeks a personal judgment establishing a direct obligation to pay money. *Perry v. Ponder*, 604 S.W.2d 306, 313 (Tex. Civ. App.—Dallas 1980, no writ). Accordingly, because the courts of the state in which the defendant resides are in a better position to determine the defendant's ability to pay, personal jurisdiction is necessary to the validity of such an order. *Id.* The jurisdictional principles used in child support determinations differ from the special jurisdictional principles used in child custody determinations which focus primarily on the "status" of the child. *Creavin*, 773 S.W.2d at 703. It is well-settled that a court may only render a judgment for child support against a person if the court has jurisdiction over that person. *Little*, 896 S.W.2d at 202; *Creavin*, 773 S.W.2d at 704; *see also Kulko v. Superior Court of Cal.*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978).

We have already concluded that the trial court had personal jurisdiction over Melo-Palacios. Therefore, the trial court need not also obtain subject matter jurisdiction before entertaining a suit for child support. Hence, the trial court erred when it dismissed appellants' cause of action for child support. We sustain Flores' points four and five and the Attorney General's point 2C.

* * *

**Notes, Comments & Questions**

1. What must be shown to establish residency?

2. Is residency necessary for *in personam jurisdiction*?

3. A visitor to a state takes the risk that said state might exercise its power over his person while there. Is this risk balanced in any way?

4. What factors distinguish and account for the varying outcomes of *In the Interest of T.J.W*. and of *Flores v. Melo-Palacios*?

## K. Personal Jurisdiction Via Service or Minimum Contacts?

### *In re* GONZALEZ

993 S.W.2d 147
(Tex. App.—San Antonio 1999, no pet.)

HARDBERGER, CHIEF JUSTICE.

This is the third appeal resulting from the dissolution of a personal and business relationship between Luisa Gonzalez and Jose Antonio O'Farrill Avila. *See In the Interest of Gonzalez*, 981 S.W.2d 313 (Tex. App.—San Antonio 1998, pet. filed); *O'Farrill v. Gonzalez*, 974 S.W.2d 237 (Tex. App.—San Antonio, 1998, pet. denied). In a prior appeal, we considered issues relating to the business relationship. *See O'Farrill*. In this appeal, we consider the product of the personal relationship—a daughter named Regina. O'Farrill raises twenty-three issues attacking orders denying his special appearance, establishing his paternity, and awarding child support and attorney fees. We affirm as modified in part and reverse and remand in part.

## PERSONAL JURISDICTION

O'Farrill, Gonzalez, and Regina are all Mexican citizens. Gonzalez and Regina currently live in San Antonio, Texas, and O'Farrill lives in Mexico. In his first five issues, O'Farrill argues there is no basis consistent with due process for Texas courts to exercise jurisdiction over him.

For a Texas court to exercise jurisdiction over a nonresident defendant, a Texas statute must authorize the exercise of jurisdiction and the exercise of jurisdiction must be consistent with due process. *See In re S.A.V.*, 837 S.W.2d 80, 85 (Tex. 1992). It is undisputed that personal service was effected on O'Farrill when his plane touched down in Texas to refuel while en route to Colorado from Mexico. The Family Code provides that a court may exercise jurisdiction over a nonresident if he was personally served in this state. *See* TEX. FAM. CODE ANN. § 102.011(b)(1) (Vernon Supp.1998). Section 102.011(b)(1) thus authorizes Texas courts to exercise jurisdiction over O'Farrill. The United States Supreme Court's decision in *Burnham v. Superior Court*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), indicates that in-state personal service is also consistent with due process.

In *Burnham*, a New Jersey defendant was personally served with a divorce petition in California while he was in that state to conduct business and visit his children. JUSTICE SCALIA, writing for a plurality of four, determined that "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' " 495 U.S. at 619, 110 S.Ct. 2105. Three other justices joined in a concurring opinion filed by JUSTICE BRENNAN. In their view, tradition alone was not dispositive; they would judge the constitutionality of in-state service on a nonresident by examining contemporary notions of due process. *See id.* at 629-32, 110 S.Ct. 2105 (Brennan, J., concurring). Ultimately, though, even these justices concluded that "as a rule the exercise of personal jurisdiction over a defendant based on his voluntary presence in the forum will satisfy the requirements of due process." *Id.* at 639, 110 S.Ct. 2105. They reasoned that by visiting the forum state, a defendant avails himself of significant benefits, such as the protection of his health and safety. *See id.* at 637-38, 110 S.Ct. 2105. JUSTICE STEVENS joined neither JUSTICE SCALIA'S nor JUSTICE BRENNAN'S opinion, but concurred in the judgment based on considerations of history, fairness, and common sense. *See id.* at 640, 110 S.Ct. 2105 (Stevens, J., concurring).

The members of the *Burnham* Court unanimously agreed that in-state service on the nonresident was sufficient to satisfy due process, but they disagreed on the reasoning to support that result. Lower courts should therefore apply the *Burnham* result to substantially identical cases. *See* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Opinions*, 80 COLUM. L. REV. 756, 779 (1987); *see also Flores v. Melo-Palacios*, 921 S.W.2d 399, 402-03 (Tex. App.—Corpus Christi 1996, writ denied) (following *Burnham* ); *Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. App.—Dallas 1991, writ denied) (following *Burnham*). *But see Conner v. ContiCarriers & Terminals*, *Inc.*, 944 S.W.2d 405, 413 (Tex. App.—Houston [14th Dist.] 1997, no writ) (noting that because *Burnham* was a plurality opinion, it does not constitute binding authority). Because O'Farrill, like the defendant in *Burnham*, received personal service while temporarily in the forum state, our state's courts may exercise jurisdiction over him pursuant to *Burnham.*

O'Farrill suggests that we should not rely on *Burnham* for two reasons. First, the Fifth Circuit has refused to apply *Burnham* to uphold jurisdiction over a nonresident corporation even though in-state service was obtained. *See Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 182-83 (5th Cir.1992). *Siemer* is distinguishable from this case and *Burnham* because it involved a corporation rather than an individual. *See id.* As the *Siemer* Court noted, *Burnham* does not apply to corporations. *See id.*

Second, unlike the defendant in *Burnham*, O'Farrill is a foreign citizen. O'Farrill argues that because both the SCALIA and BRENNAN opinions relied to some extent on American tradition, in-state personal service is not sufficient to allow Texas courts to exercise jurisdiction over a foreign national. We find nothing in either opinion purporting to limit the *Burnham* holding to American citizens. *Cf. Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir.1995) (noting, in reliance on *Burnham*, that personal service in New York on president of Bosnian-Serb republic comported with the requirements of due process for the assertion of personal jurisdiction).

Even if *Burnham* did not apply, the denial of the special appearance could be upheld pursuant to the usual test applied to establish jurisdiction over a nonresident defendant. Under that well-known test, Texas courts have jurisdiction if: (1) the defendant purposely established minimum contacts with this state and (2) the exercise of jurisdiction comports with fair play and substantial justice. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). In reviewing the application of this test, we consider all the evidence in the record, including the evidence admitted at trial. *See Vosko v. Chase Manhattan Bank*, 909 S.W.2d 95, 99 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

Although O'Farrill was served during a brief refueling stop, the record reveals that he had other significant, purposeful, and direct contacts with Texas related to this suit. Gonzalez testified that Regina was conceived around Christmastime in 1993, while she and O'Farrill were staying in San Antonio. In January 1994, they formed a Texas corporation called "Inwood House," which purchased a house in the Inwood community of San Antonio. Each of them personally guaranteed the mortgage on the house. A friend of Gonzalez testified that in February 1994, Gonzalez and O'Farrill told him they were going to have a child and they planned to make their home in San Antonio. According to Gonzalez, she, O'Farrill, and Regina lived together periodically at the Inwood house until May 1995. Through these contacts, O'Farrill availed himself of the benefits and protections of Texas law and could reasonably expect to litigate matters related to his daughter's support in this state. *See Burger King*, 471 U.S. at 474-75, 105 S.Ct. 2174.

O'Farrill exhorts us to hold that jurisdiction is lacking because of the onerous burden he would have faced in defending this suit in a foreign legal system. We recognize that we must consider the unique burdens encountered by foreign citizens called upon to defend themselves in our courts. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). But the mere fact that the defendant is a foreign citizen does not destroy jurisdiction. *See id.* The record in this case demonstrates that O'Farrill has had significant business and personal involvement with this country's legal system, including establishing a Texas export corporation and purchasing a home in Colorado. O'Farrill presented no evidence to show that traveling to Texas is difficult for him, and the record shows that he owns his own plane and has been here frequently. Considering these facts, the trial court was justified in concluding that the burden on O'Farrill was not particularly onerous. O'Farrill also emphasizes that Gonzalez and Regina are Mexican citizens. Because both of them live here, however, Texas has an interest in adjudicating this dispute. We conclude that exercising jurisdiction over O'Farrill comports with fair play and substantial justice.

Finally, O'Farrill argues that we may not uphold personal jurisdiction based on *Burnham* or the minimum contacts analysis because Gonzalez did not plead these jurisdictional grounds; she only alleged that O'Farrill was a Texas resident. At a special appearance hearing, the defendant bears the burden of negating all bases for jurisdiction. *See Siskind v. Villa Found. for Educ., Inc.*, 642 S.W.2d 434, 438 (Tex. 1982). But when the plaintiff fails to allege that the defendant performed any specific acts in Texas, the defendant's evidence that he is a nonresident is sufficient to negate jurisdiction. *See id.*; *Vosko*, 909 S.W.2d at 99. O'Farrill asserts that he established at the special appearance hearing that

he is a resident of Mexico, and that he therefore negated personal jurisdiction under *Siskind.* O'Farrill did not make this argument at the special appearance hearing. In fact, O'Farrill's attorney conceded that the court "may assert jurisdiction" over O'Farrill because he was personally served in Texas, but urged the court to use its discretion to decline to exercise jurisdiction. The attorney also argued that the minimum contacts test had not been satisfied. Jurisdiction based on *Burnham* and minimum contacts was thus tried by consent. *See* TEX. R. CIV. P. 67; *Temperature Sys., Inc. v. Bill Pepper, Inc.*, 854 S.W.2d 669, 673-74 (Tex. App.—Dallas 1993, writ dism'd by agr.).

We overrule issues one through five and uphold the exercise of jurisdiction over O'Farrill.

* * *

**Notes, Comments & Questions**

1. In *In re Gonzalez*, how does O'Farrill attempt to distinguish his case from the United States Supreme Court case of *Burnham v. Superior Court*, 495 U.S. 604 (1990)?

2. In *In re Gonzalez* what did the court consider in its minimum contacts, fair play and substantial justice analysis?

3. Who carries the burden in a special appearance? What is that burden?

## L. Who Must Receive Service of Process in a SAPCR?

**ROBERSON**
**v.**
**PICKETT**
900 S.W.2d 112
(Tex. App.—Houston [14th Dist.] 1995, no writ)

DRAUGHN, JUSTICE (Assigned).

This is an appeal by writ of error. Velma Roberson, grandmother of H.T.R., seeks review of an order signed on June 25, 1993, determining paternity and awarding conservatorship of H.T.R. to appellee, Albert Pickett, the alleged biological father of H.T.R. Appellant brings four points of error contending there was error on the face of the record because she was not served with process and was an essential party to the suit, the trial court did not have jurisdiction to award conservatorship because of a pending guardianship proceeding in the probate court, the motion seeking a determination of paternity was fatally defective because it did not contain a voluntary statement of paternity when filed, and she did not receive notice of the judgment when she had intervened in the suit. We reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

Appellant's daughter, Vanessa Roberson, had a child H.T.R., on September 25, 1988. Appellee, Albert Pickett, claims to be H.T.R.'s father.[1] Vanessa Roberson raised the child until she was murdered on July 22, 1991. Following the murder, appellant, the child's grandmother, filed a personal injury suit against those responsible for Vanessa's death. She sued individually and on her granddaughter's behalf. Appellee attempted to intervene in the suit, but lacked standing to do so because he never married Vanessa and could not establish a common-law marriage more than one year after her death. TEX. FAM. CODE ANN. § 1.91(b) (Vernon 1993). The lawsuit was settled, and H.T.R.'s recovery was deposited with registry of the court.

On September 17, 1992, appellant filed an application to be appointed guardian of H.T.R.'s person and estate in Probate Court Number 2. In her application, she contended that H.T.R. did not have a guardian of her person or estate, that H.T.R. lived with her, and that it was in H.T.R.'s best interest that she serve as her guardian. On November 16, 1992, appellee filed a contest to appellant's appointment as guardian. Appellee asserted that he was H.T.R.'s biological father, that H.T.R. lived with him and had always lived with him, that he never relinquished parental rights and did not wish to do so, and that it was in H.T.R.'s best interest that the court refuse to name appellant guardian. Approximately six months passed without either appellant or appellee taking any further action in the guardianship proceedings.

On May 11, 1993, appellee filed a separate suit in the family court to establish the parent-child relationship between H.T.R. and himself, have himself named managing conservator, and change the child's last name to his. Appellant was not served with notice of this suit. Approximately one month later on June 16, appellee also filed a statement of paternity. Upon learning of this family court suit, appellant attempted to intervene on June 24, but the trial court did not receive this intervention petition. After a hearing the next day, June 25, the trial court signed an order determining paternity and awarding managing conservatorship of the child to appellee. On December 23, 1993, appellant filed her writ of error challenging the order.

To obtain review by writ of error, appellant must show that the petition was brought within six months of the date of the judgment, that she was a party to the suit, that she did not participate in the trial, and that there is error on the face of the record. *Stubbs v. Stubbs*, 685 S.W.2d 643, 644 (Tex. 1985); TEX. R. APP. P. 45. It is undisputed that appellant brought her writ of error within six months and did not participate in the trial. Thus, we are limited to determining whether appellant was a party to the suit and, if there is error apparent on the face of the record.

In appellant's first point of error, she contends that there is error on the face of the record because she was not served with citation of the family court suit. Appellee admits that appellant was not served with notice, but responds that the statute did not require him to serve appellant. We look at all the prior proceedings to determine if appellant was entitled to notice.

Appellant originally filed a guardianship proceeding in the probate court. Vanessa Roberson, H.T.R.'s mother, was not married at the time of H.T.R.'s birth, never married or attempted to marry anyone during H.T.R.'s lifetime, and did not have a father listed on H.T.R.'s birth certificate. Therefore, H.T.R. was an orphan because she did not have a legally recognized father when her mother died. TEX. FAM. CODE ANn. § 12.02 (Vernon Supp.1995); *see In the Interest of V.M.B.*, 559 S.W.2d 901, 905 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (holding that in the absence of

[1] There is evidence that both parties agree that appellee is H.T.R.'s father. Appellant's petition in the probate court proceedings listed appellee as H.T.R.'s father. However, there is no presumption in favor of appellant because he was not married to Vanessa Roberson at the time of the child's birth, never attempted to marry Vanessa Roberson, and was not listed on H.T.R.'s birth certificate. TEX. FAM. CODE ANN. § 12.02 (Vernon Supp.1995).

legitimation, the biological father cannot assert parental rights). In the probate court, appellant sought to be named H.T.R.'s guardian as the orphan's nearest ascendant. TEX. PROB. CODE ANN. § 109(b)(1), *repealed by* Acts 1993, 73rd Leg., ch. 957 (current version at TEX. PROB. CODE ANN. § 676(c)(1) (Vernon Supp.1995)).[2] Appellant, however, was required to give notice of the probate court proceeding to appellee because the purported biological father of an illegitimate child has a cognizable and substantial interest in the custody of his illegitimate child, and has the right to notice and an opportunity to be heard with respect to custody of the child. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Rogers v. Lowry*, 546 S.W.2d 881 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). Appellee exercised these rights by filing a contest to any award of guardianship to appellant.

After appellee filed this contest, he did not seek to be named guardian in the probate court, but instead filed a suit seeking a determination of paternity and conservatorship in the family court. Appellee did not serve notice of this new suit on appellant, the probate court, or the guardian ad litem. The family code provides a list of parties who must be served in a suit affecting a parent-child relationship. The mandatory parties who must be served with process are:

> 1) the managing conservator, if any;
>
> (2) possessory conservators, if any;
>
> (3) persons, if any, having access to the child under an order of the court;
>
> (4) persons, if any, required by law or by order of a court to provide for the support of a child;
>
> (5) the guardian of the person of the child, if any;
>
> (6) the guardian of the estate of the child, if any;
>
> (7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Section 15.03(c)(2) of this code;
>
> (8) the alleged father or probable father, unless there is attached to the petition an affidavit of waiver of interest in a child executed by the alleged father or probable father as provided in Section 15.041 of this code, or unless the petition states that the identity of the father is unknown; and
>
> (9) the attorney general, if the petition seeks to establish, modify, or enforce any support right assigned to the attorney general under Chapter 76, Human Resources Code.

TEX. FAM. CODE ANN. § 11.09(a) (Vernon Supp.1992).

The court may also give notice to "any other person who has or who may assert an interest in the child and may be given to the unknown father of a child who has no presumed father." TEX. FAM. CODE ANN. § 11.09(b) (Vernon Supp.1992).[3] The maternal grandmother is not listed as one of the parties entitled to mandatory service under Section 11.09(a). Appellant could be served under Section 11.09(b) as a party "who may assert an interest in the child. However, any service under Subsection

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[2] Both parties cite TEX. PROB. CODE ANN. § 676(c)(1), the current version of the probate code section concerning guardianship of orphans. However, this section of the probate code did not go into effect until September 1, 1993, after the judgment in the underlying suit. TEX. PROB. CODE ANN. § 109(b)(1), now repealed, was the provision in effect at the time of the suit. It contains the same scheme for determining guardianship of an orphan as section 676(c)(1).

[3] The 1993 amendments made service on the unknown father mandatory by replacing "may" with "shall" in subsec. (b). Acts 1993, 73rd Leg., ch. 167, § 1, eff. Aug. 30, 1993.

(b) is optional. Therefore, at first blush, it appears that appellee did not have to serve notice on appellant.

However, in the unique situation presented in this case of first impression where the grandmother has previously filed in the probate court for guardianship of a child who has no living, legally recognized parents, we find such person must be served with process under Section 11.09(a). The statute requires service on the guardian of the person and the estate of the child. TEX. FAM. CODE ANN. § 11.09(a)(5), (a)(6) (Vernon Supp.1992). A guardian is the court-appointed representative of the child. To be appointed guardian, a party must file suit in a court of competent jurisdiction and have the court exercise its authority to appoint a guardian. Once the suit for guardianship is filed in a court with competent jurisdiction, the person who has filed suit to be named guardian has asserted an interest in the child. Therefore, the person who has filed suit has an interest in the child greater than all those who simply have or may assert an interest in the child. Under the statutory scheme, service upon a party who simply has or may assert an interest in the child is optional. Section 11.09(b). However, those who have asserted an interest in the child and have established a legally recognized relationship with the child are entitled to mandatory service. Section 11.09(a). In this case, appellant asserted her interest in the child by filing suit, but the court never established whether appellant would have a legally recognized relationship with the child.

The issue presented to this court is whether the statute intends for a person who has asserted an interest in a child by filing suit but has yet to have that right recognized is entitled to mandatory service. By filing suit to establish the relationship, the person moves from the group of those who have or may assert an interest who are not entitled to mandatory service to the group of those who are entitled to mandatory service. We hold that a person who has filed suit seeking guardianship fits within the meaning of guardian of the person or estate under sections 11.09(a)(5) and (a)(6). Even though there is not yet a legally recognized relationship, a person who files suit to be guardian steps into the shoes of the guardian under sections 11.09(a)(5) and (a)(6), at least for the purpose of being entitled to service.[4] Appellant had a legitimate right to be named guardian of the child because H.T.R. was an orphan until appellee could prove he was H.T.R.'s father. TEX. PROB. CODE ANN. § 109(b)(1). Because appellant was actively pursuing her interest in the child, she was entitled to service of process.

* * *

In this case, there is error on the face of the record because appellee failed to comply with the requirement in the family code mandating service on the guardian of the person and the estate by failing to serve citation on a party who filed a suit seeking guardianship in the probate court. We sustain appellant's first point of error. Because we reverse this matter based on appellant's first point of error, we do not address the merits of appellant's three other points of error.

We reverse and remand this matter for proceedings consistent with this opinion.

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[4] We also note that there was error in failing to serve the guardian ad litem and the probate court who also fall within the meaning of "guardian" under TEX. FAM. CODE ANN. § 11.09(a)(5), (6) (Vernon Supp.1992). However, appellant did not raise this argument in her points of error.

**Notes, Comments & Questions**

1. The grandmother's filing of the suit seems to be the defining action of *Roberson v. Pickett*. What effect did the filing have on grandmother's rights?
2. What is the current statute governing service?
3. Would the current statute have mad a difference in the outcome of the *Roberson v. Pickett* case?

## M. Temporary Orders in a SAPCR

***In re* McPEAK**
___ S.W3d ___
No. 14-17-00104-CV, 2017 WL 1366672
(Tex. App.—Houston [14th Dist.] Apr. 13, 2017, orig. proceeding)

OPINION

J. BRETT BUSBY JUSTICE

This is a divorce and child custody case involving relator Amy McPeak (Mother), real party-in-interest James McPeak (Father), and three children. On November 22, 2016, Mother and Father executed and the trial court approved Agreed Temporary Orders, which, among other things, ordered Mother to move the children to Brazoria County (where Father lived) or contiguous counties by January 1, 2017, and if Mother failed to comply, the children would be turned over to Father's possession (Temporary Orders). On January 19, 2017, the presiding judge of the 300th District Court of Brazoria County signed orders denying Mother's motion for the court to confer with the oldest child and declining to further consider Mother's motion to modify the Temporary Orders. The judge specified that he declined to further consider the motion to modify because Mother did not file an affidavit that complied with the section 156.102 of the Texas Family Code.

On February 8, 2017, Mother filed a petition for writ of mandamus in this Court. See TEX. GOV'T CODE ANN. § 22.221 (West 2004); see also TEX. R. APP. P. 52. In the petition, Mother asks this Court to compel the trial judge to (1) vacate his January 19, 2017 orders, (2) confer with the oldest child, and (3) modify the Temporary Orders.

We conclude that Mother is entitled to relief because a motion to modify temporary orders is governed by section 105.001 of the Texas Family Code, not section 156.102. Section 156.102 only applies to a motion to modify a final order that designates the person having the exclusive right to designate the primary residence of a child. The Temporary Orders were not final orders. Accordingly, the trial court abused its discretion by declining to further consider Mother's motion to modify the Temporary Orders based on its erroneous legal conclusion that Mother was required to comply with the inapplicable section 156.102. The trial court also abused its discretion by denying Mother's motion to confer with the oldest child, who was age 13, as required by section 153.009(a) of the Texas Family Code. We therefore conditionally grant the petition for writ of mandamus in part.

## I. Factual and Procedural Background

In February 2016, Mother separated from Father and moved with their three children to a home near the marital home in Brazoria County. Mother later moved with the children to Thorndale, Texas, which lies in Milam and Williamson counties, about 40 miles northeast of Austin. The children have been enrolled in school in Thorndale since September 2016.

Father filed for divorce in October 2016. The trial court held a hearing on temporary orders, which Mother attended. Mother, who was not represented by an attorney, and Father, who was represented by an attorney, executed Agreed Temporary Orders. The trial court approved the orders on November 22, 2016. Among other things, the Temporary Orders required Mother to move the children to Brazoria or contiguous counties by January 1, 2017, and if Mother failed to comply, the children would be turned over to Father's possession. Thus, the Temporary Orders required Mother and the children to leave their new home and school in Thorndale.

At some point after the Temporary Orders were signed, Mother obtained a job in Thorndale. Mother then retained an attorney to represent her. On November 29, 2016, Mother filed a motion to set aside the Temporary Orders. On December 8, Mother filed a motion to modify the Temporary Orders, requesting that the Agreed Temporary Orders be set aside or that the geographic restriction in the orders be set aside and/or modified to include Mother's county of residence. On December 28, Mother filed a motion asking the trial court to confer with the oldest child, who was 13 years old, pursuant to section 153.009 of the Texas Family Code.

The trial court heard these motions on January 18, 2017, but stopped the hearing because Mother had failed to file an affidavit that complied with section 156.102 of the Texas Family Code. On January 19, 2019, the trial court: (1) signed an order stating that the court declined to consider further evidence or testimony and declined to further consider Mother's motion to modify (Order Declining to Consider), and (2) signed an order denying Mother's motion to confer with the oldest child (Order Denying Motion to Confer).

## II. Mandamus Standard

* * *

A challenge to temporary orders in a suit affecting the parent-child relationship is allowed through mandamus, as there is no adequate remedy by appeal. See *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding). Because a trial court's temporary orders in a custody case are not appealable, mandamus is an appropriate means to challenge them. [footnote deleted].

## III. Analysis

### A. The trial court abused its discretion by concluding that section 156.102 of the Family Code applied to Mother's motion to modify the Temporary Orders.

The Temporary Orders, by granting Father possession of the children, had the effect of giving Father the exclusive right to designate the children's primary residence. [footnote deleted] Mother filed a motion to modify the Temporary Orders. The first issue presented by her petition for writ of mandamus is whether her motion to modify the Temporary Orders is governed by section 156.102 or section 105.001 of the Texas Family Code. These sections impose very different requirements.

Section 156.102(a) provides: "If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit shall execute and attach an affidavit as provided by Subsection (b)." TEX. FAM. CODE ANN. § 156.102(a). Subsection

(b) requires that the affidavit contain, along with supporting facts, at least one of three allegations. [footnote deleted] See TEX. FAM. CODE § 156.102(b).

The Order Declining to Consider indicates that the reason the trial judge declined to consider further evidence or testimony and declined to further consider Mother's motion to modify is that Mother had failed to file an affidavit complying with section 156.102(b). The trial judge also stated to Mother's counsel at the hearing that he stopped the hearing because her motion to modify lacks an affidavit under section 156.102.

Mother argues that the trial court erred, as a matter of law, because section 156.102 only applies to a suit to modify a final order, not a motion to modify temporary orders. The Temporary Orders state in their title that they are temporary, and nothing in the body of the orders indicates that they were intended to be final.

We agree with Mother's position, which is supported by recent case authority that section 156.102 only applies to modification of final orders, not temporary orders. [Authority deleted].

We agree and conclude chapter 156, like its predecessor, does not apply to modifications of temporary orders. Chapter 156 is predicated on the doctrine of res judicata. *In re S.N.Z.*, 421 S.W.3d 899, 911-12 (Tex. App.—Dallas 2014, pet. denied); *Watts v. Watts*, 563 S.W.2d 314, 316 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) . . . . Temporary orders, however, as their name suggests are intended to allow a trial court some degree of flexibility during the pendency of a proceeding. The policy concerns regarding finality of judgments and the cessation of custody litigation are not implicated in the same way by modifications of temporary orders because at the time of their entry or modification the litigation concerning the child is ongoing. For that reason, the family code expressly sets forth a different test by which the propriety of temporary orders and any modifications of temporary orders are to be measured, namely whether the temporary orders are for "the safety and welfare" of the child. TEX. FAM. CODE ANN. § 105.001(a).

We agree with this part of the *In re Casanova* decision. Accordingly, the trial court made an error of law by applying section 156.102 rather than section 105.001. Because Mother sought to modify temporary orders, not final orders, she was not required to file an affidavit that complied with section 156.102. Nor was she required to file an affidavit under the applicable section 105.001. [footnote deleted] The trial court abused its discretion by declining to further consider Mother's motion to modify based on her failure to file an affidavit that complied with section 156.102.

Mother was prejudiced by this error because the trial court not only required an affidavit that the law did not require, but also imposed a higher burden of proof than the law required. Under section 156.102(b), the movant is required to prove through affidavit that the child's present environment may endanger the child's physical health or significantly impair the child's emotional development. In contrast, under section 105.001, the court may modify temporary orders based on the safety or welfare of the child.

* * *

Regardless of whether Father's argument regarding the evidence is correct, Mother was prejudiced by the trial court's error for at least two reasons. First, the trial court stopped the hearing before Mother finished presenting her evidence. Second, absent the trial court's error, it may have ruled in Mother's favor under section 105.001's more lenient burden of proof.

Father also argues that Mother's motion to modify the Temporary Orders could have properly been denied because the motion did not allege that modification was necessary for the safety or welfare of the children. See TEX. FAM. CODE ANN. § 105.001(a). The motion to modify alleges that "the

Agreements made by Respondent are no longer workable or in the children's best interest." Father cites no authority that a motion to modify temporary orders must specifically allege that modification is necessary for the safety or welfare of the children. In any event, Mother's allegation the agreements are no longer "in the children's best interest" provided sufficient notice to Father that Mother sought to modify the agreements based on the welfare of the children. Mother is therefore entitled to mandamus relief from the trial court's decision not to further consider Mother's motion to modify the Temporary Orders.

**B. The trial court abused its discretion by denying Mother's motion to confer.**

We next consider Mother's complaint regarding the denial of her motion that the court confer with the oldest child. Section 153.009(a) of the Texas Family Code provides that at a hearing, on the application of a party, the court shall interview in chambers a child twelve years of age or older regarding the child's wishes as to the person who shall have the exclusive right to determine the child's primary residence. TEX. FAM. CODE § 153.009(a). Mother's motion to modify the Temporary Orders raised the issue of which parent should have possession of the children and the right to determine their primary residence. Mother filed a motion for the trial court to confer with the oldest child, who was 13 years old. Section 153.009 therefore required the trial court to confer with the oldest child before deciding Mother's motion to modify. The trial court abused its discretion by denying the motion to confer.

**V. Conclusion**

Mother's motion to modify the Agreed Temporary Orders is governed by section 105.001, not section 156.102. The trial court abused its discretion by declining to further consider Mother's motion to modify the Temporary Orders based on its erroneous legal conclusion that section 156.102's affidavit requirement applied. The trial court further abused its discretion by not conferring with the oldest child as required by section 153.009(a). Mother has no adequate remedy by appeal for these errors relating to temporary orders in a custody case.

We therefore conditionally grant the petition for writ of mandamus in part. We direct the trial court to: (1) vacate its January 19, 2017 orders, (2) conduct another hearing to consider Mother's motion to modify the Temporary Orders under section 105.001, and (3) confer with the oldest child as required by section 153.009(a). We express no opinion regarding the merits of Mother's motion to modify or how the trial court should rule on that motion. We deny Mother's request that we direct the trial court to modify the Temporary Orders.

We are confident the trial court will act in accordance with this opinion. The writ of mandamus shall issue only if the trial court fails to do so.

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**Notes, Comments & Questions**

1. What section of the Texas Family Code governs temporary restraining orders in SAPCRs?
2. What section of the Texas Family Code governs temporary injunctions in SAPCRs?
3. What types of temporary orders cannot be rendered except after notice and hearing?
4. What type of temporary order cannot be rendered without a verified pleading or affidavit?
5. Are temporary orders rendered in a SAPCR subject to interlocutory appeal?

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## N. A Record Is Required in a SAPCR

**STUBBS**
**v.**
**STUBBS**
685 S.W.2d 643
(Tex. 1985)

HILL, CHIEF JUSTICE.

The question presented for our consideration is whether Ruth Stubbs has met the criteria enabling her to proceed by writ of error review in the court of appeals more than five months after judgment. Ruth Stubbs sought review by writ of error to the court of appeals from the divorce decree granting a divorce to her husband, Dr. Bernald Ross Stubbs. The court of appeals denied a motion by Dr. Stubbs to dismiss the petition for writ of error. 654 S.W.2d 838. In a separate opinion, the court of appeals reversed and remanded those portions of the trial court's judgment adjudicating the property division and child support and it affirmed the judgment in all other respects. 671 S.W.2d 70. We affirm the judgments of the court of appeals.

On September 30, 1982, Bernald and Ruth Stubbs signed an agreement incident to divorce prepared by Bernald's attorney. The agreement provided for the division of marital property and for the conservatorship and support of the Stubbs' minor child. Ruth Stubbs also signed a waiver of citation. She did not waive the making of a statement of facts. The next day, Dr. Stubbs appeared with his attorney before the trial court. No record was made of the trial court proceedings. The trial judge rendered a decree of divorce reciting that the court heard the evidence and argument of counsel in the case and incorporating the parties' agreement. The decree also recites that Ruth Stubbs did not appear in person or by an attorney. Ruth Stubbs petitioned for writ of error review of the court's decision concerning the division of marital property and the payment of child support. She did not raise conservatorship issues.

The four elements necessary for a review by writ of error are: (1) the petition must be brought within six months of the date of judgment; (2) by a party to the suit; (3) who did not participate in the trial; and (4) error must be apparent from the face of the record. *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390, 392 (Tex. 1982). It is undisputed that Ruth Stubbs timely petitioned for writ of error review and that she was a party to the suit. The issues presented here are whether she participated in the trial and whether error appears on the face of the record. We first consider Ruth Stubbs' participation.

Article 2249a, section 1, TEX. REV. CIV. STAT. ANN., now rule 360(2), TEX. R. CIV. P., provided:

> No party who *participates* either in person or by his attorney *in the actual trial* of the case in the trial court shall be entitled to review by the Court of Civil Appeals through means of writ of error.

[Emphasis added.] Dr. Stubbs contends that Ruth Stubbs participated in the trial within the meaning of article 2249a by signing the waiver of citation and the agreement incident to divorce.

We defined "actual trial" in *Lawyers Lloyds of Texas v. Webb*, 137 Tex. 107, 152 S.W.2d 1096, 1097 (1941) as ordinarily understood to be the hearing in open court, leading up to the rendition of

judgment, on the questions of law and fact. We noted that article 2249a should be liberally construed in favor of the right to appeal. The courts have recognized that the extent of participation in the actual trial of the case disqualifying a party under article 2249a is a matter of degree. For example, taking part in all steps of summary judgment proceeding except appearance at hearing on the motion for summary judgment, *Norman v. Dallas Cowboys Football Club*, 665 S.W.2d 137 (Tex. App.—Dallas 1983, no writ); *Thacker v. Thacker*, 496 S.W.2d 201 (Tex. Civ. App.—Amarillo 1973, writ dism'd), or confession of judgment by attorney of record, *Lewis v. Beaver*, 588 S.W.2d 685 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), constitutes participation. Filing an answer, *Phillips Petroleum Co. v. Bivins*, 423 S.W.2d 340 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.), or a motion for new trial, *Lawyers Lloyds*, is not participation.

We hold that signing the waiver of citation and the divorce agreement were not sufficient acts of participation to preclude Ruth Stubbs from obtaining writ of error review. We approve the court of appeals' holding in *Blankinship v. Blankinship*, 572 S.W.2d 807 (Tex. Civ. App.—Houston [14th Dist.] 1978, no writ), relied upon by Dr. Stubbs. We believe that case is distinguishable, however. Johnny Blankinship, who was denied writ of error review of a divorce judgment against him, not only waived citation; he expressly waived the making of a statement of facts, and he signed the judgment prior to its entry by the trial court.

We next consider the fourth element necessary for writ of error review—whether there is error apparent from the face of the record. The papers on file in the case do not contain a statement of facts. The official court reporter was unable to furnish Ruth Stubbs a record of the proceedings at trial. Ruth Stubbs contends that Texas Family Code section 11.14(d) required the court to make a record of the trial proceedings and that in this case the absence from the record of a statement of facts constitutes error on the face of the record. We agree.

Texas Family Code section 11.14(d) requires that a record be made in all suits affecting the parent-child relationship "as in civil cases generally unless waived by the parties with the consent of the court. This case is governed by section 11.14(d) because the court adjudicated not only a property division but also custody of the Stubbs' minor child and child support payments. *See* Texas Family Code §§ 3.55(b), 11.01(5).

Section 11.14(d) places a duty on the court to make a record of the proceedings in the same manner as did article 2324, TEX. REV. CIV. STAT. ANN., before its amendment in 1975. *Rogers v. Rogers*, 561 S.W.2d 172, 173 (Tex. 1978). This means that all oral testimony must be recorded. It is the responsibility of the trial judge to see that the court reporter performs this duty. *Morgan Express, Inc. v. Elizabeth-Perkins, Inc.*, 525 S.W.2d 312, 315 (Tex. Civ. App.—Dallas 1975, writ ref'd). In this case, section 11.14(d) was violated because there was no record made of the testimony adduced at the hearing.

Dr. Stubbs cites *Brown v. McLennan County Children's Protective Services*, 627 S.W.2d 390 (Tex. 1982), as authority for his argument that the waiver of citation and the agreement incident to divorce signed by Ruth Stubbs satisfy the requirement of a complete record under section 11.14(d). We held in *Brown* that the absence of a statement of facts did not violate section 11.14(d) in a termination of parental rights case because the complaining party had voluntarily executed an irrevocable affidavit relinquishing those rights prior to hearing. Section 15.03(d) of the Family Code expressly provided for the irrevocability of affidavits made to State authorized adoption agencies. We found that by enacting section 15.03(d), the legislature intended to make such irrevocable affidavits of relinquishment sufficient evidence on which the trial court could find termination to be in the children's best interests. No statement of facts was necessary unless it could be demonstrated that the irrevocable affidavit was obtained by fraud, misrepresentation or overreaching.

Our holding in *Brown* does not control here. Unlike the affidavit in *Brown*, the agreement signed by Ruth Stubbs was not irrevocable. On the contrary, section 3.631(a) of the Family Code provides that agreements incident to divorce may be repudiated prior to the rendition of the divorce. We hold that the failure to provide Ruth Stubbs with a statement of facts in violation of section 11.14(d) constitutes error on the face of the record, allowing Ruth Stubbs to appeal by writ of error.

We affirm the judgments of the court of appeals which remanded this cause to the trial court for a new trial on the property division and child support issues.

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**Notes, Comments & Questions**

1. What is the current statute that requires SAPCRs to be recorded?

2. *Stubbs* was reviewed by writ of error. What is the current procedural vehicle that would be used in such case?

3. The Texas Supreme Court in the foregoing case of *Stubbs*, stated that "it is the responsibility of the trial judge to see that the court reporter performed this duty [recording the testimony]. Do not forget that *Stubbs* was a case reviewed by writ of error [today called a restricted appeal and governed by TEX. R. APP. P. 30] which requires that a party to the suit bringing the writ of error did not participate in the trial. This requirement placed Mrs. Stubbs almost in the position of one who has suffered a default judgment.

Be advised that if one does participate in trial, it is the duty of the participants (i.e., their counsel) to make sure that a record of the proceedings is made. In the case of *Henning v. Henning*, 889 S.W.2d 611 (Tex. App.—Houston [14th Dist] 1994, writ denied) a participant at trial was unable to present a record on appeal because the associate judge (then called the Master) had recorded the proceedings on a tape recorder which later could not be transcribed. This recording was made with the permission of the participants. It was held that because the participant who wanted to appeal had not exercised due diligence in making sure a proper record was made, that she had waived the recording of the proceedings. The appellate court cited numerous reasons supporting the determination that Appellant waived her right to a record, including: (1) she failed to object to her cause being heard by the Master; (2) she failed to provide a court reporter; (3) she failed to demand a court reporter and ask the expense be taxed as costs; (4) she failed to refute the court's finding that she had no objection to relying on the tape recording even though warned it might be of poor quality; and, (5) she failed to have a partial record transcribed from what could be transcribed.

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