

## 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 it 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 provides 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.

Perhaps the most significant change is found by the addition of TEX. FAM. CODE § 107.013 wherein a parent who, due to indigency, has received a mandatory appointment of attorney ad litem will now be presumed to remain indigent for the duration of the suit and any subsequent appeal unless the court, upon motion, determines that the parent is no longer indigent. In conjunction therewith, the duties and powers of an attorney ad litem appointed for a parent have been specifically set forth with the addition of TEX. FAM. CODE § 107.131. Likewise, the powers and duties of an attorney ad litem for an alleged father have been set forth in the newly added TEX. FAM. CODE § 107.0132. The duration of an appointment for a parent or an alleged father has been expanded. TEX. FAM. CODE § 107.016. Finally, if an attorney appointed to represent a parent or an alleged father fails to perform their statutory duties, said attorney will be subject to disciplinary action. TEX. FAM. CODE § 107.0133.

The remaining changes in this portion of the Code were relatively innocuous. The name of the “authorized agency” has been changed from the Texas Department of Protective and Regulatory Services to Department of Family and Protective Services in a number of statutes. See, TEX. FAM. CODE §§ 101.002, 101.017, 102.003. TEX. FAM. CODE § 107.004 expands the duties of an attorney ad litem, and the access to information regarding a child has been expanded by TEX. FAM. CODE §

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107.006. In addition, the Title IV-D agency has been charged, every four years, with the duty to review child support guidelines and report recommendations to standing committees of each house of the legislature. The standing committees of each house must, before each legislative session, review guidelines regarding possession of and access to children. TEX. FAM. CODE § 111.001.

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 litem; 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 of 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).<sup>1</sup> 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

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<sup>1</sup> 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.

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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**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*.
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### C. Standing Denied - No Actual Care

**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.<sup>1</sup> 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.
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.
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.
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.
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.
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.<sup>2</sup> Although Haley challenges the court's conclusions of law, she does not argue on appeal that Smith does not adequately care for her children.

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<sup>1</sup> 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).

<sup>2</sup>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

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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 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

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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....

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.

**D. Standing and Actual Care, Control, and Possession**

**COONS-ANDERSON**  
**v.**  
**ANDERSON**  
104 S.W.3d 630  
(Tex. App.—Dallas 2002, no pet)

MORRIS, JUSTICE.

The central issue we decide in this appeal is whether appellant Lisa Coons-Andersen has standing under Texas law to seek visitation with and custody of a child born to appellee Juley Andersen, appellant's long-time romantic partner. We conclude she does not have standing and, therefore, conclude the trial court properly dismissed her suit. We also conclude the trial court correctly granted appellee summary judgment on appellant's breach of contract claims against appellee. Accordingly, we affirm the trial court's judgment.

I.

Appellant and appellee began their relationship in 1988 in Florida. While they lived together, appellee conceived a child by artificial insemination. The child was born in March 1997. In October 1998, the parties' relationship ended, and appellee and the child moved to a different residence in Florida. After the parties separated, appellant continued to pay half of the child's day care expenses for three months, and appellee allowed appellant to have periodic visitation with the child. In late 1999, appellee and the child moved to Texas, where they now reside. Appellant remained in Florida. Soon after her move to Texas, appellee denied appellant any further visitation with the child.

In June 2000, appellant filed suit against appellee. The lawsuit combined a claim for breach of contract with a suit affecting the parent-child relationship as provided for under the Texas Family Code. In her original petition, appellant alleged she had standing to bring suit under section 102.003(a)(9) of the Texas Family Code because, as required by the statute, she had actual care, control, and possession of the child for a period of six months within ninety days of filing suit. She later amended her petition to allege that, but for the deceptive acts of appellee, she would have filed suit within ninety days following the period of her actual care, control, and possession of the child. Additionally, appellant sought reimbursement for expenses she incurred in connection with the birth and care of the child while she and appellee lived together in Florida, a claim based on an alleged oral contract that appellant would support appellee and the child in return for being allowed to co-parent the child.

In response to the petition, appellee filed a plea in abatement and motion to dismiss challenging appellant's standing to maintain a suit affecting the parent-child relationship because, in fact, she had not had actual care, control, and possession of the child since October 1998. The trial court granted appellee's plea and ruled that appellant did not satisfy the standing requirements of section 102.003(a)(9).<sup>1</sup>

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<sup>1</sup> The trial court's order states only that the "Motion to Abate" is granted for lack of standing, and does not recite that the family code suit is dismissed. Nevertheless, we construe the order as a dismissal. Dismissal is the proper remedy

Appellee later moved for summary judgment on appellant's breach of contract claim, arguing the alleged oral agreement was unenforceable because it violated the statute of frauds and that there was no evidence of the agreement on which appellant relied to make her claim. The trial court granted summary judgment to appellee.

Appellant raises four issues on appeal. First, she contends family code section 102.003(a)(9), as applied to her, violates the open courts provision of the Texas Constitution. Second, she argues appellee's fraudulent conduct prevented her from complying with section 102.003(a)(9) and appellee should be estopped from asserting lack of standing. Third, she claims the application of section 102.003(a)(9) violates her rights to association and to contract freely with other parties under the Texas Constitution. Fourth, she complains the trial court erred in granting summary judgment against her on the breach of contract claim.

## II.

We first address the standing issue. 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, 443-44 (Tex. 1993). The standard of review applicable to subject matter jurisdiction also applies to standing. *Id.* at 446. Under that standard, the pleader is required to allege facts affirmatively demonstrating the trial court's jurisdiction to hear the case. *Id.* On review, appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Id.* A party's standing to pursue a cause of action is a question of law. *See N. Alamo Water Supply Corp. v. Tex. Dep't of Health*, 839 S.W.2d 455, 457 (Tex. App.—Austin 1992, writ denied). Consequently, we review the trial court's actions de novo. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

Texas Family Code section 102.003(a)(9) grants standing to file a suit affecting the parent-child relationship 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) (Vernon 2002). Occasional visitation with or possession of a child, however, is not "actual care, control, and possession" under the statute and does not satisfy section 102.003(a)(9)'s strict time requirement. *See Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001). At the time of filing suit, appellant did not meet the statute's requirement because she had not had actual care, control, and possession of the child since October 1998. Therefore, she did not have standing under section 102.003(a)(9). *See Jones v. Fowler*, 969 S.W.2d 429, 433 (Tex. 1998) (lesbian mother's former romantic partner did not have standing because she did not have actual care, control, and possession of child for requisite time before filing suit).

Recognizing the statutory obstacle to her standing, appellant argues in her first issue that section 102.003(a)(9), as applied to her, violates the open courts provision of the Texas Constitution. The open courts provision states all courts shall be open and every person shall have a remedy for his injuries by due course of law. *See* TEX. CONST. art. I, § 13. It affords at least three distinct protections: (1) courts must actually be open and operating; (2) access to courts may not be impeded by unreasonable financial barriers; and (3) the legislature may not abrogate the right to assert a well-

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for lack of subject matter jurisdiction when it is impossible for the petition to confer jurisdiction on the trial court. *Whitley v. Dallas Area Rapid Transit*, 66 S.W.3d 472, 474 (Tex. App.—Dallas 2001, no pet.). We presume the trial court knows and correctly applies the law. *Thompson v. Tex. Dep't of Human Res.*, 859 S.W.2d 482, 485 (Tex. App.—San Antonio 1993, no writ). In addition, the motion sought dismissal, the order's caption states it is an order of dismissal, and the parties construed the order as a dismissal. *See Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-05 (Tex. 1971).

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established common law cause of action. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 448. Appellant invokes the third protection, claiming section 102.003(a)(9) abrogates a common law cause of action.

To establish an open courts violation, a litigant must show that, first, the statute restricts a well-recognized common law cause of action and, second, the restriction is unreasonable or arbitrary when balanced against the statute's purpose. *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508 (Tex. 1997). We must construe the statute in a manner that renders it constitutional, if possible. *See Trinity River Auth. v. URS Consultants, Inc.-Tex.*, 869 S.W.2d 367, 370 (Tex. App.—Dallas 1993), *aff'd*, 889 S.W.2d 259 (Tex. 1994).

Our first inquiry, then, is whether section 102.003(a)(9) restricts a well-recognized common law cause of action. Appellant argues she stood in loco parentis to the child and, by virtue of that relationship, would have standing under common law to file a lawsuit seeking custody of the child. She contends the statute restricts her common law right and is therefore unconstitutional.

Texas courts have traditionally recognized the rights of persons standing in loco parentis to a child. It is well-established that “in loco parentis” means in the place of a parent and refers to a relationship a person assumes toward a child not his or her own. *See Trotter v. Pollan*, 311 S.W.2d 723, 729 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.); *McDonald v. Tex. Employers' Ins. Ass'n*, 267 S.W. 1074, 1076 (Tex. Civ. App.—Dallas 1924, writ ref'd). A person standing in loco parentis to a child voluntarily assumes the obligations of a parent. *See Trotter*, 311 S.W.2d at 729; *McDonald*, 267 S.W. at 1076. Under common law, a person in loco parentis to a child had the same rights, duties, and liabilities as the child's parents. *McDonald*, 267 S.W. at 1076. These rights included, in appropriate circumstances, having standing as a party in a lawsuit involving custody of the child. *Trotter*, 311 S.W.2d at 729 (persons in loco parentis have “existing justiciable interest” in controversy involving custody of child). Being in loco parentis is, however, by its very nature, a temporary status.<sup>2</sup> *See Trotter*, 311 S.W.2d at 729; *McDonald*, 267 S.W. at 1076.

Although we agree that at common law a person standing in loco parentis to a child could have, under appropriate circumstances, standing in a custody suit, in this case appellant simply has not established that she was in loco parentis to the child at the relevant time. Appellant alleges in her brief that she was in loco parentis but fails to explain how and when she achieved this status. Nonetheless, reading her brief liberally, we perceive three possible arguments: first, appellant could claim to be in loco parentis by virtue of the rights conferred on her in the agreement she made with appellee to share parenting duties; second, she could claim she was in loco parentis due to the visitation appellee allowed her to have with the child; or third, she could claim to have been in loco parentis while she was living with the child and appellee. At oral argument, her counsel suggested she was in loco parentis by virtue of her agreement with appellee.

We do not agree a person can be in loco parentis to a child, without actually having possession of the child, by virtue of an alleged contractual agreement to share parenting responsibilities. The in loco parentis relationship arises when a non-parent assumes the duties and responsibilities of a parent and normally occurs when the parent is unable or unwilling to care for the child. The defining characteristic of the relationship is actual care and control of a child by a non-parent who assumes parental duties. Appellant asks us to hold she was in loco parentis despite the fact that the child's mother was actually caring for the child and appellant was not. We will not apply the doctrine in such circumstances. We conclude appellant's alleged contractual agreement to share parenting duties with

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<sup>2</sup> We do not address in this case whether a person in loco parentis with a child could have standing to seek permanent custody under the common law doctrine discussed here.

appellee, even if proved, cannot alone serve to confer upon her the status of in loco parentis to appellee's child.

Likewise, we conclude appellant was not in loco parentis because of the occasional visitation she had with the child after she and appellee separated. Texas courts have never applied the common law doctrine of in loco parentis to grant custodial or visitation rights to a non-parent, against the parent's wishes, when the parent maintains actual custody of the child. We decline to do so now.

Finally, we note the record shows appellant lived with appellee and the child during the first eighteen months of the child's life, and during that time she cared for the child as if she were a parent. Once appellee and the child moved out, however, any possible claim appellant may have had for standing in loco parentis ended. The common law relationship is temporary and ends when the child is no longer under the care of the person in loco parentis. *See Trotter*, 311 S.W.2d at 729; *McDonald*, 267 S.W. at 1076. The cases relied upon by appellant to assert that someone who was once in loco parentis may maintain a custody lawsuit against a child's parent simply do not stand for that proposition, and we reject the notion that appellant's possible status as a person in loco parentis continued past the time the child moved out of her home.

For us to conclude appellant was in loco parentis under the facts of this case would require an unwarranted expansion of an otherwise well-established common law doctrine. Texas cases that discuss the doctrine have a central common feature: the person deemed to be standing in loco parentis had actual care and custody of a child in the parent's absence. Indeed, this is the very cornerstone of the doctrine. Family code section 102.003(a)(9) is in complete harmony with the common law doctrine of in loco parentis: a person who assumes the duties of a parent may be treated like a parent under the law and has the right to be a party in a lawsuit involving the child's custody. Instead of abrogating a common law right, the statute actually embraces it. Even though we have concluded appellant has not established that she was in loco parentis to the child, we also conclude family code section 102.003(a)(9) does not abrogate any cause of action appellant may have held under the common law doctrine of in loco parentis.

Moreover, even if section 102.003(a)(9) restricted such a cause of action, appellant still has not shown an open courts violation because she failed to establish that the provision is unreasonable and arbitrary when balanced against the statute's purpose. Appellant complains that the requirement of filing suit within ninety days of having actual custody of the child imposed an impossible condition on her. Specifically, she argues that ninety days after her possession of the child ended, she could not file suit in Texas because all parties still lived in Florida and she could not file suit in Florida because that state's courts have ruled that a biological mother's former lesbian partner does not have standing to seek custody of or visitation with a child. In essence, appellant complains that the ninety-day requirement operates as an unconstitutional statute of limitations.

The purpose of section 102.003(a)(9) is to create standing for those who have developed and maintained a relationship with a child over time. *In re Garcia*, 944 S.W.2d 725, 727 (Tex. App.—Amarillo 1997, no writ); *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ). Six months is, in the judgment of the legislature, the minimum time needed to develop a significant relationship for purposes of standing to seek custody. *Garcia*, 944 S.W.2d at 727; *T.W.E.*, 828 S.W.2d at 808. The requirement that the six months' possession be within ninety days of filing suit prevents persons who do not have a recent or current relationship with the child from disrupting the child's life with stale claims. *Garcia*, 944 S.W.2d at 727; *T.W.E.*, 828 S.W.2d at 808 (interpreting former subsection 11.03(a)(8) of the family code, requiring actual possession of child for six months immediately preceding filing of suit). We conclude the statute's ninety-day time period for filing suit

is not unreasonable or arbitrary when balanced against its purpose. We resolve appellant's first issue against her.

In her second issue, appellant contends appellee should be estopped from challenging her standing under section 102.003(a)(9) because appellee engaged in deceptive and fraudulent conduct to prevent her from filing suit within the required time. Appellant, however, does not direct us to any specific authority or evidence to support her contention. As such, she presents nothing for us to review and waives her claim. *See* TEX. R. APP. P. 38.1(h); *McIntyre v. Wilson*, 50 S.W.3d 674, 682 (Tex. App.—Dallas 2001, pet. denied).

In her third issue, appellant argues section 102.003(a)(9) of the family code infringes her freedom of contract and right to association under the Texas Constitution. Specifically, appellant asserts her alleged contractual agreement to co-parent the child should guarantee her standing to file a suit affecting the parent-child relationship. Because the statute denies her standing, she contends it interferes with her constitutional freedoms of contract and association. We doubt the merit of such a contention. Regardless, appellant, in support of her contention, cites a clearly inapplicable provision of the Texas Constitution<sup>3</sup> and offers no case authority to support her position. Accordingly, she has waived her argument. *See* TEX. R. APP. P. 38.1(h); *McIntyre*, 50 S.W.3d at 682.

Appellant complains, in her fourth issue, that the trial court improperly granted summary judgment in favor of appellee on the breach of contract claim. Appellant alleged in her petition that in 1995 she agreed to support appellee emotionally and financially in appellee's efforts to conceive a child in exchange for which appellee agreed that appellant would co-parent and assist in rearing the child. Appellant alleged she performed the agreement by paying for appellee's artificial insemination, other uninsured medical expenses for appellee and the child, child care expenses, and food, clothing, and shelter for appellee and the child. She alleged appellee breached their agreement by moving out of the household with the child, changing her visitation schedule with the child, and denying her contact with the child. Appellant sought, as damages, reimbursement for her child-related expenditures. She did not plead for specific performance of the contract.

Appellee filed a no-evidence motion for summary judgment on the breach of contract claim, arguing there was no evidence the money spent by appellant was not intended to be gratuitous, and there was no evidence the parties' contract contemplated remuneration for appellant in the event of a breach. The trial court granted summary judgment on both grounds. A request for a no-evidence summary judgment is, in effect, a request for a pretrial directed verdict. *Boyattia v. Hinojosa*, 18 S.W.3d 729, 735 (Tex. App.—Dallas 2000, pet. denied). We apply the same legal sufficiency standard in reviewing no-evidence summary judgments as we apply in reviewing directed verdicts. *Id.* We review the evidence in the light most favorable to the respondent and disregard all contrary evidence and inferences. *Id.* We will reverse the summary judgment only if it appears the respondent presented more than a scintilla of evidence to raise a genuine issue of material fact with respect to the challenged element. *Id.*

The expenditures for which appellant sought reimbursement were made while she and appellee lived together as romantic partners. Under Texas law,<sup>4</sup> "where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract

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<sup>3</sup> Appellant cites article XIV, section 1 of the Texas Constitution, which refers to the establishment of the General Land Office.

<sup>4</sup> We apply Texas law under the well-recognized presumption that the law of another state is the same as Texas law. *See* *Braddock v. Taylor*, 592 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.).

for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation.” *Salmon v. Salmon*, 406 S.W.2d 949, 951 (Tex. Civ. App.—Ft. Worth 1966, writ ref’d n.r.e.) (quoting *Martin v. de la Garza*, 38 S.W.2d 157 (Tex. Civ. App.—San Antonio 1931, writ dismissed)). Appellant testified in her deposition that she and appellee had an oral agreement relating to emotional and financial support while they lived together, and that when they separated, they entered into a written agreement relating to the continuing care of the child. She provided no further detail about the terms of either agreement. She further testified she and appellee had no written agreement providing appellee would reimburse her for money she spent on the child’s behalf. This summary judgment evidence, without more, is insufficient to raise a fact issue as to whether appellant made her expenditures with the expectation of remuneration. We conclude the trial court correctly granted summary judgment in favor of appellee on appellant’s breach of contract claim. We resolve appellant’s fourth issue against her.

Having resolved appellant’s four issues against her, we affirm the judgment of the trial court.

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**Notes, Questions & Comments**

1. In *Coons-Anderson v. Anderson* what does the court mean by its statement that standing is part of subject matter jurisdiction?
  2. What is subject matter jurisdiction?
  3. If a judgment is entered by a court that does not have subject matter jurisdiction, how effective is that judgment?
  4. What protections are afforded under the “open courts” provision of the Texas Constitution?
  5. What is meant by “*in loco parentis*?”
  6. Does TEX. FAM. CODE § 102.003(9) support deceptive conduct by a party? How so?
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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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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

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<sup>2</sup> 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.

<sup>3</sup> 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."

<sup>4</sup> 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.

their break-up. Katcher's pleadings do not raise any issue relating to the result of the adoption 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.<sup>6</sup> 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.

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<sup>6</sup> *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”).

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 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]

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### **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 Liberal Construction of Pleadings**

**RUPERT**

v.

**McCURDY**

141 S.W.3d 334

(Tex. App.—Dallas 2004, no pet.)

MOSELEY, JUSTICE.

This case involves the standing of a party to pursue a suit affecting the parent-child relationship (SAPCR). The trial court’s judgment named appellee Wesley J. McCurdy, Jr. as possessory conservator of the child, J.C.D., granted Wesley standard visitation rights pursuant to the family code, and ordered Wesley to pay child support. It is undisputed that Wesley is not J.C.D.’s parent, grandparent, or other relative.

The family code provision governing Wesley’s standing provided at that time: “An original suit may be filed at any time by: . . . a person who has had actual care, control, and possession of the child for not less than six months preceding the filing of the petition.” *See* Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20 § 1, 1995 Tex. Gen. Laws 113, 125, *amended by* Act of May 30, 1999, 76th Leg., R.S., ch. 1390, § 2, 1999 Tex. Gen. Laws 4696 (current version at TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon Supp.2004-2005)).

J.C.D.’s mother, Mary Alicia (Dowell) Rupert, appeals the judgment. In two issues, she contends that Wesley lacked standing to seek the rights of a possessory conservator and visitation because he never filed a pleading alleging a SAPCR, and, if he did, he failed to do so within the time requirements of section 102.003(a)(9).

Wesley did not file a pleading alleging a SAPCR. His first and only indication that he desired to be named J.C.D.’s possessory conservator was set forth in a motion for new trial (which the trial court

granted). The evidence is undisputed that Wesley did not have actual care, control, and possession of J.C.D. for not less than six months immediately preceding the date he filed his motion. Therefore, assuming without deciding that Wesley's motion for new trial could be construed as a petition alleging a SAPCR, we nevertheless conclude the evidence is undisputed that Wesley lacked standing under the family code. Absent Wesley's standing to file a SAPCR, the trial court had no jurisdiction to render judgment as to possessory conservatorship, visitation, and child support. Therefore, we sustain Mary's issues, vacate the portion of the judgment relating to those matters, and affirm the judgment as modified.

#### FACTUAL AND PROCEDURAL BACKGROUND

J.C.D. was born on March 10, 1996. Mary and J.C.D. moved in with Wesley a month or two later and moved out in January 1999. It is undisputed that Wesley is not J.C.D.'s biological or adoptive father and is not otherwise related to J.C.D.

On March 26, 1999, Mary filed an original petition for divorce, requesting a determination of whether she and Wesley had a common-law marriage and, if so, to grant a divorce, order a division of the community property, and confirm her separate property. On April 15, 1999, Wesley filed an answer denying he and Mary were ever married. However, if the court found a marriage existed, Wesley requested that the court confirm his separate property and reimburse Wesley's separate estate for funds expended to benefit or enhance the community estate. Neither pleading raised any issue as to J.C.D.

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On June 29, 1999, Wesley timely filed a motion for new trial. In his motion, he asserted—for the first time and contrary to what he said in his original answer—that a common-law marriage *did* exist between himself and Mary. Wesley also asserted in the motion that J.C.D. had been in Wesley's "care, custody, and control" for over three years, and that Wesley therefore had standing under section 102.003(a)(9) of the family code to be named a possessory conservator of J.C.D. with the rights of a conservator, which Wesley requested.

The trial court heard Wesley's motion for new trial on August 2, 1999.<sup>2</sup> On August 6, 1999, the trial court signed an "Order Granting Motion for New Trial and Temporary Orders." In this order, the trial court expressly "vacated and set aside in all things" its June 9 order. The trial court appointed Mary temporary sole managing conservator and Wesley temporary possessory conservator of J.C.D., with specified rights and duties. The order also provided for "possession of [J.C.D.] at all times as the parties may mutually agree and, in the absence of mutual agreement," on alternate weekends, beginning August 7, 1999. Further, the order provided that Wesley pay child support.

Thereafter, neither party filed additional pleadings, although the record shows that the trial court granted two motions for withdrawal and substitution related to Mary's attorneys. On August 8, 2002, three years after the court signed the "Order Granting Motion for New Trial and Temporary Orders," the court held a final hearing. At the beginning of the hearing, Mary made an oral motion for dismissal, on grounds that Wesley had no standing to assert a SAPCR because "no petition was ever filed within the time constraints of 102.003." According to Mary: "And that is our standing [sic], the Court has no jurisdiction." The court overruled the motion.

Wesley testified that he, Mary, and J.C.D. lived together "as a family" from April or May 1996 until January 1999, when they "split up." Wesley agreed with the statement that "[t]he Court did find [i.e., at the August 2, 1999 hearing] that you had standing to participate in the child's life because you

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<sup>2</sup> There is no reporter's record of that hearing in the record on appeal.

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had lived with him for more than six months.” Wesley was then asked by his counsel, “When did you first come to court to get that standing, to get that visitation [ ]?” Wesley responded it was August 2, 1999, about three years previously. Counsel asked Wesley, “[W]hat kind of visitation are you actually exercising now?” Wesley replied, “Saturday morning from 9:00 AM till Sunday at 6:00 PM.” His counsel also asked “What about holidays and special events, and those sort of things, are you getting those?” Wesley replied, “I have tried, but nothing.” Wesley agreed that he wanted “to expand this to standard, like, pick [ ] him up on Friday at 6:00 till Sunday at 6:00 and give us 30 days in the summer” unless Wesley and Mary lived more than 100 miles apart. Wesley’s counsel made the statement: “All we’re asking for is the visitation we [sic] have been having.” There was testimony that Wesley paid the child support ordered by the court.

Mary testified that Wesley called her for “three or four months” after she moved out, that he wanted to see J.C.D., and that saw him “on occasion.” Mary testified that visitation had continued since August 1999.

On August 30, 2002, the trial court signed the “Final Order Establishing Possessory Conservator Rights and Visitation.” The final order recited that the case came on for final hearing on August 8, 2002. The final order’s provisions as to Wesley’s rights to J.C.D., including possessory conservatorship and visitation, were substantially the same as in the temporary order. The final order also included provisions regarding child support, as did the temporary order. The final order made no mention of divorce or property division issues. However, it stated: “It is ordered that all relief requested in this case and not expressly granted is denied.”

In its findings of fact, the trial court found that Wesley had actual care, control, and possession of J.C.D. for more than six months; and that Wesley first sought visitation of J.C.D. within ninety days of the date of separation, i.e., January 1999. The trial court also made conclusions of law: Wesley had standing to pursue possessory conservatorship of J.C.D. pursuant to section 102.003; and it was in J.C.D.’s best interest that possessory conservatorship with all rights that apply thereto be established in Wesley with regard to J.C.D.

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### **RIGHTS OF POSSESSORY CONSERVATOR, VISITATION, AND CHILD SUPPORT**

Under her first issue, Mary argues that there was no evidence that Wesley ever filed suit to establish his rights as possessory conservator, seek visitation, or pursue any other type of relief in this matter, and therefore he did not meet the requirements for standing of section 102.003(a)(9). Under her second issue, she argues Wesley did not meet the time requirement of section 102.003(a)(9). In light of the trial court’s findings of fact and conclusions of law and the version of section 102.003(a)(9) applicable to this case, we construe Mary’s arguments to be that there is no evidence to support the trial court’s determination that Wesley had standing to pursue SAPCR-related relief and, even if the findings of fact are correct, the trial court’s conclusion of law as to whether Wesley had standing to file a SAPCR or raise parent-child issues as a counterclaim in the divorce action under section 102.003(a)(9) of the family code is incorrect as a matter of law, and thus that the trial court had no jurisdiction to order possessory conservatorship and visitation.

\* \* \*

#### *Discussion*

Pleadings are composed of petitions and answers. *Elliott v. Elliott*, 797 S.W.2d 388, 391-92 (Tex. App.—Austin 1990, no writ); see TEX. R. CIV. P. 45 (providing that petition shall consist of “a statement in plain and concise language of the plaintiff’s cause of action”). A pleading determines the

issues upon which parties go to trial. *Crain v. San Jacinto Sav. Ass'n*, 781 S.W.2d 638, 639 (Tex. App.—Houston [14th Dist.] 1989, writ dismissed w.o.j.). Its purpose is to put the opposing party on notice of the character of evidence that she will be called upon to meet and place parameters on the forthcoming contest. *Id.*

In contrast, a motion is an application for an order. *Id.* at 638. Motions may be accepted or rejected by the court, whereas pleadings, if they sufficiently predate the trial, may be submitted and amended freely by the parties without the necessity of court approval. *Id.* at 639 (citing rule of civil procedure 63). Accordingly, motions are not the functional equivalents of pleadings because insufficient similarities exist between a motion and a pleading to allow them to carry the same legal significance. *Kenseth v. Dallas County*, 126 S.W.3d 584, 602 (Tex. App.—Dallas 2004, pet. filed); *In re City of San Benito*, 63 S.W.3d 19, 25 (Tex. App.—Corpus Christi 2001), *rev'd in part & aff'd in part by City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750 (Tex. 2003); *Jobe v. Lapidus*, 874 S.W.2d 764, 765-66 (Tex. App.—Dallas 1994, writ denied); *Crain*, 781 S.W.2d at 639.

Even though Mary's original petition alleged that there was no "child of the marriage," and even though neither that petition nor Wesley's original answer raised any child-related issues, the record shows that the issue of Wesley's visitation with J.C.D. was brought up early in the divorce proceeding. The June 9, 1999 order provided for Wesley's "reasonable access and visitation" to J.C.D. "as may be mutually agreeable between" Mary and Wesley; however, the order also stated that the parties "agreed that such visitation and access . . . shall not amount to 'standing' under the Texas Family Code."

Wesley's June 29, 1999 motion for new trial requested that Wesley be named as a possessory conservator of J.C.D. with the rights of a conservator pursuant to section 102.003(a)(9), the family code's standing provision. This motion asked the trial court to set aside the prior judgment in order to retry the common-law marriage issue and to try, for the first time, Wesley's request to be named possessory conservator, a request that was made for the first time in the motion. *See* TEX. FAM. CODE ANN. § 101.032(a) (Vernon 2002) (defining a suit affecting the parent-child relationship (SAPCR) as "a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested"); § 102.002 (Vernon 2002) (providing that "[a]n original suit begins by the filing of a petition as provided by this chapter"). The trial court granted this motion; in the same order it appointed Wesley as temporary possessory conservator and provided for visitation and child support.<sup>3</sup>

We acknowledge that Wesley's motion for new trial contained at least "a statement in plain and concise language" that he requested to be named J.C.D.'s possessory conservator. *See* TEX. R. CIV. P. 45. However, Wesley's motion for new trial did not meet the requirements of section 102.008, which specifies the contents of a petition and all other documents in a SAPCR. *See* TEX. FAM. CODE ANN. § 102.008 (Vernon 2002). Further, Wesley never filed a pleading or amended pleading meeting those requirements, or alleging or seeking to allege a SAPCR.

We note that the Tyler Court of Appeals has held that we should "indulge a liberal construction of pleadings and pre-trial procedures in suits affecting the parent-child relationship." *In re Pringle*, 862 S.W.2d 722, 724 (Tex. App.—Tyler 1993, no writ). However, we need not decide whether Wesley's motion for new trial may be construed as a petition alleging a SAPCR, because even if it were so construed, it is undisputed that when Wesley filed it he did not meet the requirements for standing under section 102.003(a)(9).

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<sup>3</sup> The August 6, 1999 order also set aside the June 9 order.

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Under the applicable version of section 102.003(a)(9), Wesley had standing to file a SAPCR if he “had actual care, control, and possession of the child for not less than six months preceding the filing of the petition.” Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20 § 1, 1995 Tex. Gen. Laws 113, 125 (amended 1999) (current version at TEX. FAM. CODE ANN. § 102.003(a)(9)).<sup>4</sup> This section should not be interpreted to be “mechanistic” in application. *Jones v. Fowler*, 969 S.W.2d 429, 433 (Tex. 1998) (per curiam). However, the six-month period of actual care, control, and possession required by subsection (9) “must *immediately* precede the filing of the petition.” *Tex. Dep’t of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001) (emphasis added) (citing *Jones*, 969 S.W.2d at 433).

Accordingly, Wesley had the burden to prove that he “had actual care, control, and possession of [J.C.D.] for not less than six months preceding” June 29, 1999, the date he filed his motion for new trial, that is, between December 29, 1998 and June 29, 1999. *See id.*; *In re Pringle*, 862 S.W.2d at 725; *Williams v. Anderson*, 850 S.W.2d 281, 283-84 (Tex. App.—Austin 1993, writ denied). In other words, even if Wesley at some point had actual care, control, and possession of J.C.D. for at least six months, the proper inquiry is whether he did so for the six-month period immediately before he filed his petition. *See Sherry*, 46 S.W.3d at 861.

There was evidence that Wesley had “occasional” visits with J.C.D. between January and June 1999, and “contact and access” pursuant to the June 9, 1999 order. “Occasional visitation with or possession of a child, however, is not ‘actual care, control, and possession’ under the statute and does not satisfy section 102.003(a)(9)’s strict time requirement.” *Coons-Andersen*, 104 S.W.3d at 634 (citing *Sherry*, 46 S.W.3d at 861); *see Williams*, 850 S.W.2d at 283-84.

It is also true that the August 6, 1999 order granted Wesley possession of J.C.D. on alternate weekends, and there is evidence that Wesley had actual possession on weekends for a three-year period pursuant to that order. However, that possession is irrelevant to the issue of standing pursuant to section 102.003(a)(9), which requires care, control, and possession for the designated period immediately *before* the filing of a SAPCR. *See* Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20 § 1, 1995 Tex. Gen. Laws 113, 125 (amended 1999) (current version at TEX. FAM. CODE ANN. § 102.003(a)(9)).

Further, even though *Jones* states that section 102.003(a)(9)’s requirement for standing is not to be applied “mechanistically,” we conclude there is no evidence Wesley met such a less “mechanistic” standard. *Jones* refers to *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ), as an example of this standard. In *T.W.E.*, a three-week interruption between actual possession and the putative father’s counterclaim for custody (or the mother’s divorce suit, the opinion is not clear) did not destroy the father’s standing to seek custody. *Id.* The supreme court held that the “policy and reasoning” of section 102.003(a)(9) require “‘expeditious action by the claimant, who should act with all due, deliberate, reasonable speed.’” *Jones*, 969 S.W.2d at 433 (citation omitted).

*Jones* refers to the exact length of time before “it’s ‘too late’ “ as a matter for the trial court’s “discretion.” *Id.* But it is undisputed that here Wesley did not seek (or assert that he wanted to seek) possessory conservatorship until he filed his motion for new trial—five months after Mary and J.C.D. moved out, three months after Mary filed suit, approximately eleven weeks after Wesley filed an answer, approximately ten weeks after the court held a hearing on the case, and twenty days after the trial court entered a final judgment (later set aside) stating that Wesley’s agreed visitation and access to J.C.D. would not amount to standing under the family code.

Thus, it is undisputed that Wesley did not file his motion for new trial within the time requirement of section 102.003(a)(9). Further, we cannot conclude that Wesley acted “with all due deliberate,

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<sup>4</sup> [Footnote omitted.]

reasonable speed” to raise any SAPCR-related claims. Therefore, even if the trial court could have properly construed the Wesley’s motion as a pleading asserting a SAPCR, an issue we do not reach, the trial court erred in concluding that Wesley had standing to seek possessory conservatorship, visitation, and child support. Without standing pursuant to section 102.003(a)(9), the trial court was without jurisdiction to conclude that it was in J.C.D.’s best interest that possessory conservatorship, with all rights and responsibilities that apply thereto, be established in Wesley with regard to J.C.D. *See* TEX. FAM. CODE ANN. § 151.001 (Vernon Supp.2004-2005) (describing rights and duties of parent, including possession and support). Accordingly, we resolve Mary’s first and second issues in her favor.

### **CONCLUSION**

Because of our disposition of Mary’s issues, we vacate the sections of the “Final Order Establishing Possessory Conservator Rights and Visitation” labeled *Conservatorship*, *Possession*, and *Child Support*. As modified, we affirm the trial court’s judgment.

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### **Notes, Comments & Questions**

1. What does the court mean in *Rupert v McCurdy* when it states that the standing requirement is not to be applied “mechanistically?”
2. Can you provide an example of a less mechanistic approach?
3. If you had represented Wesley when and how would you have proceeded in order to obtain for him the result he desired?

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### **G. 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);

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§ 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;<sup>1</sup>
- 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.<sup>2</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> The agreed order was reduced to writing and signed by the trial court and the parties on October 6, 1998.

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 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.

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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.<sup>7</sup>

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<sup>7</sup> 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

“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.<sup>8</sup> 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

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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, 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).

<sup>8</sup> 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.

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<sup>9</sup> consider the child's principal 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,<sup>10</sup> 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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<sup>9</sup> 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 the relevant time frame." [Emphasis added]. See House Research Organization Bill Analysis, HB 1622, *Daily Floor Report*, April 15, 1999.

<sup>10</sup> 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."

**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*?
  3. Do you agree with the explanation in *Doncer*? Consider the interplay between the standard possession order and primary residence in reaching your conclusion.
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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.<sup>1</sup> After a hearing the trial court found clear and

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<sup>1</sup> Section 12.06(a) provides,

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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]

\* \* \*

(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.

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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).

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).<sup>2</sup>

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 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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<sup>2</sup> 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."

## I. Jurisdiction—Child Support, Visitation Expenses, Custody and Visitation

### *In re S.A.V. & K.E.V.*

837 S.W.2d 80

(Tex. 1992)

COOK, JUSTICE.

This case involves complex jurisdictional issues arising from a Texas trial court's modification of a Minnesota divorce decree. We must decide whether the Texas court could exercise jurisdiction to modify the decree with respect to four areas: child support, visitation expense, custody, and actual visitation arrangements. The court of appeals determined that the Texas court could exercise jurisdiction to modify child support and visitation expense but that the Texas court could not exercise jurisdiction to modify custody or visitation. 798 S.W.2d 293. Because we hold that the trial court could exercise jurisdiction over all these issues, we affirm in part and reverse in part the judgment of the court of appeals.

#### I. FACTS AND PROCEDURAL HISTORY

The mother and the father, both physicians, were married on June 7, 1980 in Minnesota. They continued to reside in Minnesota throughout their marriage. The mother and the father entered a stipulated divorce decree in 1986. The decree contained specific provisions relating to the two minor children of the marriage. The decree provided for joint custody of the children with the mother having physical custody. The decree also provided for visitation. In addition, the decree set out each parent's child support obligation. Each parent was obligated to pay child support when the children resided with the other parent for more than one week.

The mother moved to Amarillo in the spring of 1987. The children joined her there in August 1987. The father has continued to reside in Minnesota since the divorce.

On October 22, 1987, the Minnesota court modified its divorce decree. The court implemented a provision in the original decree which provided that the mother's child support obligation would be increased if her annual income reached \$60,000. In addition, the Minnesota court held that the parties could deduct their visitation expenses from their child support obligation. This modification was made to allow for the visitation expenses the father incurred when traveling to Amarillo to see the children.

On January 19, 1989, the mother brought the instant action in Texas to modify the Minnesota court's October 1987 order. The mother asked the trial court to terminate the offset for visitation expenses. Additionally, she asked that she not be required to pay any child support to the father and that the court modify the joint conservatorship of the children.

The next day the father filed a motion to modify the same decree in a Minnesota court. The father asked that the mother be ordered to pay additional child support and that the offset for visitation expenses be maintained.

Simultaneous modification proceedings in Texas and Minnesota resulted.

In order to object to the Texas trial court's exercise of jurisdiction, the father entered a special appearance pursuant to Rule 120a of the Texas Rules of Civil Procedure. The father's challenge to the Texas court's jurisdiction took two forms. First, the father objected to the trial court's exercise of subject matter jurisdiction to modify custody. Second, the father objected to the trial court's exercise of personal jurisdiction over him to modify his child support obligation. The trial court denied his special appearance and determined that it had subject matter jurisdiction over the case and personal jurisdiction over the father.

Before the Texas court reached the merits of the case, the Minnesota court issued an order modifying the Minnesota decree. The Minnesota order modified the parties' child support obligations and terminated the offset of visitation expenses. The Minnesota order did not alter custody or visitation.

After the Minnesota court had rendered its order, the Texas trial court issued an order modifying the Minnesota decree. The Texas court's order mirrored the Minnesota order with respect to child support and visitation expenses. However, the Texas order dissolved the joint conservatorship and appointed the mother as sole managing conservator. The order also narrowed and specified the father's visitation rights. The father appealed the Texas court's order modifying the Minnesota decree arguing that the trial court did not have subject matter jurisdiction over the case or personal jurisdiction over him. Additionally, the father challenged the merits of the trial court's modification of visitation and custody.

On April 5, 1989, while the case was pending before the Texas court of appeals, the Minnesota trial court entered a separate order that unconditionally asserted jurisdiction over child support issues. The order also conditionally asserted continuing jurisdiction over the custody issues involved in this case. The Minnesota trial court's assertion of jurisdiction over custody was expressly conditioned on an appellate court ruling. On December 24, 1990, the Minnesota court of appeals issued an opinion affirming the April 5th order of the Minnesota trial court.

In the appeal of the Texas order, the court of appeals determined that, by raising the issue of subject matter jurisdiction in his special appearance, the father made a general appearance before the trial court. Therefore, the court held that the father had subjected himself to the personal jurisdiction of the Texas court. As a result, the court of appeals determined that the trial court's modification of the father's support obligation and offset of visitation expenses was proper. The court determined, however, that the Texas court's modification of the Minnesota order as it related to custody and actual visitation arrangements was improper under the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C.A. § 1738A (West Supp.1990).

## **II. DUE PROCESS REQUIREMENTS**

We begin our examination of the issues presented in this case by examining the distinct due process requirements necessary for the proper exercise of jurisdiction over child support, visitation expense, child custody, and visitation.

### **A. Child Support and Visitation Expense**

Claims for child support and visitation expenses are like claims for debt in that they seek a personal judgment establishing a direct obligation to pay money. *See Creavin v. Moloney*, 773 S.W.2d 698, 703 (Tex. App.—Corpus Christi 1989, writ denied); *Perry v. Ponder*, 604 S.W.2d 306, 312-13 (Tex. Civ. App.—Dallas 1980, no writ). Therefore, a valid judgment for child support or visitation expenses may be rendered only by a court having jurisdiction over the person of the defendant. *See Kulko v. Superior Court of California*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978).

### B. Custody and Visitation

A “custody determination” means a court decision providing for the custody of a child, including visitation rights. TEX. FAM. CODE ANN. § 11.52 (Vernon 1986). Unlike adjudications of child support and visitation expense, custody determinations are status adjudications not dependent upon personal jurisdiction over the parents. *See Creavin*, 773 S.W.2d at 703; *Perry*, 604 S.W.2d at 313; *see also Shaffer v. Heitner*, 433 U.S. 186, 208 n. 30, 97 S.Ct. 2569, 2582 n. 30, 53 L.Ed.2d 683 (1977).

Generally, a family relationship is among those matters in which the forum state has such a strong interest that its courts may reasonably make an adjudication affecting that relationship even though one of the parties to the relationship may have had no personal contacts with the forum state. *See Creavin*, 773 S.W.2d at 703; *Perry*, 604 S.W.2d at 313. Consequently, due process permits adjudication of the custody and visitation of a child residing in the forum state without a showing of “minimum contacts” on the part of the nonresident parent. *See Creavin*, 773 S.W.2d at 703; *Perry*, 604 S.W.2d at 313.

The Texas legislature recognized the state’s strong interest in determining the custody of children by adopting the Uniform Child Custody Jurisdiction Act (UCCJA). TEX. FAM. CODE ANN. § 11.51 *et seq.* (Vernon Supp.1992). To acquire jurisdiction over custody issues, no connection between the nonresident parent and the state is required. Instead, jurisdiction can be established by demonstrating that Texas has become the child’s “home state.” *Id.* at § 11.53. Texas will become the child’s home state when the child has resided here for six months, or since birth if the child is younger than six months. *Id.* at § 11.52(5). Alternatively, a Texas court may assert jurisdiction to modify custody when the best interests of the child will be served because the child and at least one contesting parent have a significant connection with Texas and substantial evidence concerning the child’s care exists in Texas. *Id.* at § 11.53(a)(2).

If the requirements of the Family Code are satisfied, the state’s interest in determining custody has been demonstrated. That is, the state has acquired a sovereign’s interest in and responsibility for the child’s welfare. In such a situation, the state’s interest in the child’s welfare outweighs the nonresident parent’s interest in avoiding the burden and inconvenience of defending the suit in Texas. Therefore, due process does not require that a connection exist between the nonresident parent and this state. In adjudications of custody, once these jurisdictional provisions have been satisfied, the court can properly exercise jurisdiction over the nonresident. Satisfaction of these provisions confers “personal jurisdiction” over the nonresident as well as subject matter jurisdiction over the case. *See Creavin*, 773 S.W.2d at 703; *Perry*, 604 S.W.2d at 313-14.

### III. JURISDICTION OVER CHILD SUPPORT AND VISITATION EXPENSE

Because custody adjudications do not require minimum contacts with the forum state, disputes involving both custody and child support create a unique jurisdictional problem for courts. A custody adjudication may be made by a court that has no jurisdiction to render a personal judgment for support against a nonresident parent. This difficulty, however, is inherent in our system of jurisdiction as a result of the separate due process requirements for adjudications of custody and adjudications of child support. With this inherent difficulty in mind, we must now attempt to reach a result that is both fair to the parties and in the best interest of the children.

#### A. No Waiver of Special Appearance

In determining whether the father waived his special appearance, the distinct jurisdictional requirements for adjudications of custody are relevant. The mother sought to have the Texas court modify both custody and child support. In his special appearance, the father challenged the trial court’s subject matter jurisdiction to adjudicate custody as well as the court’s personal jurisdiction

over the father. The court of appeals determined that, by raising the issue of subject matter jurisdiction in his special appearance, the father made a general appearance before the trial court. We disagree.

By challenging the court's subject matter jurisdiction over custody, the father challenged the satisfaction of the jurisdictional statute. As discussed earlier, in adjudications of custody, satisfaction of the jurisdictional statute confers "personal jurisdiction" over the nonresident. As a result, the father's challenge to the court's subject matter jurisdiction over custody issues served as a challenge to the court's "personal jurisdiction" over the father. This type of challenge is properly raised in a special appearance. See TEX. R. CIV. P. 120a. Therefore, we hold that the father did not waive his right to complain of the trial court's lack of personal jurisdiction over him by challenging the court's subject matter jurisdiction over custody issues.<sup>1</sup>

### **B. Minimum Contacts Analysis**

Because the father properly preserved his right to challenge the trial court's exercise of personal jurisdiction over him, we must determine whether that exercise of jurisdiction was proper. For a Texas court to properly exercise jurisdiction in suits seeking to impose a personal obligation to pay money, such as child support modification proceedings, two conditions must be met. First, a Texas long-arm statute must authorize the exercise of jurisdiction. Second, the exercise of jurisdiction must be consistent with federal and state constitutional guarantees of due process. *Schlobohm v. Schapiro*, 784 S.W.2d 355, 356 (Tex. 1990).

Section 11.051 of the Family Code provides the Texas courts with personal jurisdiction over nonresident parents with regard to child support. Subsection 4 of that provision requires only "any basis" consistent with due process. TEX. FAM. CODE ANN. § 11.051(4) (Vernon 1986).

Under the federal constitutional test of due process, the plaintiff must initially show that the defendant has established "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). The plaintiff must then show that the assertion of jurisdiction comports with fair play and substantial justice. *Id.* The fair play analysis is separate and distinct from the minimum contacts issue. See generally *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113, 107 S.Ct. 1026, 1032-33, 94 L.Ed.2d 92 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77, 105 S.Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985). The jurisdictional formula Texas courts are to use to ensure compliance with federal constitutional requirements of due process was recently clarified by this Court in *Guardian Royal Exchange Assurance v. English China Clays*, 815 S.W.2d 223 (Tex. 1991). First, the nonresident must have purposely established minimum contacts with Texas. *Id.* at 230. This means that there must be a "substantial connection" between the nonresident defendant and Texas arising from action or conduct of the nonresident defendant purposefully directed toward Texas. *Id.* When specific jurisdiction is asserted, the cause of action must arise out of or relate to the defendant's contacts with Texas. *Id.* When general jurisdiction is alleged, there must be continuous and systematic contacts between the nonresident defendant and Texas. General jurisdiction requires a showing of substantial activities by the nonresident defendant in Texas. *Id.*

Second, the assertion of personal jurisdiction must comport with fair play and substantial justice. *Id.* at 231. In this inquiry, it is incumbent upon the defendant to present "a compelling case that the

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<sup>1</sup> We do not reach the broader question of whether raising subject matter jurisdiction in a typical suit that seeks to impose a personal obligation constitutes a general appearance. See *Goodwine v. Superior Court of Los Angeles*, 63 Cal.2d 481, 47 Cal.Rptr. 201, 407 P.2d 1 (1965); see also Annotation, *Objection Before Judgment to Jurisdiction of Court Over Subject Matter as Constituting General Appearance*, 25 A.L.R.2d 833 (1952).

presence of some consideration would render judgment unreasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 477, 105 S.Ct. at 2185). The following factors, when appropriate, should be considered: (1) the burden on the defendant; (2) the interests of the forum state in adjudicating the dispute; (3) the plaintiff’s interest in obtaining convenient and effective relief; (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Id.* Once minimum contacts have been established, however, the exercise of jurisdiction will rarely fail to comport with fair play and substantial justice. *Id.*; see *Burger King*, 471 U.S. at 477-78, 105 S.Ct. at 2184- 5; *Schlobohm*, 784 S.W.2d at 358.

The mother argues that the trial court’s exercise of personal jurisdiction over the father was proper under the federal and state guidelines. She argues that the father’s trips to visit the children establish the necessary minimum contacts. In addition, the mother relies on the fact that the father sought employment in Amarillo to argue that the father’s contacts with Texas were continuing, systematic and related to his relationship with the children.

With the federal and state guidelines in mind, we hold that the Texas trial court’s exercise of jurisdiction did not violate the father’s right to due process.

First, the father purposefully established minimum contacts with Texas. There was a substantial connection between the father and Texas arising from his repeated visits to Texas. Although it is unclear exactly how often the father came to Texas, the record reflects that he visited Amarillo so often between September 1987 and January 1989, that there were many months in which he was able to virtually eliminate his entire child support payment (\$1800 per month) through his visitation expense offset.

In analyzing minimum contacts, we recognize that it is not the number of the contacts with the forum state that is important. Rather, the quality and nature of the nonresident defendant’s contacts are important. *Guardian Royal*, 815 S.W.2d at 230 n.11. The record reflects that during his numerous trips to Texas, the father visited the children and sought employment in Amarillo. At the special appearance hearing, the father testified that on one trip to Amarillo he spent four hours with doctors at the Amarillo Diagnostic Clinic. During that visit, he inquired into the opportunities available at the clinic and expressed an interest in any openings that might arise. The father testified that, during a subsequent trip to Amarillo, he spent two hours making the rounds with another doctor at the clinic. This testimony indicates that the father’s contacts with Texas included a continuing job search as well as visits with the children. Based on these facts, we find that the father purposefully established minimum contacts with Texas.

Two Texas cases have held that there were no minimum contacts between the nonresident parent and Texas even though the parent had paid visits to Texas. See *Cunningham v. Cunningham*, 719 S.W.2d 224, 228 (Tex. App.—Dallas 1986, writ dismissed); *Ford v. Durham*, 624 S.W.2d 737, 740 (Tex. App.—Fort Worth 1981, writ dismissed).<sup>2</sup> Although these cases appear to conflict with our decision today, they are distinguishable from the instant case.

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<sup>2</sup> Other Texas courts have held that visits to the children in Texas may establish minimum contacts with Texas. See *Crockett v. Crockett*, 589 S.W.2d 759, 762 (Tex. Civ. App.—Dallas 1979, writ refused n.r.e.); *Bergdoll v. Whitley*, 598 S.W.2d 932, 935 (Tex. Civ. App.—Austin 1980, writ refused n.r.e.).

Courts from other jurisdictions also hold that trips to visit the children can establish minimum contacts with the forum state. See *McCarthy v. McCarthy*, 146 Wis.2d 510, 431 N.W.2d 706 (Ct.App.1988); *Duehring v. Vasquez*, 490 So.2d 667 (La.Ct.App.1986). Because the father conducted a continuing job search while he was in Texas, we do not reach the question whether visits to the children alone can establish minimum contacts.

In *Cunningham*, the nonresident parent's only recent contact with the state was one unsuccessful attempt to visit the child in Texas. *Cunningham*, 719 S.W.2d at 225. The court held that this contact and the mother's unilateral removal of the child to Texas without the father's approval did not establish any basis meeting the requirements of due process. *Id.* at 228. The facts of the present case are distinguishable from those of *Cunningham*. The father has made numerous trips to Texas to visit the children. Additionally, the father sought employment during his visits to Texas.

In *Ford*, the nonresident parent came to Texas several times to visit the child and came to Texas at least twelve times to conduct business. *Ford*, 624 S.W.2d at 740. The court found that the father's trips to Texas to visit the child were insufficient to subject him to the jurisdiction of the Texas trial court. *Id.* The court further found that the business trips did not give rise to a cause of action regarding the parent-child relationship so as to subject him to the jurisdiction of the Texas courts. In this case, it appears that the father paid more visits to Texas than the nonresident parent in *Ford*. Additionally, *Ford* was decided before the Texas "due process formula" had been modified to allow for general jurisdiction. See *Schlobohm*, 784 S.W.2d at 358. Therefore, the court in *Ford* did not include the nonresident's business contacts as part of the due process analysis. In this case, the father's trips, when taken as a whole, are sufficient to establish minimum contacts with Texas.

Second, the Texas court's assertion of personal jurisdiction comports with fair play and substantial justice. The burden on the father of adjudicating the suit in Texas is not an extremely heavy one. Although there are many miles between Texas and Minnesota, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a state where he has minimum contacts. See generally *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 201, 2 L.Ed.2d 223 (1957). Moreover, the father's repeated trips to Texas indicate that traveling to this state does not present an undue hardship on him. Additionally, Texas has asserted its particularized interest in adjudicating child support by enacting a special jurisdictional statute. See TEX. FAM. CODE ANN. § 11.051 (Vernon 1986); see also *Kulko*, 436 U.S. at 98, 98 S.Ct. at 1700. Finally, Texas has a vital interest in protecting the rights of children within its borders and providing for their support. For these reasons, we hold that the Texas court's exercise of jurisdiction comports with fair play and substantial justice.

#### **IV. JURISDICTION OVER CUSTODY AND VISITATION**

The UCCJA creates a system of concurrent jurisdiction in custody determinations. That is, two states may have subject matter jurisdiction to modify custody of the same children. This is true in the instant case. Because the children lived in Texas for a period in excess of six months before the proceedings in question, Texas is their "home state" under the Texas UCCJA and has acquired subject matter jurisdiction over the children's status. TEX. FAM. CODE ANN. §§ 11.52(5), 11.53. Minnesota also had subject matter jurisdiction over the original custody determination made in the 1986 divorce decree and continues to have jurisdiction concerning the custody of the children. MINN. STAT. ANN. § 518A.03 (West 1990). Therefore, Texas and Minnesota have concurrent jurisdiction over the same child custody question.

In order to prevent jurisdictional conflicts and competition over child custody, the United States Congress passed the Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C.A. § 1738A (West Supp.1990). The PKPA requires every state to give full faith and credit to child custody determinations of other states. 28 U.S.C.A. § 1738A(a). However, the PKPA provides that:

A court of a State may modify a determination of the custody of the same child made by a court of another State, if

- (1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

28 U.S.C.A. § 1738A(f). In case of any conflict, the PKPA takes precedence over state law.

The court of appeals rejected the mother's argument that the Minnesota court declined to exercise its jurisdiction. The mother bases her argument on the April 5, 1990 order rendered by the Minnesota trial court while this case was pending before the Texas court of appeals. The Minnesota order states:

**CONCLUSIONS OF LAW**

1. This Court has jurisdiction over all dissolution matters, including child support and visitation expenses.
2. This Court has continuing jurisdiction over child custody and visitation based on the children's best interests pursuant to Minnesota's version of the Uniform Child Custody Jurisdiction Act.
3. Minnesota is not an inconvenient forum.
4. This Court will decline to exercise its jurisdiction over child custody and visitation if Texas insists on exercising jurisdiction pursuant to an appellate court decision.

**IT IS HEREBY ORDERED:**

1. [The father's] motion for this Court to exercise jurisdiction is granted with respect to child support and visitation expenses and partially granted with respect to child custody and visitation.
2. [The mother's] motion for this Court to decline jurisdiction is granted with respect to child custody and visitation issues if an appellate court rules this Court should not be exercising jurisdiction.
3. [The father] shall provide the Texas Court of Appeals and District Court with a copy of this Order and Memorandum.

The court of appeals determined that, although the Minnesota court appeared to decline jurisdiction in paragraph 4 of the above conclusions of law and paragraph 2 of the decree, when considered as a whole, the order did not decline jurisdiction within the meaning of the PKPA. Instead, the court of appeals concluded, those recitations were only a "praiseworthy attempt" by that Minnesota court to shorten the "period of uncertainty" by deferring to the Texas court of appeals' decision. 798 S.W.2d at 297. We disagree.

In its order, the Minnesota court recognizes that it has jurisdiction over all dissolution matters, i.e., child support, visitation expenses, child custody and visitation. The order, however, *asserts* jurisdiction only over child support and visitation expenses, those matters for which "minimum contacts" are required. The Minnesota court declines to exercise its subject matter jurisdiction over custody and visitation.

Our view is supported by the Minnesota court of appeals' opinion in the appeal of the April 1990 order. That opinion was issued following the Texas court of appeals' disposition of the case. The Minnesota court of appeals affirmed the Minnesota trial court's order and held that, if no appeal was taken from the Texas court of appeals' judgment, or this Court upheld the court of appeals, Minnesota would exercise jurisdiction over custody and visitation issues to assure that a "jurisdictional vacuum" would not occur. The Minnesota court went on to hold that if this Court affirmed the Texas trial court's exercise of jurisdiction over child custody and visitation, Minnesota "will *continue to decline* to exercise the jurisdiction it has over these issues." (emphasis added). In interpreting the actions of

the Minnesota trial court, we respect the determination made by the Minnesota court of appeals that the trial court had declined to exercise jurisdiction over custody and visitation.

This case presents the difficulties inherent in the resolution of all interstate custody disputes. The cooperation of the Minnesota court of appeals has allowed us to resolve the jurisdictional questions with careful regard for the rights of the parties and the best interests of the children.

Because we determine that Minnesota has declined to exercise its jurisdiction over custody and visitation matters, the Texas court's exercise of jurisdiction over custody and visitation was proper under the PKPA.

## V. CONCLUSION

For the above reasons we affirm in part and reverse in part the judgment of the court of appeals. We hold that the trial court could exercise jurisdiction to modify the Minnesota decree as it related to child support, visitation expense, custody and visitation. The court of appeals determined that the trial court could not properly exercise jurisdiction over visitation and custody and, therefore, did not address the merits of the trial court's order modifying these aspects of the Minnesota decree. Because the father properly challenged the trial court's modification of visitation and custody, we remand this cause to the court of appeals so that it may address the merits of the father's challenges to the modification order.

HECHT, JUSTICE, joined by PHILLIPS, CHIEF JUSTICE, and CORNYN, JUSTICE, concurring in part and dissenting in part.

I agree with the Court that the district court properly exercised its jurisdiction to modify the provisions of the parties' Minnesota divorce decree concerning custody and visitation. I do not agree, however—although it is a close question—that the district court had personal jurisdiction over the father, who still resides in Minnesota, to modify the provisions of the decree relating to support and payment of visitation expense. I therefore respectfully dissent from Parts III.B and V of the Court's opinion but concur in the remainder of it. I would reverse the judgment of the court of appeals in its entirety and remand the case to that court for consideration of other points raised by the father.

The father's only contacts with Texas were his visits to his children in Amarillo and his inquiries on some of those visits concerning employment there. For a Texas court to exercise specific personal jurisdiction over the father, the mother's cause of action must arise out of or relate to his contacts with Texas. *Guardian Royal Exch. Assurance, Ltd. v. English China Clays*, 815 S.W.2d 223, 227 (Tex. 1991); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 413-414, 104 S.Ct. 1868, 1871-72, 80 L.Ed.2d 404 (1984). While the mother's action to modify the father's support obligation does not arise out of his visits to the children here, the action and the visits are not completely unrelated. The relationship between them, however, is not sufficient for specific personal jurisdiction over the father. If it were, Texas would have jurisdiction over the father if he visited his children here but not if they went to Minnesota for visits. To avoid being compelled to come to Texas to litigate, the father would be encouraged to insist upon visitation in Minnesota, despite any inconvenience of that journey to the mother and the children.

\* \* \*

I would hold that the father did not have sufficient contacts with Texas for our courts to exercise personal jurisdiction over him. I would also hold that that exercise is not fundamentally fair or just. I would therefore conclude, as JUSTICE GONZALEZ does, that the district court's exercise of personal jurisdiction over the father to modify his support obligation violated his right to due process under the Fourteenth Amendment to the United States Constitution.

The district court's exercise of jurisdiction over the father appears to be of little significance in this case. The district court modified the father's support obligation in the Minnesota decree in the same way that the Minnesota court had already modified that obligation. Thus, the father's obligation is now the same under both the Texas judgment and the Minnesota judgment. Since the father resides in Minnesota, and there is no suggestion that he has any property in Texas, it seems that the mother would most likely enforce the Minnesota judgment, if necessary, rather than the Texas judgment. Thus, the Court has gone out of its way to exercise jurisdiction over a nonresident when it appears to be unnecessary. For this additional reason I respectfully dissent.

GONZALEZ, JUSTICE, dissenting.

This case turns on two questions. First, did Minnesota decline to exercise jurisdiction over the dispute? And second, did sufficient minimum contacts exist for the Texas court to exercise personal jurisdiction over an out-of-state parent who merely visited our state to see his children? The answer to both questions must be "yes" in order for today's opinion to stand. Conflicting language from the Minnesota courts' decisions clouds the answer to the first question. The trial court conditionally declined to exercise jurisdiction, but the appellate court characterized that action as a declination. Nothing, however, obscures the answer to the second question. Federal constitutional requirements of due process should lead us to no other conclusion but that the assertion of personal jurisdiction over the visiting parent by Texas is unreasonable.

The states of Minnesota and Texas have concurrent jurisdiction over the custody, support and visitation of the children. After a hearing, a Minnesota trial court concluded that it was a convenient forum to resolve the dispute between the parties.<sup>1</sup> The Minnesota trial court recognized the potential for conflicting orders in this case and wisely decided to *defer* exercising jurisdiction over these issues to ascertain whether Texas would *insist* on exercising its own jurisdiction over this case. A Texas intermediate court of appeals reviewed this matter and, in my opinion, correctly concluded that Minnesota *had deferred* rather than declined jurisdiction within the meaning of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. 798 S.W.2d at 297. Our Court disagrees and holds that Minnesota declined jurisdiction. More egregiously, our Court implies that any parent who comes to Texas to visit his or her children and consults the "want ads" or stops by the Employment Office while on one of these visitation trips has engaged in sufficient "minimum contacts" to become subject to the personal jurisdiction of Texas courts. All of this gives new meaning to the phrase: "Don't mess with Texas!" I dissent.

\* \* \*

### CONCLUSION

Because the Minnesota court did not unconditionally decline to exercise its jurisdiction over the suit, but merely deferred the exercise of its jurisdiction pending the resolution of the Texas case, Texas cannot properly assert jurisdiction over the child custody and visitation issues under the PKPA. Furthermore, because the father has not established minimum contacts with Texas, Texas should not assert personal jurisdiction over him. Finally, there is absolutely no reason for Texas to insist on

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<sup>1</sup> The following factors show that the parties have substantial contacts in Minnesota: (1) the parties were married in Minnesota; (2) they lived in Minnesota until their divorce; (3) the children of the marriage were born in Minnesota; (4) the children have relatives in Minnesota; (5) the father lives in Minnesota; and (6) his family and friends who would testify on his behalf live in Minnesota. The parties *stipulated* that Minnesota would retain jurisdiction over all issues dealing with custody, visitation and support as long as one of the parents resided in Minnesota.

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exercising jurisdiction over this case; in the future, some of our sister states may not be as accommodating. In the long run, it is the children who will suffer.

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**Notes, Comments & Questions**

1. What is a special appearance?
2. In *In re S.A.V. & K.E.V.*, why did the father find it necessary to object to subject matter jurisdiction and personal jurisdiction?
3. The father in *In re S.A.V. & K.E.V.* faithfully exercised his visitation rights and unwittingly supported a finding that the trial court had personal jurisdiction. What did JUSTICE HECHT and JUSTICE GONZALEZ think about this? What do you think?
4. Remember the UCCJEA in its current form will answer many jurisdictional questions that might arise.

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**J. Escaping S.A.V.**

**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.<sup>1</sup>

**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

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<sup>1</sup> 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.

is a question of law. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). 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.<sup>2</sup> *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*

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<sup>2</sup> 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.

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*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, 567 (Tex. App.—Amarillo 1998, no pet.); *Cunningham v. Cunningham*, 719 S.W.2d 224, 228 (Tex. App.—Dallas 1986, writ dismissed); *Ford v. Durham*, 624 S.W.2d 737, 740 (Tex. App.—Fort Worth 1981, writ dismissed). 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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#### **K. Personal Jurisdiction**

#### **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.

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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 dismissed). 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

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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.

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**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. Does the holding in *Flores v. Melo-Palacios* raise any questions regarding the holding of *In re S.A.V. & K.E.V.*
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## L. 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

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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 dismissed by agr.).

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

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### **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?
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## M. 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.<sup>1</sup> 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

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<sup>1</sup> 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).

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 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)).<sup>2</sup> 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;

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<sup>2</sup> 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).

- (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).<sup>3</sup> 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 (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

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<sup>3</sup> 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.

entitled to service.<sup>4</sup> 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.

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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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**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 made a difference in the outcome of the *Roberson v. Pickett* case?
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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.

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<sup>4</sup> 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.

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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 dismissed), or confession of judgment by attorney of record, *Lewis v. Beaver*, 588 S.W.2d 685 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ refused n.r.e.), constitutes participation. Filing an answer, *Phillips Petroleum Co. v. Bivins*, 423 S.W.2d 340 (Tex. Civ. App.—Amarillo 1967, writ refused 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

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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 [14<sup>th</sup> 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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**O. Ad Litem, Other Appointments, & Fees**

**SAMARA**

v.

**SAMARA**

52 S.W.3d 455

(Tex. App.—Houston [1st Dist.] 2001, pet. denied)

COHEN, JUSTICE.

The Court denies Daniel Lemkuil's motion for en banc rehearing, but the panel withdraws its opinion of May 31, 2001 and issues this opinion in its stead.

In this divorce case, the judge appointed a guardian ad litem and an attorney ad litem for the children. The judge then allowed the guardian to hire an attorney and assessed part of that attorney's fees against appellant, John Samara ("John"). The question is, did the trial judge have authority to allow the guardian to hire an attorney? We hold she did not. Thus, we reverse and render judgment that John not pay fees to the guardian's attorney. We affirm the judgment in all other respects.

**Facts**

The trial judge initially appointed Christine Jonte as both guardian ad litem and attorney ad litem for the children. She then removed Jonte as guardian and appointed Marinelle Timmons as the new guardian ad litem. Jonte continued to serve as attorney ad litem. While Jonte was thus serving, the judge granted Timmons's motion to hire attorney Daniel Lemkuil to represent Timmons in her role as guardian ad litem.

The parties made an oral Rule 11 agreement on child support, custody, visitation, asset division, and, John alleges, debt allocation.<sup>1</sup> The judgment (1) awarded Lemkuil \$9,650 in attorney's fees against John and (2) ordered John to pay some debts incurred by Sonya. John contends the first item above was unauthorized by law and the second was contrary to the Rule 11 agreement.

### **Dismissal Motion**

Lemkuil has moved for dismissal, claiming John is estopped from appealing because he (1) moved to modify child custody while this appeal was pending, (2) accepted the child custody and child support award, and (3) accepted the terms of the property award.

John is not estopped from appealing when, as here, the relief he seeks would not affect his right to benefits he accepted in the judgment. *See Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1004 (1950); *Twin City Fire Ins. Co. v. Jones*, 834 S.W.2d 114, 115 (Tex. App.—Houston [1st Dist.] 1992, writ denied). John's appeal involves attorney's fees and debt allocation, not issues regarding child support, child custody, or property division, which Lemkuil contends John has accepted. Thus, a reversal of the debt allocation and attorney's fees would not affect John's other rights under the divorce judgment.<sup>2</sup> We hold that John is not estopped from bringing this appeal.

Lemkuil further contends we should dismiss this appeal because John (1) has not filed a reporter's record, (2) has not complied with the original briefing schedule, (3) did not serve Lemkuil with a copy of John's motion for extension of time to file the appellant's brief, or other documents, and (4) did not attach a certificate of conference to John's motion for extension of time to file a brief, which was filed on August 17, 2000. *See* TEX. R. APP. P. 10.1(a)(4), (a)(5).

First, failure to file a reporter's record does not justify dismissal. We must still decide the appeal based on the briefs and the clerk's record. *See* TEX. R. APP. P. 37.3(c). Second, John complied with this Court's briefing schedule. Third, John's documents filed here contain certificates of service. No evidence shows the certificates were made in bad faith. Fourth, while John did not attach a certificate of conference to his motion for extension of time to file his brief, we ordered John to file his brief by November 30, 2000, and Lemkuil never moved for reconsideration of that ruling. We decline to dismiss John's entire appeal for one procedural violation on one motion, the disposition of which Lemkuil never contested.

We deny Lemkuil's dismissal motion and also John's motion for sanctions under TEX. R. APP. P. 45.

### **Guardian Ad Litem**

In his first and third issues, John contends the trial judge erred by (1) allowing the guardian ad litem to hire Lemkuil as her counsel and (2) requiring John to pay Lemkuil's attorney's fees. John contends that (1) Rule 173<sup>3</sup> does not provide for appointment of an attorney for a guardian ad litem and (2) in any event, the guardian did not need an attorney because the attorney ad litem, Jonte, was

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<sup>1</sup> John has not provided a reporter's record, and the clerk's record, which contains part of the oral Rule 11 agreement, omits the part allegedly involving debt allocation. John has attached to his brief what he contends is the text of that agreement on debt allocation. That document is not part of the appellate record, however; therefore, we cannot consider it. *See Till v. Thomas*, 10 S.W.3d 730, 733-34 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (courts cannot consider documents attached to briefs unless the documents are part of the appellate record).

<sup>2</sup> Reversal of a contested debt allocation might affect the overall property division. In that case, acceptance of the asset division might constitute an estoppel. That is not the case here, however, because John is seeking specific performance of what he contends are terms of an agreed property division.

<sup>3</sup> *See* TEX. R. CIV. P. 173.

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already representing the children. *See* TEX. FAM. CODE ANN. § 107.011 (Vernon 1996) (attorney ad litem may be appointed “to protect the interests of the child. . .”); *id.* § 107.014 (Vernon Supp.2001). We agree.

The judge’s order allowing Timmons to hire Lemkuil had the same effect as if the judge had appointed Lemkuil to represent the children. No statute expressly allows a judge to appoint an attorney for a guardian ad litem.<sup>4</sup> Moreover, courts do not have inherent power to do so. *See Thomas v. Anderson*, 861 S.W.2d 58, 61 (Tex. App.—El Paso 1993, no writ); *see also Toles v. Toles*, 45 S.W.3d 252, 267 (Tex. App.—Dallas 2001, no pet.). If Timmons needed legal advice to protect the children’s interests, she should have consulted Jonte, the attorney ad litem. If dissatisfied with Jonte, Timmons should have requested a different attorney ad litem or resigned and requested the judge to appoint an attorney as guardian ad litem. We hold that (1) the trial judge exceeded her authority by appointing Lemkuil to represent Timmons and (2) requiring John to pay Lemkuil’s fees was harmful.

Generally, the standard of review for attorney’s fees is abuse of discretion. Here, the judge had no authority to appoint Lemkuil; therefore, she had no discretion to do so. *See Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997) (a trial court abuses its discretion if its decision is contrary to law). Even if the judge had had such discretion, the appointment of a second attorney would have been justified only by extraordinary circumstances. It is the attorney ad litem’s duty to represent the children. *See* TEX. FAM. CODE ANN. § 107.014. Few children need two attorneys, one for themselves and another for their guardian, and nothing suggests these children did.

We sustain John’s first and third issues.

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We reverse only that portion of the judgment requiring John to pay Lemkuil’s attorney’s fees and render judgment that Lemkuil take nothing in attorney’s fees from John.<sup>7</sup> The judgment is otherwise affirmed.

A majority of the justices of this Court voted to deny Daniel Lenkuil’s motion for en banc rehearing.

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### Notes, Comments & Questions

1. What is the link between trial court authority and trial court discretion?
2. What does it mean when it is stated that a court has no inherent authority to take certain actions?
3. What types of actions are explicitly excluded within the definition of a SAPCR?

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<sup>4</sup> A guardian ad litem is not a party to the suit, but (1) may “conduct an investigation to the extent that the guardian ad litem considers necessary to determine the best interest of the child for whom the guardian is appointed”; (2) is entitled to “attend all legal proceedings in the case but may not call or question a witness unless the ad litem is a licensed attorney”; and (3) is entitled to “testify in court . . . regarding the recommendations concerning the actions that the guardian ad litem considers to be in the best interest of the child. . .” TEX. FAM. CODE ANN. §§ 107.002(a)(1), (c)(4), (c)(6) (Vernon Supp.2001). A guardian ad litem is not entitled to compensation for work that exceeds proper responsibilities. *See Marshall Investigation & Sec. Agency v. Whitaker*, 962 S.W.2d 62, 62-63 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Roark v. Mother Frances Hosp.*, 862 S.W.2d 643, 647 (Tex. App.—Tyler 1993, writ denied) (holding a guardian ad litem who exceeds his role and assumes the duties of plaintiff’s attorney is not entitled to extra compensation).

<sup>7</sup> The final judgment also awarded \$4,405.50 to Lemkuil against Sonya. Sonya does not appeal that award; consequently, we do not disturb it.

**P. Orders Pending Appeal**

***In re* GONZALEZ**

981 S.W.2d 313

(Tex. App.—San Antonio 1998, pet denied)

LOPEZ, JUSTICE.

This appeal challenges the trial court’s dismissal of a post-judgment enforcement proceeding in a paternity suit. The appeal originated from a lawsuit filed by Luisa Gonzalez on behalf of her daughter, Regina. Gonzalez obtained court orders for child support and arrearages against the child’s father, Jose Antonio O’Farrill Avila. In its Final Decree in Parentage Suit, the trial court ordered Avila to deposit \$1 Million with the court. The decree further ordered that the deposit be placed in trust and distributed to Gonzalez in monthly increments of \$6,300 for support of Regina. Avila appealed this decree.

After Avila perfected his appeal, Gonzalez filed a motion for confirmation of arrearages because Avila failed to comply with the court’s orders. Specifically, Gonzalez asked the trial court to reduce the following orders to a money judgment:

- a. “Order on Pretrial Conference” awarding Gonzalez \$6,030 per month in temporary child support.
- b. “Order Granting Judgment for Child Support Arrearage” granting Gonzalez \$64,089, plus interest, in child support arrearages.
- c. “Final Decree in Parentage Suit” ordering child support in the amount of \$6,300 per month and ordering Avila to deposit the \$1 Million with the court.

In response to Gonzalez’s motion, Avila moved to dismiss the proceeding, contending the trial court did not have jurisdiction to enforce the orders because an appeal was pending on the paternity judgment and that, as a result of the appeal, jurisdiction for enforcement rested with this court. The trial court, apparently persuaded by Avila’s argument, dismissed the proceeding, stating in its dismissal order that the trial court did not have jurisdiction to enforce the orders awarding child support.

In two issues, Gonzalez asks us to reverse the trial court’s order dismissing her motion for confirmation of arrearages and to order the trial court to entertain her motion. In her first issue, Gonzalez contends that the trial court has an affirmative duty under section 157.263 of the Family Code to render judgment for accrued but unpaid child support where a proper motion has been filed and no allegation of payments or offset has been raised. Because she filed a motion asking for the arrearages to be reduced to judgment and because Avila does not contend he has paid child support, Gonzalez maintains that the trial court erred by dismissing her motion for want of jurisdiction. In her second issue, she maintains that the trial court has jurisdiction over the proceeding even though the merits of the court’s final decree is pending appeal. We first determine which court—the trial court or this court—has jurisdiction to enforce the orders.

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Section 109.001 of the Texas Family Code anticipates the need to protect the safety and welfare of a minor child during the pendency of an appeal. With respect to temporary orders, the Code provides that:

(a) Not later than the 30th day after the date an appeal is perfected, on the motion of any party or on the court's own motion and after notice and hearing, the court may make any order necessary to preserve and protect the safety and welfare of the child during the pendency of the appeal as the court may deem necessary and equitable. In addition to other matters, an order may:

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(6) suspend the operation of the order or judgment that is being appealed.

TEX. FAM. CODE ANN. § 109.001 (Vernon 1996) (emphasis added). Logically, if the trial court has the authority to *suspend* an order or judgment that is being appealed, the court has jurisdiction to *enforce* an order or judgment that is being appealed. See *Sullivan v. Sullivan*, 719 S.W.2d 239, 240 (Tex. App.—Dallas 1986, writ denied); *Bivins v. Bivins*, 709 S.W.2d 374, 376 (Tex. App.—Amarillo 1986, no writ). While this provision might appear to empower the court to act only within a 30-day window after an appeal is perfected, the Code clearly indicates in section 109.001 that the court retains jurisdiction beyond 30 days even where the merits of the order is under appeal.

Notably, subsection (b) of section 109.001 provides that the trial “court retains jurisdiction to enforce its orders rendered under this section unless the appellate court, on a proper showing, supersedes the court’s order.” TEX. FAM. CODE ANN. § 109.001(b) (Vernon 1996). We interpret this language to mean that the trial court retains jurisdiction to enforce temporary orders for child support whenever the payor-parent fails to pay. In this case, this court has not superseded the trial court’s orders nor has the trial court suspended enforcement of the orders; and therefore, the trial court has jurisdiction to reduce the order awarding temporary child support to a money judgment.

Similarly, section 109.002 addresses the trial court’s power to enforce final orders. Specifically, the Code provides:

(c) An appeal from a final order, with or without a supersedeas bond, does not suspend the order unless suspension is ordered by the court rendering the order. The appellate court, upon a proper showing, may permit the order to be suspended.

TEX. FAM. CODE ANN. § 109.002(c) (Vernon 1996). In the instant case, neither the trial court nor this court has suspended enforcement of the orders awarding Gonzalez child support. Because the court’s orders have not been suspended, the trial court has the authority to reduce arrearages due by virtue of its previous orders to a money judgment. See *id.* § 157.263 (directing trial court to reduce arrearages to a money judgment upon request). Although this determination may appear to conflict with the holding in *Ex parte Boniface*, we find that case distinguishable from this one. See *Ex parte Boniface*, 650 S.W.2d 776, 778 (Tex. 1983).

In *Boniface*, the Supreme Court of Texas determined that proceedings for enforcement of an order awarding an ex-wife a share of her ex-husband’s retirement pay rested with the appellate court because the order directing payment was pending appeal. *Boniface*, 650 S.W.2d at 778. Specifically, the Court determined that the trial court did not have jurisdiction to hold the payor-spouse in contempt for not complying with the trial court’s order. *Id.* Despite this seemingly contrary holding, the Court also held that the order directing the husband to pay still maintained “full force and effect pending the appeal” because the order had not been suspended. *Id.* Like the order directing payment of retirement benefits in *Boniface*, the orders awarding Gonzalez child support have not been suspended. Thus, the orders maintain full force and effect pending an adverse ruling in Avila’s appeal. Because the trial

court retains jurisdiction to enforce its order unless the appellate court supercedes the order, Gonzalez is entitled to have the arrearages reduced to judgment as an action necessary to preserve and protect the safety and welfare of Regina Gonzalez. *See* TEX. FAM. CODE ANN. § 109.001(b), 109.002 (Vernon 1996); *see also id.* § 157.263. As a result, we sustain Gonzalez’s second issue.

Having determined in Gonzalez’s second issue that the trial court has jurisdiction to reduce her arrearages to a money judgment, we need only consider whether the Family Code places the trial court under an affirmative duty to reduce the arrearages to a money judgment. Section 157.263 provides that

[i]f a motion for enforcement of child support requests a money judgment for arrearages, the court *shall* confirm the amount of arrearages and render one cumulative money judgment.

TEX. FAM. CODE ANN. § 157.263 (Vernon 1996) (emphasis added). We find that by using the word “shall” in section 157.263, the Legislature intended to place the trial court under an affirmative duty. Because the language of section 157.263 is mandatory, the trial court erred by dismissing Gonzalez’s motion for confirmation of arrearages. We sustain Gonzalez’s first issue.

Having determined that the trial court had jurisdiction to reduce the child support arrearages to a money judgment, and that the court was bound to do so by section 157.263, we reverse the dismissal order.

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**Notes, Comments & Questions**

1. When must orders pending appeal be entered?
  2. What is the effect if the timing established in the statute is not respected?
  3. What types of orders may be entered pending appeal?
  4. Before going on to the next chapter, identify all issues in a family law case that can only be decided by the trial court judge.
  5. Identify those issues that when decided by a jury cannot be contravened by the trial court judge.
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