

# **STANDING AND OTHER NON-PARENT ISSUES**

Presented by

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Author/Speaker, *Internet Searches for Financial & Personal Information Useful in Family Law Litigation*, Texas Academy of Family Law Specialists Annual Trial Institute 2004.

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Client Alert: E-Discovery –  
Amendments to the Federal Rules of Civil Procedure, Co-Author

*Thompson & Knight LLP  
December 2006*

Searching for Clear Skies in the World of Electronic Discovery:  
Recent Developments and the Role of Counsel, Co-Author

*Skywritings, DRI Aerospace  
Law Committee Newsletter  
Winter 2006*

Business Torts Update, Co-Author

*Texas Business Litigation Journal*

Economic Contribution in a Nutshell:

Reimbursement: Then and Now

Tracing Economic Contribution Reimbursement - Hypotheticals, Co-Author

*Advanced Family Law Seminar  
August 2007*

How to Get Above, Beyond, & Around the

Child Support Cap, Co-Author

*Parent Child Relationships:  
The Definitive Short Course  
November 2007*

Electronic Evidence in the Information Age, Co-Author

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TABLE OF CONTENTS

I. INTRODUCTION ..... 1

II. STANDING UNDER CHAPTER 102 OF THE TEXAS FAMILY CODE..... 1

    A. General Standing to File a Suit Affecting the Parent-Child Relationship..... 1

    B. Statement to Confer Standing ..... 2

    C. Standing for Grandparent or Other Person..... 2

    D. Standing for Sibling ..... 2

    E. Standing to Request Termination and Adoption ..... 2

    F. Standing of Title IV-D Agency ..... 3

    G. Limitations on Standing ..... 3

III. RIGHTS OF GRANDPARENT, AUNT OR UNCLE..... 3

    A. Suit for Possession or Access by Grandparent..... 3

    B. Appointment of Grandparent, Aunt or Uncle as Managing Conservator ..... 4

IV. OTHER TEXAS FAMILY CODE PROVISIONS REGARDING STANDING ..... 4

    A. Standing to File a Suit for Modification ..... 4

    B. Standing to Seek Modification of Child Support Recipient..... 4

    C. Standing to Adjudicate Parentage ..... 5

    D. Standing to Apply for a Protective Order ..... 5

    E. Standing to Seek Child Support for a Disabled Child..... 5

    F. Standing to Annul Marriage of Minor or Incapacitated Person ..... 5

    G. Standing to Petition to Validate a Gestational Agreement..... 5

V. PARENTAL PRESUMPTIONS AND RIGHTS OF NON-PARENTS ..... 5

VI. CONCLUSION ..... 6



## STANDING AND OTHER NON-PARENT ISSUES

### I. INTRODUCTION

The Texas Family Code includes a number of provisions which address standing and other non-parent issues. There has also been significant case law regarding non-parent issues over the past decade. This paper will discuss the most relevant of those issues.

The authors would like to thank Brian Webb and K. Nicole Voyles for permission to use their article entitled *Third Party Standing and Intervenors* from the Parent-Child Relationship Conference in Austin, Texas, on November 8-9, 2007.

### II. STANDING UNDER CHAPTER 102 OF THE TEXAS FAMILY CODE

Chapter 102 of the Texas Family Code contains the provisions that control standing to file most suits affecting the parent-child relationship. Following is a discussion of each of those provisions.

#### A. General Standing to File a Suit Affecting the Parent-Child Relationship

Texas Family Code §102.003 addresses general standing to file a suit affecting the parent-child relationship. At least twelve of the fourteen categories address standing for non-parents. Under this section, an original suit may be filed at any time by:

- (1) a parent of the child;
- (2) the child through a representative authorized by the court;
- (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
- (4) a guardian of the person or of the estate of the child;
- (5) a governmental entity;
- (6) an authorized agency;
- (7) a licensed child placing agency;
- (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160 of the Family Code, subject to the limitations of that chapter, but not otherwise;
- (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter

161 of the Family Code or to whom consent to adoption has been given in writing under Chapter 162 of the Family Code;

- (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;
- (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573 of the Government Code, if the child's parents are deceased at the time of the filing of the petition; or
- (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035 of the Family Code, regardless of whether the child has been born.

Two of the most frequently used grounds for standing by a non-parent are §102.003(a)(9), the provision conferring standing to a person who has had actual care, control, and possession of the child for at least six months, and §102.003(a)(11), the provision giving standing to a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months. Texas courts have held that the six-month period must immediately precede the filing of the suit.<sup>1</sup> The courts have also noted that occasional visitation does not confer standing, though the six-month possession may be interrupted.<sup>2</sup> Texas Family Code §102.003(b) explains:

In computing the time necessary for standing under Subsections (a)(9), (11), and (12), the court may not require that the time

<sup>1</sup> *Rupert v. McCurdy*, 141 S.W.3d 334, 341 (Tex. App.—Dallas 2004, no pet.); *Coons-Anderson v. Anderson*, 104 S.W.3d 630, 634, 636 (Tex. App.—Dallas 2003, no pet.).

<sup>2</sup> *Coons-Anderson*, 104 S.W.3d 630, 634; see also *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex. App.—San Antonio 1992, no writ).

be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

The El Paso Court of Appeals has defined "principal residence" as a fixed place of abode occupied consistently over a substantial period of time which is permanent rather than temporary.<sup>3</sup>

### **B. Statement to Confer Standing**

Texas Family Code §102.0035 addresses the ability to confer standing to a non-parent in the context of an adoption. Under this section, a pregnant woman or a parent of a child may execute a statement to confer standing to a prospective adoptive parent as provided by §102.003(a)(14). The statement may not be executed in a suit brought by a governmental entity under Chapter 262 or 263 of the Family Code. The statement to confer standing must contain the signatures, names, ages, and addresses of the person named as a prospective adoptive parent and of the pregnant woman or parent of the child who is consenting to the termination or adoption. The statement must also contain the birth date of the child or the anticipated birth date if the child has not been born and the name of the county in which the suit will be filed. The statement may be signed at any time during the pregnancy of the mother of the unborn child whose parental rights are to be terminated, and may be revoked at any time before the person executes an affidavit for voluntary relinquishment of their parental rights. The statement to confer standing must be attached to the petition in a suit affecting the parent-child relationship.

### **C. Standing for Grandparent or Other Person**

Texas Family Code §102.004 provides additional circumstances under which a grandparent or "other person" may file an original suit seeking custody of a child or intervene in a pending suit. Effective September 1, 2007, this section added standing for "another relative of the child related within the third degree by consanguinity" to file an original suit for custody. Thus, the statute now gives standing to great-grandparents, siblings, aunts, uncles, first cousins and other relatives.

Under §102.004, a grandparent or other qualifying relative of the child may file an original suit requesting managing conservatorship if there is satisfactory proof that: (1) such conservatorship is necessary because the child's present circumstances would significantly impair the child's physical health or

emotional development; or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit. This section does not allow a grandparent or other person to file an original suit requesting appointment as a possessory conservator of a child. However, §102.004(b) states that the court may grant a grandparent or "other person deemed by the court to have had substantial past contact with the child" leave to intervene in a pending suit if there is satisfactory proof that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

Texas Family Code §102.004 states that possession of or access to a child by a grandparent is governed by Chapter 153 of the Family Code, which is discussed below.

### **D. Standing for Sibling**

Texas Family Code §102.0045 provides standing for a sibling who is at least eighteen years of age to file suit for access to the child if that sibling is separated from the child because of an action taken by the Department of Family and Protective Services. Section 102.0045(b) specifies that such access is governed by the standards established by Subchapter J, Chapter 153 of the Family Code.

### **E. Standing to Request Termination and Adoption**

Under Texas Family Code §102.005, the following persons may file an original suit requesting only an adoption, or an original suit for termination of the parent-child relationship joined with a petition for adoption:

- (1) a stepparent of the child;
- (2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the thirty-day period preceding the filing of the petition;
- (3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
- (4) an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to file the original suit.

<sup>3</sup> *Doncer v. Dickerson*, 81 S.W.3d 349, 362 (Tex. App.—El Paso 2002, no pet.).

for adoption is controlled by Texas Family Code §102.003 and §102.0035, discussed above.

**F. Standing of Title IV-D Agency**

Texas Family Code §102.007 provides standing for a Title IV-D agency to file a child support action as authorized by the Texas Family Code, including a suit for modification or enforcement.

**G. Limitations on Standing**

Texas Family Code §102.006 places limitations on standing when the parent-child relationship between the child and every living parent of the child has been terminated. In those situations, an original suit may NOT be filed by:

- (1) a former parent whose parent-child relationship with the child has been terminated by court order;
- (2) the father of the child; or
- (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.

These limitations on filing suit do not apply to a person who: (1) has a continuing right to possession of or access to the child under an existing court order; or (2) has the consent of the child’s managing conservator, guardian, or legal custodian to bring the suit. Likewise, the limitations do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child, provided the adult sibling, grandparent, aunt or uncle files an original suit or a suit for modification requesting managing conservatorship of the child within 90 days after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services.

The Texarkana Court of Appeals has found that this statute merely bars certain parties from filing suit who would otherwise have standing to file the suit.<sup>4</sup>

**III. RIGHTS OF GRANDPARENT, AUNT OR UNCLE**

Additional rights of grandparents, aunts and uncles are contained in Subchapter H, Chapter 153 of the Family Code. Most of these provisions deal with a grandparent’s suit for possession of or access to a grandchild.

**A. Suit for Possession or Access by Grandparent**

Texas Family Code §153.432 allows a biological or adoptive grandparent to file suit for possession of or access to a grandchild. This suit may be filed as an original suit or as a modification under Chapter 156 of the Family Code. Section 153.452(b) specifies that a grandparent may request possession of or access to a grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit.

Section 153.433 states that the court shall order reasonable possession of or access to a grandchild by a grandparent if:

- (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent’s parental rights terminated; and
- (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent’s child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child’s physical health or emotional well-being; and
- (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
  - (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
  - (B) has been found by a court to be incompetent;
  - (C) is dead; or
  - (D) does not have actual or court-ordered possession of or access to the child.

Section 153.434 provides that a grandparent may NOT request possession of or access to a grandchild if:

- (1) each of the biological parents of the grandchild has:
  - (A) died;
  - (B) had the person’s parental rights terminated; or
  - (C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 of the Family Code and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child’s

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<sup>4</sup> *In re C.M.C.*, 192 S.W.3d 866, 873 (Tex. App.—Texarkana 2006, no pet.)

stepparent as the managing conservator of the child; and

- (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

The United States Supreme Court's decision in *Troxel v. Granville* is famous for its recognition of the fundamental right of parents to decide with whom their child will have contact, and its ruling that a trial court must presume that a fit parent makes such decisions in the best interest of the child.<sup>5</sup> In *Troxel*, the Supreme Court found that a Washington state statute which allowed for any third party to petition for visitation rights with a child was unconstitutional. The Court reasoned that a judge cannot ignore the wishes of a fit parent in determining whether visitation should be awarded to a party.<sup>6</sup> The Court found that "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children . . . [I]f a fit parent's decision of the kind at issue here become subject to judicial review, the court must accord at least some special weight to the parent's own determination."<sup>7</sup>

The Texas Supreme Court has applied *Troxel* to deny a grandmother access to her grandchild in the well-known Texas case styled *In re Mays-Hooper*.<sup>8</sup> In this case, conflicts arose between the child's mother and the child's paternal grandmother after the child's father died.<sup>9</sup> The grandmother sued the mother under the pre-2005 Texas Family Code grandparent-access statute, which gave a grandparent visitation with a grandchild following a fracturing event, such as a parent's death, if visitation was in the child's best interest.<sup>10</sup> After rejecting the mother's constitutional challenges, the trial court granted the grandmother significant possession of the child.<sup>11</sup> The Texas Supreme Court found that the trial court abused its discretion in its ruling and that the visitation order had fatal problems similar to those in *Troxel*, such as no evidence that the child's mother was unfit, no

evidence that the child's health or emotional well-being would suffer if the court deferred to the mother's decision, and no evidence that the mother intended to completely exclude the grandmother's access.<sup>12</sup>

In 2007, the Texas Supreme Court emphasized the presumption that a fit parent acts in the child's best interest and that this presumption may be overcome only by proving by a preponderance of the evidence that denial of the grandparent's access to the child would significantly impair the child's physical health or emotional well-being.<sup>13</sup> The El Paso Court of Appeals had previously found that grandparents must overcome the parental presumption even if the grandparents would be better at raising the children.<sup>14</sup>

#### **B. Appointment of Grandparent, Aunt or Uncle as Managing Conservator**

Texas Family Code §153.431 provides that if both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child. However, this section explains that such consideration does not alter or diminish the discretionary power of the court.

#### **IV. OTHER TEXAS FAMILY CODE PROVISIONS REGARDING STANDING**

Other provisions regarding standing are contained in the Texas Family Code. Some of these are obviously used more frequently than others.

##### **A. Standing to File a Suit for Modification**

Texas Family Code §156.002 provides that a party affected by an order may file a suit for modification in the court with continuing, exclusive jurisdiction. Section 156.002(b) adds that a person or entity who, at the time of filing, has standing to file an original suit under Chapter 102 of the Family Code (discussed above) may file a suit for modification.

##### **B. Standing to Seek Modification of Child Support Recipient**

In addition to the general standing to file a suit for modification, Texas Family Code §156.409 provides standing to seek a modification of a child support order for a person having physical possession of a child for at least six months in a case where the primary conservator of the child has voluntarily relinquished the primary care and possession of the

<sup>5</sup> *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

<sup>6</sup> *Troxel*, 530 U.S. at 69.

<sup>7</sup> *Troxel*, 530 U.S. at 68.

<sup>8</sup> *In re Mays-Hooper*, 189 S.W.3d 777 (Tex. 2006).

<sup>9</sup> *Id.* at 777.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 778.

<sup>13</sup> *In re Derzapf*, 219 S.W.3d 327, 333 (Tex. 2007).

<sup>14</sup> *Chavez v. Chavez*, 148 S.W.3d 449, 459 (Tex. App.—El Paso 2004, no pet.)

child, has been incarcerated or sentenced to be incarcerated for at least ninety days, or has relinquished primary care and possession of the child in a proceeding under Title 3 or Chapter 262 of the Family Code.

Under §156.409(a-2), the court may act sooner than the six months and may render a temporary order for the redirection of support for the benefit of the child if it is in the child's best interest.

### **C. Standing to Adjudicate Parentage**

Under Texas Family Code §160.602, the following persons and entities have standing to file a suit to adjudicate the parentage of a child:

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

Section 160.602(b) provides that once a child having no presumed, acknowledged, or adjudicated father becomes an adult, a proceeding to adjudicate the parentage of the adult child may only be maintained by that adult child.

### **D. Standing to Apply for a Protective Order**

Texas Family Code §82.002 allows the following persons and entities to apply for protective orders:

- (1) an adult member of the family or household;
- (2) an adult member of the dating relationship;
- (3) any adult for the protection of a child;
- (4) a prosecuting attorney; or
- (5) the Department of Protective and Regulatory Services.

### **E. Standing to Seek Child Support for a Disabled Child**

Texas Family Code §154.303 restricts standing to bring a suit for support of a minor or adult disabled child to: (1) a parent of the child or another person having physical custody or guardianship of the child under a court order; or (2) the child if the child is 18 years of age or older, does not have a mental

disability, and is determined by the court to be capable of managing the child's financial affairs. The cause of action may not be transferred or assigned except for an assignment made to the Title IV-D agency.

### **F. Standing to Annul Marriage of Minor or Incapacitated Person**

Texas Family Code §6.102 allows a parent, a managing conservator, a guardian, or a next friend for the benefit of a minor to file a suit for annulment of a marriage of a person who is sixteen or seventeen years of age.

Under Texas Family Code §6.108(a)(1), a party's guardian or next friend may bring suit for annulment of a marriage if the party to the marriage lacked the mental capacity to consent to the marriage and the party has not voluntarily cohabitated with the other party during a period when the party possessed the mental capacity to recognize the marriage relationship.

### **G. Standing to Petition to Validate a Gestational Agreement**

Texas Family Code §160.755 provides standing to the intended parents and the prospective gestational mother to commence a suit to validate a gestational agreement.

## **V. PARENTAL PRESUMPTIONS AND RIGHTS OF NON-PARENTS**

The Texas Family Code contains a number of presumptions favoring parents over non-parents. Section 153.131 provides that "unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child." This presumption may be rebutted under §153.373 if the court finds that: (1) the parent has voluntarily relinquished actual care, control and possession of the child to a nonparent, licensed child-placing agency, or authorized agency for a period of one year or more, a portion of which was within 90 days preceding the date of intervention in or filing of the suit; and (2) the appointment of the nonparent or agency as managing conservator is in the best interest of the child.

The Fort Worth Court of Appeals has recently used this section to find that a particular set of grandparents did not have standing to intervene in the divorce and custody proceedings at issue because, among other things, they did not provide satisfactory proof to the trial court that appointment of either or both parents as managing conservators would

significantly impair the child's physical health or emotional development.<sup>15</sup>

At least one Texas court has held that when a parent and a non-parent are seeking managing conservatorship, the court will favor the parent in an evidentiary review.<sup>16</sup> The non-parent must affirmatively prove by a preponderance of the evidence that appointment of the parent as managing conservator would significantly impair the child's physical or emotional health. The non-parent must offer evidence of some act or omission that demonstrates an award of custody to the parent seeking managing conservatorship would result in physical or emotional harm to the child.<sup>17</sup>

Texas courts have held that the parental presumption does not apply in a modification proceeding.<sup>18</sup>

Texas Family Code §153.191 likewise provides a presumption that a *parent* who is not appointed as a managing conservator will be appointed as a possessory conservator unless the court finds that the appointment is not in the best interest of the child and that *parental* possession or access would endanger the physical or emotional welfare of the child.

Texas Family Code §153.137 contains a presumption that the standard possession order is a minimum amount of time for a *parent* who is named as a joint managing conservator who is not awarded the exclusive right to designate the primary residence of the child. Texas Family Code §153.252 also states that there is a rebuttable presumption that the standard possession order provides reasonable minimum possession of a child for a *parent* named as a possessory conservatory or joint managing conservator and is in the best interest of the child. The Texas Family Code does not provide any guidelines for possession and access of a child by a nonparent other than the general "best interest" standard under §153.002 and "reasonable" possession or access for a grandparent under §153.433.

Subchapter G, Chapter 153 of the Family Code governs the appointment of a non-parent as a conservator. Sections 153.371 and 153.376 list the rights and duties of non-parent managing conservators and non-parent possessory conservators. These rights and duties of non-parents differ from the rights and

duties of parent managing conservators and parent possessory conservators. Texas Family Code §32.001 also allows certain non-parents to consent to medical, dental, psychological, and surgical treatment of a child when a parent cannot be contacted.

## VI. CONCLUSION

Because of the legal presumptions favoring parents over non-parents, the restrictions on standing for non-parents, and the aftermath of *Troxel v. Granville*, non-parents face particular challenges in suits affecting the parent-child relationship.

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<sup>15</sup> *In re M.J.G.*, 248 S.W.3d 753, 763 (Tex. App.—Fort Worth 2008, no pet.).

<sup>16</sup> *In re S.W.H.*, 72 S.W.3d 772, 778-779 (Tex. App.—Fort Worth 2002, no pet.).

<sup>17</sup> *In re S.W.H.* at 777.

<sup>18</sup> *Sotelo v. Gonzales*, 170 S.W.3d 783, 790 (Tex. App.—El Paso 2005, no pet.); *In re V.L.K.*, 24 S.W.3d 338 (Tex. 2000).