PROVING SIGNIFICANT IMPAIRMENT

KELLY AUSLEY-FLORES, Attorney
kflores@ausley-algert.com

ANN G. YOUNG, Paralegal
ayoung@ausley-algert.com

Ausley, Algert, robertson & Flores, L.L.P.
3307 Northland Drive, Suite 420
Austin, Texas 78731
(512) 454-8791
(512) 454-9091 Facsimile

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CHAPTER 33

KELLY AUSLEY-FLORES

AUSLEY, ALGERT, ROBERTSON & FLORES, L.L.P.
Attorney at Law
3307 Northland Drive, Suite 420
Austin, Texas 78731
(512) 454-8791
(512) 454-9091 Facsimile
kflores@ausley-algert.com
www.ausley-algert.com

EDUCATION

Texas Tech University, B.B.A. in 1987, cum laude
Texas Tech School of Law, J.D., 1995, cum laude

PROFESSIONAL ASSOCIATIONS AND HONORS

Board Certified by Texas Board of Legal Specialization, Family Law, since 2000
Fellow, American Academy of Matrimonial Lawyers
Member, Texas Academy of Family Law Specialists
Named Texas Super Lawyers® - Rising Stars® Edition (Texas Monthly, 2004 and 2005)
Named Best Lawyers' Austin Family Law Lawyer (2012 through the present)
Member, Collaborative Law Institute of Texas
Member, International Academy of Collaborative Professionals
Member, State Bar of Texas (Family Law Section)
Member, College of the State Bar of Texas
Member, Austin Bar Association (Family Law Section)
Member, Texas Bar Foundation, 2004 through the present
Member, Pro Bono College of the State Bar of Texas, 1999 through the present
Recipient, 1998 and 1999 Pro Bono Award, Volunteer Legal Services of Central Texas

CAREER PROFILE

Practiced family law with Ausley, Algert, Robertson & Flores, L.L.P. since August, 1995 and became a partner in December, 2001.
Trained in Collaborative Law and trained as a family law mediator.
Volunteer, Volunteer Legal Services of Central Texas since 1996 as a mentor and lawyer.
Volunteer, Texas Advocacy Project previously Women's Advocacy Project since 2004 as a lawyer.
Obtained certification as a specialist in the area of family law through the Texas Board of Legal Specialization (December, 2000).

PERSONAL

Born February 23, 1965, in Lubbock, Texas and raised in Austin.
Married to Joe Flores - two children.
Member, First United Methodist Church, Austin.

AUTHOR and LECTURER

"Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 17, 2003.

"Post Trial Basics & Closing the File," Advanced Family Law Seminar - Boot Camp, State Bar of Texas, August 8, 2004.

"Effective Use of ADR in Family Law Cases," 2005 Poverty Law Conference, Texas Lawyers Care, March 30 - April 1, 2005.

"Closing the Friendly and Unfriendly File," Advanced Family Law Drafting Course, State Bar of Texas, December 8-9, 2005.

"Traveling Light: Collaborative Law Without Paralegals or Assistants," Collaborative Law Spring Conference 2008, State Bar of Texas, February 28-29, 2008.

"Collaborative Law," Alternative Dispute Resolution Course, University of Texas Law School, Professor Cynthia Bryant, March 6th, 2008.

"Child Support (What Do Judges Do in Various Counties) Above & Below the Guidelines, the High Income Earners (Death of the Obligor)," Marriage Dissolution Institute, State Bar of Texas and Family Law Section, April 17-18, 2008.

"Closing the File," Summer School - State Bar College, State Bar of Texas, July 17-19, 2008.

"Closing Documents Other than QDROs," Advanced Family Law Drafting Course, State Bar of Texas, December 4-5, 2008.

"Putting Agreements on Paper," Collaborative Law Course 2010, State Bar of Texas and Collaborative Law Institute of Texas, March 4-5, 2010.

"Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 9-10, 2010.

"We're Done! (Or are we?) - Closing the File," Advanced Family Law Drafting Course, State Bar of Texas, December 5-6, 2013.

"Closing the File 101," Marriage Dissolution 101 Course, State Bar of Texas, April 23, 2014.

"Closing the File 101 – The Long Good-Bye," Marriage Dissolution 101 Course, State Bar of Texas, April 8, 2015.

LECTURER

"Creative Discovery," Family Law Essentials, Family Law Council, Nacogdoches, Texas, June 4, 2004.

"Post Trial Basics & Closing a File," State Bar Convention - Boot Camp, June 25, 2004.

"Closing Out Your File," Williamson County Family Law Seminar, October 29, 2004.

"How to Study for and Pass the Board Certification Exam," Advanced Family Law Course, State Bar of Texas, August 10, 2005.

"Trends in Family Law," 2009 Statewide Assistant Attorneys General Conference, Austin, Texas, July 10, 2009.

"Changes in SAPCR Issues and Trends for the Future," 35th Annual Advanced Family Law Course, State Bar of Texas, August 3-6, 2009.

"Collaborative Law," Travis County Family Law Section Luncheon, January 6, 2010.

"The Paradigm Shift," Nuts & Bolts of the Collaborative Process Course, State Bar of Texas and the Collaborative Law Institute of Texas, March 3, 2010.

"Characterization & Tracing: An Overview," Advanced Family Law Course, State Bar of Texas, August 4, 2011.

"Know When to Hold Them, Know When to Fold Them: Settlement Agreements, Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements," Author: Jimmy Vaught, Marriage Dissolution, State Bar of Texas, April 19, 2013.

"Know When to Hold 'Em, Know When to Fold 'Em, Accepting and Firing Clients," The Austin Bar Family Law Section Spring CLE, May 13, 2016.

COURSE DIRECTOR/PLANNING COMMITTEES:

Planning Committee - Collaborative Law Course 2010
Planning Committee - Advanced Family Law Course 2010
Course Director - Family Law Boot Camp 2010
Planning Committee and Course Director, Marriage Dissolution 101 Seminar, April, 2013.
Planning Committee - Advanced Drafting Course 2013

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I. SCOPE OF ARTICLE

While the majority of our day-to-day child-related cases involve parents as the only litigants, more and more frequently, relatives are becoming involved in conservatorship and access suits, either by choice or necessity. Consequently, family law practitioners must be familiar with the statutes and cases that govern these unique situations. The Legislature continually reviews and revises the laws in this area, both substantively and procedurally, as do the courts.

This article addresses limited topics in this area, particularly cases in which litigants have a higher burden to overcome. Proving significant impairment requires petitioners to meet a higher burden when seeking temporary orders under TFC 156.006(b)(1); when modifying orders within one year of a prior order under TFC 156.102(b)(1); when filing based on a standing statute that governs relatives under TFC 102.004 (a)(1); and when filing under the possession statute for a grandchild under TFC 153.433 (a)(2).

The purpose of this article is to explore how a practitioner would go about "proving significant impairment" under these statutes, so that in situations where a conservator needs to meet a higher burden in modifications, or where a relative may seek conservatorship and/or access, the practitioner can understand the procedural requirements and substantive law considerations.

II. WHEN CONSERVATORS HAVE A HIGHER BURDEN – MODIFICATIONS

A. Temporary Orders

Under Texas Family Code §156.006(b)(1) the conservator seeking temporary orders modifying the exclusive right to designate a child's primary residence must show best interest of the child and that the child's present circumstances would significantly impair the child's physical health or emotional development.

To meet this higher burden, the Petitioner must execute an affidavit asserting the specific facts that support the allegation that the child's present circumstances would significantly impair the child's physical health or emotional development. The Court then must make an initial determination, on the basis of that affidavit, that the facts adequately support the allegation in order for the Petitioner to proceed with a temporary orders hearing. In the event the Court finds, based upon the affidavit, that the facts are inadequate, then the Court must deny the relief sought and should decline even to proceed with a hearing on such requested temporary relief.

This provision must be analyzed in cases where relocation is an immediate issue. For example, in the case of ***In re Strickland,*** 358 S.W.3d 818,821 (Tex.App.—Fort Worth 2012, orig. proceeding), the mother had been awarded the exclusive right to designate the child's domicile, without a geographic restriction. The mother subsequently gave notice to the father of an impending move. The father immediately filed a Petition to Modify and set the matter for a temporary orders hearing, requesting that the mother be prohibited from moving and subjected to a specific geographic restriction while the matter was pending. The trial court agreed with the father. The Fort Worth appellate court held that the trial court's temporary order imposing a geographic restriction on the children's residence, when there was no such geographic restriction imposed in the parties' Final Decree of Divorce, is a modification in violation of §156.006(b)(1). The court held that the trial court's order that the children remain 'in the area' pending the preparation of a social study amounted to a modification of the conservator's exclusive right to designate the children's residence under the Decree.

Practice Tip: In jurisdictions which impose standing orders immediately upon the filing of a family law suit, such standing orders can create immediate problems/burdens. Example: In Travis County, the standing orders state that both parties are prohibited from removing the children from the State of Texas, acting directly or in concert with others, without the written agreement of both parties or an order of the Court at the time of filing. In such circumstances, if you are representing the party who has the exclusive right to designate a child's primary residence, without a geographic restriction, then you must take immediate action to lift the standing orders.

In another relevant case, ***In re Sanchez,*** 228 S.W.3d 214, 217-18 (Tex.App.—San Antonio 2007, orig. proceeding), the appellate court found that the trial court effectively changed mother's exclusive right to designate the child's primary residence by substantially reducing her overall possession time, and restricting her possession rights.

B. Changing the Right To Designate Domicile within One Year

Texas Family Code §156.102(b)(1) requires the petitioner to file an affidavit if that party seeks to change the designation of the primary conservator within one year of the most recent order. Similar to the provisions cited above, a court can dismiss the modification suit based solely on the review of this affidavit, without any advance notice to the litigants. This higher burden requirement is meant to discourage

re-litigation of custodial issues within a short period of time after the custody order is rendered.

Practice Tip: If a party files a modification suit within a year of the prior order under §156.102(b)(1) without an affidavit, I suggest you file a Motion to Deny Relief and a Motion to Dismiss. In addition, you could file a Motion for Sanctions. Parties have been sanctioned for not filing the appropriate affidavit.

The affidavit must be specific and based upon personal knowledge. ***In re D.W.J.B.,*** 362 S.W.3d 777, 77 (Tex.App.—Texarkana 2012, no pet.) states the following: "Grandmother filed an affidavit [under §156.102(b)(1)] claiming that she was 'deeply concerned for the safety and welfare' of the child, complaining of [father's] 'lengthy criminal history', [and detailing information she had heard from the child and other family members.] An affidavit not explicitly based on personal knowledge is legally insufficient. Conclusions in the affidavits based upon the statements from others demonstrate the grandmother's lack of personal knowledge. Because the portion of the affidavit regarding [father's alleged endangering acts was] not within the grandmother's personal knowledge, these statement were not required consideration by the trial court during the initial examination of whether the affidavit was sufficient to merit a hearing under §156.102 . . ."

There are circumstances in which an affidavit is not adequate or no affidavit was filed, yet the court found the error harmless, such as in a situation where the Respondent did not initially challenge the affidavit or lack thereof. If an affidavit is not filed, then it is not error if the court finds in the initial hearing with testimony that the environment for the child may significantly impair the child's emotional development or physical health. In ***In re A.L.W.,*** 356 S.W.3d 564, 566-67 (Tex. App.—Texarkana 2012, no pet.), the court found that the trial court did not have to make a specific finding on the record that the affidavit was sufficient in order to warrant a hearing - the fact that the court set the hearing was, itself, proof that it regarded a filed affidavit as adequate. Even if the court erroneously holds a hearing despite the absence of an affidavit, any error is rendered harmless if the testimony admitted during the hearing supports an allegation that the children's environment may significantly impair their emotional development.

III. CONSERVATORSHIP

With respect to representing relatives in family law matters, it is likely that the cases we will encounter most frequently are those where a relative or third party is actually seeking conservatorship of the child, either through a joint managing conservatorship (JMC) or a sole managing conservatorship (SMC). The likelihood of success can depend on many factors, including whether the suit is an original suit or a modification; which standing statute is applicable; the degree of relationship between the child and the relative seeking relief; whether procedural requirements were followed; and the kind of relief sought. This section of the article will address these issues as they relate to a suit by a relative seeking actual conservatorship of a child, and whether the relative/third party has standing to do so.

A. General Standing Statute

The Texas Family Code contains both a general standing statute as well as provisions specific to relatives' standing. Prior to evaluating "proving significant impairment" under TFC 102.004 (a)(1), you should look at the general standing statute to see if you can avoid this higher burden. Thus, a relative of a child may seek conservatorship under any standing statute, general or specific, that applies to his or her particular circumstances. Clearly, before a party is entitled to pursue relief, that party must have standing to file the suit in the first place. Thus, a firm understanding of the standing statutes is crucial to ensure that the case is not over before it gets started.

Texas Family Code §102.003 governs general standing to file an original suit by any individual who meets the requirements set forth therein. Thus, if a relative meets the criteria of any of the fourteen (14) provisions conferring standing, the fact that the party is a relative is essentially irrelevant, unless otherwise contemplated by the statute.

While TFC §102.003 addresses "original" suits for conservatorship, other provisions of the Family Code refer to TFC §102.003 as a means of conferring standing in a subsequent suit (e.g., modification). Likewise, as TFC §102.003 does not require the party seeking conservatorship to be a relative of the child, it can provide grounds to achieve standing for a relative seeking conservatorship, in addition to the specific standing statutes relating to relatives. As such, it is important to understand the various provisions of the general standing statute as it pertains to the relative seeking relief.

The general standing statute sets forth in relevant part:

> "(a) 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, subject to the limitations of that chapter, but not otherwise;
(9) a person other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
(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, 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 regardless of whether the child has been born."

"(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.

"(c) Notwithstanding the time requirements of Subsection (a)(12), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted." [TFC 102.003]

With the exception of subparagraph (13), then, the fact that the person seeking conservatorship of a child is a relative of the child is not relevant to confer standing, as long as the elements of one of the provisions under 102.003 are met.

However, one of the most misconstrued provisions of TFC §102.003 is subparagraph (9) of that statute regarding a person who has had actual care, control and possession of the child for at least six months. Many cases have been filed under this statute, based upon the fact that the parent or parents of the child resided with a relative (and the child) for a period of six months. This, in and of itself, is insufficient to confer standing upon the party if the parents continued to act as parents and did not actually or constructively abdicate their parental duties to the party/relative.

In re M.J.G., 248 S.W.3d 753 (Tex.App.–Fort Worth 2008, no pet) speaks directly to this issue. In that case, both the children and their parents were living in their grandparents' home. The grandparents later sought custody of the children after at least six months had passed. The Ft. Worth Court of Appeals held that although the grandparents did perform 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 also care for the children or that they had abdicated their parental duties and responsibilities to the grandparents. Thus, grandparents did not establish the six-month period of actual care, custody and control necessary under TFC §102.003(9) to establish their standing to file an original SAPCR petition. *In re M.J.G.* at 758-759.

It would appear, then, that although TFC §102.003(9) does not specifically require "abdication" of parental duties in favor of the party seeking custody, at least one appellate court seems to imply abdication is a requirement. The degree of abdication, nature of the parental duties performed, and the specific facts of each case will be important factors in these matters. Regardless, it appears that if one or more of the parents

reside with the child in the home of the party seeking conservatorship, then something more than the mere fact that the child lived with the party for more than six months will be required.

A case that supports this proposition is *Jasek vs. TDFPS*, 348 S.W.3d 523 (Tex.App.–Austin 2011). In that case, children had been placed with the Jaseks by the Department as foster parents for over two years, while the Department was seeking termination of the children's biological parents' rights. At some point after both parents' rights had been terminated but the children remained with the Jaseks, Mr. Jasek apparently failed a drug test. The Jaseks sought to intervene in the prior termination case (already completed) in the court of continuing jurisdiction, stating that they had actual care and control of the children for over six months (i.e. two years). The Department objected, stating that "actual care and control" under TFC 102.003(9) required "legal right of control" and thus argued that the Jaseks had not met their standing requirement. The Department also objected stating that intervention was not appropriate because there was no longer any case pending before the court, since the terminations had already been granted and thus there was a final, appealable order.

The Austin Court of Appeals agreed that intervention was not the proper procedural mechanism to get before the trial court since there was no pending case. However, the appellate court further stated that, contrary to the Department's argument, the Jaseks had given them sufficient notice of their intent to file suit, and the mere 'misnaming' of the petition would not preclude them from proceeding.

More significantly, the court went on to hold that "actual care, custody and control" did not require some legal right to same, but instead turned on facts such as who had provided for their daily care, protection, control and reasonable discipline, basic needs for food, shelter and medical care, and other day-to-day needs. As such, the court found that the Jaseks had met the standing requirements under 102.003(9).

It is interesting to note, however, that the Jasek case did not involve a question of "abdication" of those duties by a parent, since the children were placed in foster care with the Jaseks by the Department, and the parents' rights had been terminated.

B. Standing Statutes Specific to Relatives

In addition to the general standing statute found in TFC §102.003, the Texas Family Code sets out several other standing statutes specifically pertaining to relatives seeking conservatorship (as opposed to possession and access). Each of these will be set out in detail below.

Caselaw continues to develop in the area of proving significant impairment to show us what is necessary to meet this requirement.

1. Burdens of Proof.

Appellate courts disagree as to the evidentiary standard necessary to establish "satisfactory proof" under Family Code 102.004(a). Most of the courts have found the standard to be preponderance of the evidence. See ***In re L.D.F.*** 445 S.W.3d 823, 828 (Tex.App.—El Paso 2014, no pet.); ***Mauldin v. Clements,*** 428 S.W.3d 247, 263 (Tex.App.—Houston [1st Dist.] 2014, no pet.); and ***Medrano v. Zapata,*** No. 03-12-00131-CV (Tex.App.—Austin 2013, no pet.)(memo op.; 12-31-13). In ***Medrano v. Zapata,*** the Court uses the standard of preponderance of evidence. "While [in this case] there may have been abundant reasons for the district court to credit [mother's] version of the facts rather than [son's], it remains that it impliedly did otherwise—and it is a fundamental limitation on our power that we must defer to such assessments by a fact-finder. We are likewise required to view the evidence in the light favorable to the district court's findings, drawing reasonable inferences in their favor, and presuming that the court resolved any evidentiary conflicts in a manner supporting its findings." But the Houston Court of Appeals held in ***In re K.D.H.,*** 426 S.W. 3d 879, 881 (Tex. App.—Houston [14th Dist.] 2014, no pet.), that proof under the statute must be considered in the light most favorable to the petitioner/grandmother and enable reasonable and fair-minded people to find that an order naming grandmother SMC of the child was necessary.

2. Cases Where Significant Impairment Was Found

In ***In re L.D.F.,*** 445 S.W.3d 823, 828 (Tex.App.—El Paso 2014, no pet.), the court ruled that a court has wide discretion to appoint conservators in the child's best interest. In these situations, where a trial court appoints a parent and nonparent as conservators, it implicitly ruled that for the parent to have sole custody would significantly impair the child's physical health or emotional development. Here, because the trial court permitted grandparent intervention and joint custody in this case, we must assume it impliedly found that father's SMC would significantly impair the child's physical heath or emotional development. In this case, the parent assaulted family members, was hospitalized for drug use and mental-health reasons five times in five years, and refused ongoing therapy or regular medication for his mental-health issues.

In re R.T.K., 324 S.W.3d 896 (Tex.App.—Houston [14th Dist.] 2010, no pet.) held that the appointment of stepmother as managing conservator should be upheld. The biological parent was

incarcerated for much of the child's early life, was later absent from the child's life for more than two years, and repeatedly failed to exercise her rights to visit her child.

Taylor v. Taylor, 254 S.W.3d 527, 536-37 (Tex. App.—Houston [1st Dist.] 2008, no pet.) Grandparents filed a petition requesting to be appointed managing conservators of their three minor grandchildren, in preference to the children's parents. The court found that the evidence was legally sufficient to support an implied finding that the appointment of the father as managing conservator would significantly impair the children's physical or emotional development. The evidence showed that the father favored his girlfriend's children over his own children; there were allegations of sexual abuse in the father's home and assistance was not sought by the father; and, due to marital problems of the parents, the children spent significant time being raised by their grandparents.

In re B.G.M., No. 06-10-00022-CV (Tex.App.—Texarkana 2011, pet. denied)(memo op.: 8-4-11) The court found the appointment of a parent as managing conservator would significantly impair the child's physical health or emotional development, as governed by a preponderance of the evidence standard. The evidence showed that the parents lived in squalid living conditions; the home-schooling provided for the child was not adequate; and the medical care needed for the child's cerebral palsy did not happen.

3. Cases Where Significant Impairment Was Not Found.

Gray v. Shook, 329 S.W.3d 186, 198 (Tex.App.—Corpus Christi 2010), *rev-d in part on other grounds,* 381 S.W.3d 540 (Tex.2012). The court found that the evidence of possible harm to the child was speculative and would not overcome parental presumption. The possible harm of a child being "uprooted" in order to live with father was not enough to overcome the parental presumption.

Critz v. Critz, 297 S.W.3d 464 (Tex.App.—Fort Worth 2009, no pet.). The court abused its discretion by appointing the paternal grandparents as joint managing conservators with the parent. The parent's past drug use, unemployment, lack of a vehicle, and not owning her own residence were insufficient grounds to overcome the parental presumption.

In re K.R.B., No. 02-10-00021-CV (Tex.App.—Fort Worth 2010, no pet.)(memo op.; 10-7-10). The parental presumption was not overcome by evidence of past drug history, when the parent had passed all drug tests taken in the 20 months before trial.

4. Grandparents

Perhaps the most common situation we family lawyers will encounter with relatives seeking conservatorship is in representing (or defending against) grandparents seeking conservatorship. It is an unfortunate reality that many grandparents find themselves in the position of providing for the daily needs of their grandchildren, either because the children's parents cannot do so or will not do so. In recognition of this issue, TFC §102.004 provides an additional method of conferring standing upon grandparents who might not otherwise meet the standing requirements set forth in TFC § 102.003.

Texas Family Code §102.004 provides as follows:

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

Thus, even if a grandparent does not have standing under the general standing statute, (i.e. has had possession for over six months, et. al.), the fact that the

person is a grandparent can confer standing to file either an original suit or an intervention in a pending suit if the grandparent can present satisfactory evidence that placing the child with the parents would significantly impair the child's physical health or emotional development, OR if the parents consent. While this is a heavy burden, it is also one that does not require the lengthy time requirements of many of the provisions set forth in the general standing statute.

Furthermore, as pertains to filing an intervention under TFC §102.004(b), at least one appellate court has held that the wording of the statute does not necessarily require a close bond or long-standing relationship between the grandparent and the child if the significant impairment test is met. In the case of ***In re M.A.M.***, 35 S.W.3d 788, 790 (Tex.App.–Beaumont 2001, no pet.), the Beaumont court of appeals held that the phrase "deemed by the court to have had substantial past contact" modifies "other person," and not "grandparent." As such, it would appear that the mere existence of the grandparent-grandchild relationship is sufficient to confer standing under 102.004(b) to file an intervention in a pending suit, thus recognizing, if not elevating, the status of grandparents, as opposed to other persons related to or with substantial past contact with the child.

5. Siblings

In addition to the specific grandparent and in addition to the specific grandparent and "person with substantial past contact" standing provisions, there is a special provision related to siblings under TFC §102.0045. However, the statute applies only in DFPS cases where a child has been separated from the sibling as a result of the department's actions, and it applies only to access and possession, ***not*** conservatorship. (See TFC §153.551). Additionally, the sibling seeking access must be an adult. Thus, with regard to conservatorship, the sibling seeking conservatorship must meet the other standing requirements found under TFC §102.003 or TFC §102.004.

6. Third Degree of Consanguinity

A relative within the third degree of consanguinity is one who is a great-grandparent/grandchild; a great-uncle/aunt/nephew/niece; children of great uncle/aunt; children of first cousins; or the child's second cousin(s). Thus, under TFC §102.004 (a), only relatives within this level of affinity may file suit for conservatorship, unless they independently meet one of the other general standing thresholds under TFC 102.003.

7. Substantial Past Contact

As stated above, TFC §102.004 allows a person who shows 'substantial past contact with a child' to intervene in a pending suit to seek conservatorship. Please remember, however, that this remedy is limited to filing an ***intervention***, not an original suit for conservatorship. In other words, the person with substantial past contact who is seeking conservatorship can only do so if he/she is intervening in a current, pending case that was filed by appropriate parties with standing. If there is not a current pending action before the court, then the party asserting 'substantial past contact' must qualify under some other standing statute (e.g. actual possession for at least 6 months, etc.).

Nonetheless, TFC §102.004 opens wide the gates to anyone who has had substantial past contact with the child to intervene in a pending suit. Theoretically, this could be teachers, neighbors, daycare workers, school bus drivers, etc. Clearly, it will depend upon the specific facts of the case. The wording of the statute seems to imply a need for a threshold determination by the court. Thus, if you are opposing the intervenors, you may want to file a Motion to Dismiss Third Party Intervention and request a hearing for the court to determine whether there is sufficient "substantial past contact" to merit standing. Likewise, such a hearing should also include asking the court to determine whether or not the "significant impairment" requirement is met. Both are required for standing to intervene. In any case, each situation must be evaluated on a case-by-case basis by the trial court with respect to the specific circumstances of each case. [See ***In re C.M.C.*** 192 S.W.3d 866, (Tex.App.–Texarkana 2006, no pet.)–substantial past conduct is inherently a fact-intensive inquiry impossible to formulate a concise standard....The Legislature intended the standard to be flexible in order to deal with 'inevitable situations.]

8. Original Suits

As mentioned above, both the statutes and the case law distinguish between standing for original suits and standing for subsequent suits (e.g. modifications). Additionally, there are specific requirements within each category. While several of those requirements have been touched on, the following are the specific rules as pertain to whether the action is an original suit or a modification.

a. Petitioning Party

At a minimum, a relative or third party seeking conservatorship in an original proceeding (which could actually include a modification if there is no current pending matter before the court) must establish and plead sufficient facts and grounds to have standing to pursue the action. Thus, while a party seeking conservatorship via an original suit is not required to plead every fact upon which they rely to confer standing, they at least have to track the statutory language and cite the Family Code provision upon which they rely for standing. For example, at least

some showing that the person is related within the third degree of consanguinity (e.g. "Petitioners are the aunt and uncle of the child the subject of this suit") would be required. A petitioner also must set forth the general allegations upon which he or she is relying to establish standing. (E.g. "Petitioners have standing to seek conservatorship under TFC §102.004 in that they are the paternal aunt and uncle of the child the subject of this suit, and would show that appointing them joint managing conservators is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development.") If a party meets the standing requirements to file an original suit, one would presume that he/she also meets the requirements to intervene in a pending suit. The reverse, however, is not the case.

b. Intervening in a Pending Case

TFC §102.004 discusses the requirements for a "grandparent or other person deemed by the court to have had substantial past contact" to intervene in a pending suit. In other words, a party who might not otherwise independently meet the general standing requirements of TFC §102.003 or the specific requirements of TFC §102.004(a), may be able to intervene if he/she meet the requirements of TFC §102.004 (b), that being the significant impairment test. However, while this may broaden the pool of people who might seek conservatorship, it also *limits* the remedy to a currently pending case. Thus, even if a person has substantial past contact and there may be a significant impairment to the child if parents are appointed SMC or JMC, if there is no pending lawsuit before the court at the time the third party files, there is nothing to "intervene into." As such, the party would have to meet some other statutory standing requirement sufficient to file an original suit, or the petition cannot stand.

c. Burden of Proof

We all know that the burden of proof lies with the party seeking affirmative relief. Thus, whether filing an original suit or intervention, the burden is on the filing party to prove the elements of their cause of action.

Unfortunately, there seems to be a great deal of confusion among practitioners and judges about the difference between the necessary elements to confer standing and the facts sufficient to meet one's burden of proof on the ultimate relief requested. Some of that confusion may be that some of the standing statutes incorporate the same language as the statutes that set forth the burden of proof to support relief, and sometimes they are actually intertwined. However, it is important to understand the difference, because whether a party may ultimately succeed on final disposition is a different question than whether that party has the initial right/standing simply to bring suit.

For example, a person who has had actual care, control and possession of a child for over six months under TFC §102.003 (9), has standing to seek conservatorship of the child, regardless of whether he/she can meet the burden of proof on the ultimate issue. If it is an *original* suit where the third party is seeking conservatorship and one or both of the child's parents, the party must ultimately show that appointment of the parent/s would significantly impair the child's physical health or emotional development under TFC §153.131, which sets forth the "parental presumption." However, the party does *not* have to make a threshold showing of significant impairment just to be able to *file* the case. They have standing to file suit if they otherwise meet the requirements of TFC §102.003. But remember, having standing to file suit does not alleviate the party's burden to prove the remaining elements of their case. It simply gives them the ability to have their day in court on the ultimate merits.

Compare that situation, however, to the actual standing requirement of TFC §102.004 (a), which requires, for standing to file suit, not only that the persons be related to the child within the third degree of consanguinity, but also that they allege and provide satisfactory proof that appointment of the parents would significantly impair the child's physical health or emotional development, or that the parents consent to the suit. Thus, although we know that if it is an original suit the party must overcome the parental presumption by showing significant impairment to the child, TFC §153.004 (a) *also* requires proof of significant impairment as a threshold showing to even have standing to file suit. Again, if you are representing a parent or party who objects to the involvement of the third party seeking conservatorship under this provision, it may be wise to request that the court hold a hearing to determine if there is 'satisfactory proof' of significant impairment to confer standing. This is an area that has been discussed by the Family Law Section Legislative Committee regarding the procedure to determine standing under this provision, and whether to provide statutorily for a preliminary standing hearing when a relative/third party asserts standing under this statute.

Understanding the difference between standing to file suit and the burden of proof on the substantive issues is important because the burden of proof can be different, depending upon whether the case is an original suit or a modification. In some instances, the burden of proof to succeed ultimately in a final hearing on the merits may be vastly different than in an original suit. This is particularly true in the area of third-party litigation in modifications. However, even though the burden may not be as great in a

modification, the standing requirements for each particular case still must be met.

9. Modifications

As stated above, the Family Code imposes a 'parental presumption' in original suits for parents over third parties seeking conservatorship. However, no such presumption applies to modifications filed by relatives/third parties. Specifically, the Texas Supreme Court held in the case of ***In re V.L.K.***, 24 S.W.3d 338 (Tex.2000) that the Legislature apparently did not intend for the parental presumption to apply in modification proceedings because no presumption akin to TFC §153.131 was included in the modification provisions set forth in Chapter 156.

Unfortunately, it appears that many lawyers (and some judges) misapply the ***V.L.K***. case to standing issues as opposed to burden of proof issues. If a third party files a modification action, even though there is no parental presumption for the ultimate outcome, the third party still may not succeed if he/she has not met the standing requirements under which the third party is attempting to come before the court. For example, if a grandparent wants to file a modification action for conservatorship, but has not met one of the standing provisions of TFC §102.003 (e.g. actual possession for at least 6 months), he/she may try to acquire standing under TFC §102.004, which allows relatives within the third degree of consanguinity to have standing without meeting length of possession requirements. As far as the ultimate determination of conservatorship, there is no parental presumption of significant impairment to overcome. However, this may be a distinction without a difference, because TFC §102.004 requires a showing of significant impairment to even have standing to file suit in the first place. In other words, the standing statute itself incorporates a parental presumption that would not otherwise be required in a modification if the party had standing under the general statute of TFC 102.003.

In contrast, however, the grandparent/third party who otherwise meets the general standing requirements of TFC §102.003 (e.g. actual possession for 6 months), only has to show "best interest" in a modification if the third party has standing under a provision that does not require a showing of significant impairment. It appears that much of the confusion is caused by the fact that the parental presumption definition contains the identical wording of some of the standing provisions. Nonetheless, there are factual scenarios that contemplate a third party having standing to file a modification and not being required to prove significant impairment. As such, when representing third parties in a potential modification, it is important to explore all possible theories of standing that would have the effect of lessening the burden of proof on the ultimate issue.

IV. GRANDPARENT ACCESS

In addition to outright conservatorship, relatives may be able to seek access (i.e. visitation) with the child, even if they do not want/seek primary custody of the child. The right and ability to seek access, however, is greatly limited by both statutes and case law. Different rules apply to different types of relatives, which will be discussed below.

Because of the now infamous case of ***Troxel v. Granville***, 530 U.S. 57 (2000), we have some constitutional guidance regarding what are commonly referred to as "grandparents' rights" cases. Unfortunately, the appellate opinions are all over the place on some of the finer points, and the Texas Legislature recently amended the statute which now imposes certain procedural requirements in addition to the substantive ones.

A. Current Statutes and Legislative Changes

The Texas grandparent access statutes are found in TFC §§153.432-434. Section 153.432 primarily states that a grandparent has standing to request access to (as opposed to conservatorship of) a child, regardless of whether managing conservatorship is an issue in the case. In other words, a grandparent may file a "stand-alone" suit for visitation without seeking managing conservatorship. The amendment to TFC §153.432, effective September 1, 2009, adds the requirement that an affidavit be attached which alleges facts sufficient to meet the burden of proof set forth in TFC §153.433. Specifically, TFC §153.432 (c) provides:

> "In a suit described by Subsection (a), the person filing the suit must execute and attach an affidavit on knowledge or belief that contains, along with supporting facts, the allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-being. The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433."

This addition was part of a compromise between the drafter of the bill and the Family Law Foundation during the 2009 Legislative session. Essentially, the original draft of the legislation, among other things, imposed a much higher burden (clear and convincing evidence as opposed to preponderance of the evidence), and significantly restricted a grandparent's ability to ever be able to succeed in an access suit, even if successful in showing that denial of access would significantly harm the child. The compromise codified

in the 2009 amendment thus retains the original burden of proof, but imposes a higher procedural burden upon the grandparent seeking access, much like the affidavit requirement for parties seeking a modification of conservatorship within a year of the prior order. The affidavit in both circumstances is intended to provide a hurdle to litigants in an effort to curb questionable filings. The affidavit now required to be attached to grandparent access pleadings is almost identical to the one required for modification of conservatorship within one year. The 'significant' impairment language is the same burden of proof in both instances, and thus now there is more uniformity of what is required in the affidavits.

The Texas statute that sets forth the burden of proof for grandparent access cases is TFC §153.433, which states in relevant part:

> "(a) The court may 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;
> (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.
>
> (b) An order granting possession of or access to a child by a grandparent that is rendered over a parent's objections must state, with specificity that:
>
> (1) at the time the relief was requested, at least one biological or adoptive parent of the child had not had that parent's parental rights terminated;
> (2) the grandparent requesting possession of or access to the child has overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that the 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: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 153.433 was also amended during the 2009 session to require that any order on cases filed on or after September 1, 2009 must make specific findings that the statutory requirements were met, and must further set forth those findings specifically within the order.

In addition to the aforementioned sections, TFC §153.434 places limitations on the standing of a grandparent to file suit. Being a grandparent may not be enough to request visitation. TFC §153.434 states in relevant part:

> "A biological or adoptive 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 and the affidavit designates an authorized agency,

> licensed child-placing agency, or person other than the child's 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 crux of this statute is basically that if both parents' rights have been terminated, either by death or through legal proceedings, the grandparent no longer has standing to seek access. This would not, however, prevent a guardianship or conservatorship action under TFC §102.003, but would prevent a suit seeking visitation only.

At the time of the submission of this article, the Family Law Section Legislative committee has proposed legislation that would modify this statute and eliminate the requirements that a grandparent have standing only if a parent is dead, incarcerated, mentally incompetent, or does not otherwise have court-ordered access. The proposed legislation, if passed in the Legislature, would provide that ***any*** grandparent of a child has standing to seek access (i.e. parent(s) does not have to be dead, incarcerated, incompetent, etc.). The grandparent would still be required to meet his/her burden of proof in a final merits hearing, but it would expand the pool of potential grandparents who would at least have the initial standing to seek access.

B. *Troxel* and Its Progeny

By now it is fairly widely known that the seminal case regarding grandparent access is the United States Supreme Court case of ***Troxel v. Granville***, 530 U.S. 57 (2000). What seems to cause confusion, however, is how that case affected Texas law, both statutory and common law, and how the finer points of some of the issues are to be decided in light of the holding therein. In 2005, the Texas Legislature amended TFC §153.433 in an effort to come into compliance with *Troxel*. The primary holding of *Troxel* provides that in grandparent access cases, the grandparent must overcome the presumption that "a fit parent acts in the best interest of his/her child."

It has been argued, however, that the Texas statute may actually go a step further than Troxel, because it actually *defines* what that presumption is. Section 153.433 defines the presumption as requiring a showing that denial of access would significantly impair the child's physical health or emotional well-being. It is questionable as to whether *Troxel* really requires such a high burden of significant impairment. Nevertheless, the Texas statute imposes this burden to even obtain access, which burden is almost identical to the requirements of a grandparent seeking custody in an original suit under 102.004, or in a modification if the grandparent does not independently meet one of the general standing provisions of TFC §102.003.

It can also be argued that the burden established by the Legislature is so narrow as to all but prevent grandparents from obtaining access in almost any situation. The majority of Texas grandparent access cases have turned on the specific issue of whether the facts presented to the court were sufficient to show a significant impairment.

As set forth in the statute, significant impairment can be met one of two ways: physical health, or emotional well-being. One would presume that most cases involving significant impairment to the child's physical health would likely at least start as a request for managing conservatorship that would remove the child from the dangerous situation, although there may be a few instances where the simple denial of grandparent access might result in the child experiencing physical detriment. However, it is likely that the most common basis for seeking and granting grandparent access would be the emotional harm that might result if that grandparent-grandchild bond was terminated. How to prove that denial of grandparent access would result in such harm is no easy task, and the Texas cases are inconsistent in their findings.

Presumably evidence would have to be presented of the length and nature of the relationship and the specific facts that could lead the fact finder to believe that denial of access would result in *significant* emotional harm. Again, however, these cases turn on the specific facts of each case, and what may have seemed sufficient in one may not necessarily be sufficient in another. Several of the more notable cases are discussed below.

In the case of *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007), the Texas Supreme Court held that although the court-appointed expert in that case testified that the children would benefit from contact with the grandmother, there was no evidence that denial of access would significantly impair the children. *In re Derzaph*, at 327. In fact, it was noted in *Derzaph* that the expert actually testified that the children had benefitted from decreased contact with the grandmother due to her actions of undermining the father's initiatives, and that the children should first renew contact with their step-grandfather and uncles prior to renewing contact with the biological, maternal grandmother. [See *In re Derzaph*, at 334.] (emphasis added).

Whether denial of access would significantly impair a child's emotion well-being is about as subjective as one can possibly imagine. Apparently, however, (at least according to *Derzaph*), it has to be something more than mere speculation and a finding that access would be in the child's best interest. There must be sufficient evidence that could lead a

reasonable fact-finder to believe that the denial would cause significant emotional harm.

One way of proving this would presumably be through expert psychological testimony. However, if the relationship between the grandparent and other parent has deteriorated to such an extent that the grandparents believe they need court intervention to obtain access, the likelihood of having that sort of evidence in the beginning is unlikely. Nonetheless, none of the cases stand for the proposition that the burden can never be met, but simply that the evidence must be sufficient to show harm. What that is remains to be seen and always will turn on the specific facts of the case. We have several cases where the appellate courts have determined the evidence insufficient, but precious little where they have found it sufficient.

Nonetheless, Texas courts have long recognized the importance of awarding grandparents access to their grandchildren in appropriate cases, and has a compelling interest in providing a forum for grandparents having a significant existing relationship to petition for access to their grandchildren. *[See In re Pensom*, 126 S.W.3d 251, 255 (Tex. App. San Antonio 2003, orig. proceeding); *Lilley v. Lilley*, 43 S.W.3d at 712. A statute allowing grandparent access only under particular circumstances, and provided it is in the grandchild's best interest, does not violate a parent's rights. [See *Lilley v. Lilley*, 43 S.W.3d at 711.]

Furthermore, several courts have held that "access" does not necessarily mean "possession" or visitation. Thus, one could imagine an example whereby the court ordered telephone contact or other forms of communication, and not actual visitation. [See e.g. *Gonzales v. Graydon* 28 S.W.3d 825, 831 (Tex.App.–Corpus Christi 2007, no pet.)–"A person with rights of "access to" children may approach them, communicate with them and visit with them, but may not take possession or control of the children away from the managing conservator. A person with rights to "possession of" children may exercise possession and control of the children, to the exclusion of all other persons including the managing conservator, during periods of possession. A person with rights of possession of children also has rights and responsibilities toward their care and behavior. *Citing* Blalock v. Blalock, 559 S.W.2d 442, 443 (Tex.App.-Houston [14th Dist.] 1977, no writ) (possessory conservator has duty to provide for child during periods of possession but the duty is limited to those periods). The Family Code does not define the terms "possession" and "access." When a statute does not define a term, we apply the term's ordinary meaning."]

Practice tip: Also in regard to grandparents seeking conservatorship, keep in mind that, while the Supreme Court has held that the Grandparent Access statute under TFC §153.433 does not apply to step-grandparents (*see* ***In re Derzapf***, 219 S.W.3d 327 (Tex. 2007), a step-grandparent may have standing to seek sole or joint managing conservatorship under the "substantial past contact" provision of TFC §102.004 (b). Make sure not to confuse standing for actual conservatorship with standing for grandparent access under Chapter 153. The former grants actual conservatorship status, while the latter only addresses possess and/or access for a grandparent.

C. Procedural Considerations and Temporary Orders

How, then, does one obtain grandparent access under the current statutory scheme? While difficult, it is not impossible.

Certainly, the procedural requirements must be met, which means making sure that the required affidavits are attached to the pleadings, and that there are specific facts set forth in the pleadings which, if taken as true, could support the relief requested. This is likely in the form of affidavits setting forth the facts showing the length of the grandparent/grandchild relationship, the nature and frequency of the contact, the circumstances surrounding the absence of the parent that allows the grandparent to seek access (e.g. the tragic death of the parent, etc.), and so forth. The more facts that the grandparent can allege to show that the grandparent/grandchild relationship was of such a degree that it could be reasonably concluded that harm would result by interfering with the contact, the higher the chance of succeeding in the request for access.

One key to how to go about this can be found in the *Derzaph* case. In that case, the grandparents requested temporary orders wherein the court appointed an expert psychologist to evaluate the situation and make a recommendation regarding whether the denial of access would significantly impair the grandchildren. Unfortunately for the grandparents in Derzaph, the expert testified that [s]he did not believe the situation rose to the level of 'significant impairment,' and in fact stated that because of the grandmother's questionable tactics and behavior, access might actually be detrimental. Nonetheless, Derzaph seems to at least suggest that a court could enter temporary orders to investigate the issue and appoint an expert to assist the fact finder in that regard.

The ultimate conclusion, then, is that there exists no bright line, litmus test for when grandparent access is appropriate, and not too much direction from the courts is offered in that regard. Hence, the best advice that could be offered is to be creative, and to make sure to plead as many facts surrounding the grandparent relationship as possible to increase the likelihood of a favorable result. Likewise, seeking temporary orders relief for expert assistance in that regard could prove extremely beneficial.

D. *In Re Scheller* and Its Aftermath

Possibly the single-most tragic case regarding grandparents, not to mention potentially incorrectly decided (which is the author's opinion since it was a case from this author's law firm!), is the Texas Supreme Court decision in *In re Scheller*, 325 S.W.3d 640 (Tex. 2010). In *Scheller*, after a temporary orders hearing, the trial court entered temporary orders that: 1) provided for periods of grandparent access and possession of the children; and 2) appointed a PhD psychologist to investigate the situation and report to the court whether denial of access to their grandfather would significantly impair the children's physical health or emotional well-being.

At the temporary orders hearing, substantial evidence of the bond and relationship between the children and their grandfather was presented, including the enormous amount of time the children spent with the grandfather both before and after their mother (the grandfather's daughter) had passed away, the support, both financial and emotional, that the grandfather had provided after the death of his daughter (the mother of the children), and the abrupt denial of access that occurred when the father of the children became romantically involved with a woman he married within a few days before the temporary orders hearing. Considerable testimony was presented by the grandfather himself, as well as the children's step-grandmother (who had also been involved in the children's lives since each of their births), and several lay witnesses who had ongoing observations of the relationship between the children and their grandfather.

Subsequent to the temporary orders hearing, the father of the children, Scheller, filed a mandamus and request for stay in the Austin Court of Appeals. The Austin Court ultimately affirmed the trial court's ruling on the temporary orders, denied mandamus relief, and dissolved the stay. Scheller then filed a mandamus in the Texas Supreme Court and requested a stay until a decision was issued. The two main issues before the court at that juncture were: 1) whether temporary access should have been granted (i.e. whether the grandfather had met his burden for access); and (2) whether the trial court abused its discretion in appointing an expert to investigate the ultimate issue, that being whether denial of access would significantly impair the children's physical health or emotional well-being.

Approximately nine-and-a-half months later, the Supreme Court finally issued a *per curiam* opinion. The trial court granted the mandamus relief as to temporary access issue, stating the grandfather had failed to meet the statutory burden for access, but denied mandamus relief as to the appointment of the expert. In so doing, the court stated that it was within the trial court's authority to appoint an expert to assist the court in making factual determinations regarding whether depriving the grandfather of access would significantly impair their physical health or emotional well-being.

It is the author's opinion that this decision is a travesty for several reasons, not the least of which is the (possibly unintended) far-reaching implications of these findings. First, implicit in the opinion is the idea that lay testimony is somehow insufficient to meet evidentiary requirements or a basis upon which the court to rely. The tragedy thus lies in the fact that, if the Supreme Court is implying that only expert testimony is sufficient to meet the burden of 153.433, under what circumstances could a grandparent ever be successful in obtaining temporary or permanent grandparent access to a child unless:(1) an expert had coincidentally already been in place and could offer such testimony; or (2) in the case of a final order, the parties had sufficient funds to pay for the appointment of an expert to investigate and make a report or recommendation to the court in that regard? Thus, it would appear that the ultimate effect of the *Scheller* opinion seems to imply that only expert testimony will be considered sufficient to support an order of access that is based upon emotional impairment (as opposed to impairment to physical health). It is this author's sincere hope that trial courts will not interpret *Scheller* in such a way as to preclude or minimize lay testimony, that has been an accepted type of evidence in jurisprudence for hundreds of years.

As a result of the potential unintended effects of this opinion, the Legislative Committee of the Family Law Section is proposing legislation that will propose two substantive changes to the Grandparent Access statutes: (1) make clear that the burden of proof to sustain a grandparent access suit does ***not*** require (but could include) expert testimony; and (2) that any grandparent (i.e. the parent of a parent of the child the subject of the suit) may have standing to seek access, and is not dependent upon a parent of the child being dead, incarcerated, incompetent or otherwise does not have court-ordered access or possession. Once again, the proposed legislation will be included in the Section legislative package to be supported and promoted by the Texas Family Law Foundation this next section.

V. CONCLUSION

Representing parents (when there is heightened burden) and third parties (when you must prove significant impairment) poses unique problems and issues, and a thorough understanding of the statutes is required to ensure that the statutory requirements are met. Creativity is essential in the pleadings and proof of these cases, but when you are careful to follow the mandated provisions, these causes of actions can be successful. Careful attention to detail and facts can make the difference in whether the case proceeds to

final hearing or is dismissed for procedural deficiencies early on.