

**ALTERNATIVES AND OPTIONS BETWEEN CUSTODY AND CARE
OF MINORS: CHOOSING BETWEEN CONSERVATORSHIP,
ADOPTION, OR GUARDIANSHIP**

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Ceremonial Courtroom of Harris County Civil District Courthouse

September 20, 2016
11:30 a.m.-12:30 p.m.

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Introduction

With the “traditional” family in the United States becoming far less prevalent, and the two-parent household steadily evolving into more blending families and children being raised by their grandparents, aunts, uncles, and siblings, it is important for practitioners to be well versed in the areas of adoptions, conservatorships, and guardianships.

Most laypeople rely on the internet to obtain legal information that is usually not applicable to their case or is not the law in Texas. An even bigger issue is that more laypeople are utilizing online self-help forms to attempt to seek the legal results they want, but in reality their efforts are usually inadequate in the eyes of the law. Furthermore, when laypeople contact attorneys to assist them with their legal matter, they are very adamant that they should be seeking either a conservatorship or guardianship when in reality the factual circumstances surrounding their case would warrant just the opposite. This is a growing issue each year with advances in technology and more online resources being available and ultimately causing laypeople to use the term conservatorship and guardianship incorrectly and interchangeably.

This article is meant to provide a brief overview regarding the differences between adoptions, conservatorships, and guardianship, but more specifically provide attorneys with an understanding of when they should advise a client to seek an adoption, conservatorship, or guardianship based on the client’s factual situation and the legal remedy available to the client. By no means is this article an attempt to provide a comprehensive understanding of each of adoption, conservatorship, or guardianship issues, but rather it should provide attorneys with basic knowledge about the pros and cons between the different options.

Adoption

Adoption is when a person or persons petitions a family court to create a legal parent-child relationship between a child and a person who is not the child’s biological parent. Adoption is a permanent process that creates a person’s life-long commitment to a child. Section 162.001 of the Texas Family Code allows any adult, who meets the statutory requirements to adopt a child. The three most common forms of adoptions are: (1) stepparent adoption; (2) grandparent /family member adoption; and (3) foster parent adoptions. [1]

Stepparent Adoptions

Current Stepparent Adoption

A stepparent adoption can be filed when the child’s parent whose rights have not been terminated is currently married to the petitioner in a stepparent adoption proceeding. In a stepparent adoption, both the stepparent and the stepparent’s spouse must both be joined in the petition for the adoption. [1]

A stepparent adoption is most commonly used when the child’s biological parents have separated and one of the parents decides to remarry someone else, and the child’s stepparent wishes to establish a legal parent-child relationship with the child because either the father or mother’s

parental rights have been terminated in a prior proceeding or they will be terminated simultaneously in an adoption proceeding.

Former Stepparent Adoption

The Texas Family Code also allows for a former stepparent to adopt a child when: (1) the child is at least two years of age; (2) the mother or father's parental rights have been or will be terminated with respect to one of the child's parents; (3) the petitioner seeking the adoption is the child's former stepparent, and (4) either (a) the nonterminating parent consents to the adoption or (b) the former stepparent has been a managing conservator or has had actual care, possession, and control of the child for at least one year prior to the filing of the adoption. If the former stepparent is remarried, the former stepparent's new spouse *must* be joined in the petition for the adoption as well. [2]

Grandparent/Family Member Adoptions

A grandparent or other family member adoption is typically filed under the following circumstances (1) the child's parent has passed away or (2) both of the child's parents are deemed unfit by clear and convincing evidence in a Family Court, and both parents can no longer care for the child due to the parent's: (a) substance abuse; (b) mental health disorder; (c) incarcerated for a substantial period or; (d) the parent's parental rights have been terminated in a prior action through the Department of Family and Protective Services. [3]

In a grandparent or family member adoption, *both* parents' parental rights must be terminated prior to filing an adoption or a termination proceeding must be joined in an adoption suit. If *both* parents' parental rights are not terminated, the grandparent or other family member adoption will be treated similar to a stepparent adoption in that: (1) the child must be at least two years of age; (2) at least one of the parent's parental rights have been or will be terminated; (3) the grandparent or family member has been (a) managing conservator of the child or (b) the grandparent or family member has had actual care, possession, and control of the child for at least six months prior to filing the adoption suit and; (4) the nonterminating parent consents to the adoption. [3]

The scenario of only one parent's parental rights being terminated is far less likely to occur. Usually, then, grandparent or family members are advised that both parents' parental rights must be terminated before filing an adoption suit or the termination and adoption suit must be filed simultaneously. Again, if the grandparent or family member is married, Section 162.002(a) of the Texas Family Code requires that the grandparent or family member and their spouse be joined into the petition for adoption suit as well.

Foster Parent or Caregiver Adoptions with the Department of Family and Protective Services (“DFPS”)

Foster parent or caregiver adoptions are most often used when the Department of Family and Protective Services has been named a managing conservator over a child, and both parents’ parental rights have been terminated in a prior action.

A Texas Family Court may order termination of a parent-child relationship in a termination suit filed by the Department of Family and Protective Services based on the requirements listed in Chapter 161; Subchapter A (“Grounds”) of the Texas Family Code.” If an affidavit of relinquishment of parental rights contains a consent for the Department of Family and Protective Services or a licensed child-placing agency to place the child for adoption, and appoints the department or agency as the managing conservator of the child, [then] further consent by the [child’s] parent is not required and the adoption order will terminate all [parental] rights of the parents without further termination proceeding.” [4]

After the Department of Family and Protective Services or a licensed child-placing agency has consented to the adoption of a child, then the Department of Family and Protective Services or the licensed child-placing agency must include verified allegations that illustrate that there has been compliance with Subchapter B of the Texas Family Code (“Interstate Compact on the Placement of Children). [5] And if there has not been compliance with the Interstate Compact on the Placement of Children, then the petition in suit for adoption or suit for appointment of a nonparent managing conservator with the authority to consent to adoption of a child must include a “verified statement of the particular reason for noncompliance.” [6]

If the affidavit does not contain a consent for the Department of Family and Protective Services or a licensed child-placing agency to consent to adoption of the child then, “the court may waive the requirement of consent by parent conservator if the court finds that the consent is being refused or has been revoked without good cause.” [7] The issue of consent “shall be conducted by a court without a jury.” [8]

Legal Process/Requirements to Obtain an Adoption

Whether the adoption is a stepparent adoption, grandparent adoption, family member adoption, or foster parent adoption, the legal process and requirements are substantially the same throughout the Texas Family Courts.

Prerequisites to Filing Petition for Adoption and Petition for Adoption

The petition for adoption proceeding should be filed as a new action in a Texas Family Court. If there is a Family Court that has exclusive and continuous jurisdiction of the child, then a petitioner *must*: (1) file the action in the same county that retains exclusive and continuous

jurisdiction over the child; and (2) the petition for adoption should reference (a) the court number; (b) the cause number; and (c) the current order that the court acquired and retained continuing and exclusive jurisdiction of the child in a prior proceeding. [9]

The statutory requirements listed under the Texas Family Code, requires that the person petitioning the court to adopt the child must (1) be at least 18 years of age or older; (2) satisfy the residence requirement that the child resides with them for at least six months; (3) meet the statutory requirements under Section 162.001 of the Texas Family Code for a stepparent adoption, grandparent, other family member adoption, or a foster parent or caregiver adoption; (4) join their spouse into the adoption proceeding; (5) file a written consent of a managing conservator to the adoption, unless the court has waived the requirement of consent by the managing conservator or the managing conservator is a petitioner in the suit for adoption; (6) file a written consent of a child 12 years of age or older unless the court waives the requirement; and (7) ensure that the adoption will be in the best interest of the child. [10]

Criminal History Report, Social Study, and Medical History Report

Prior to a child being adopted, the court must have on file a criminal history report for each person seeking to adopt the child. [11] The court must accept a person's criminal history report from the Department of Family and Protective Services or a licensed child-placing agency as long as the report is not obtained more than one year from the date of filing the adoption. [12] To avoid any delays, the petitioner should request that a copy of the background report be directly sent to the court where the adoption is filed.

A Social Study will be ordered by the court in adoption cases for the child and for each person who is seeking to adopt the child. The Social Study must follow the guidelines set out in Subchapter D of the Texas Family Code. [13]

The Texas Family Code only requires a Health, Education, and Genetic History Report in foster parent adoptions that involve the Department of Family and Protective Services. [14] A Medical History Report is not required in an adoption proceeding filed by a grandparent, aunt, uncle, or a stepparent. [15] Family Courts will usually only waive the requirement of a Medical History Report in an adoption that involves the Department of Family and Protective Services when "the child's biological parents cannot be located and their absences resulted in insufficient information being available to compile the report." [16]

Who is Required to Attend the Hearing?

If the joint petitioners are married, and it would be “unduly difficult for one of the petitioners to appear at the hearing,” then the court can waive the attendance of one of the petitioners as long as the other spouse is present. [17]

If the child is twelve years of age or older, the child is required to attend the hearing for the adoption, unless the court waives the requirement if it is in the best interest of the child. [18]

Joining Termination Proceeding with Adoption Proceeding

If a parent’s parental rights have not been terminated in a prior proceeding, a petitioner can file a petition for adoption and termination of parental rights simultaneously and “the court [must] terminate the parent-child relationship at the same time [that] the adoption order is rendered. The court must make separate findings that the termination is in the best interest of the child and that the adoption is in the best interest of the child.” [19] If a petitioner brings a petition for termination of parental rights and a petition for adoption at the same time, the hearing for the termination and the adoption can be scheduled for the same day, but the court has to hear and rule on the termination suit before hearing the adoption suit.

If the parent or parents do not execute an Affidavit for Voluntary Relinquishment of Parental Rights, then the petitioner should seek termination of parental rights under Section 161.001, 161.002, or 161.003 of the Texas Family Code. If the court finds by clear and convincing evidence grounds for termination of the parent child relationship, then an order terminating the parent-child relationship divest the parent and the child of all legal rights and duties with respect to each other, including but not limited to: (1) conservatorship; (2) visitation; (3) child support; (4) medical support, except that the child will maintain the right to inherit from and through the parent unless the court orders otherwise. [20]

Outcome of an Adoption and Termination Order

Legal Parent Child Relationship and Inheritance

If a Family Court grants the adoption, the adoption creates a legal parent child relationship between the adoptive parent and the child for all purposes. [21]

The child can inherit from and through their adoptive parent as if the child’s adoptive parents were the child’s biological parents. [22] “The term ‘child,’ ‘descendant,’ ‘issue,’ and other terms indicating the relationship of a parent and child includes an adopted child unless the context or express language clearly indicates otherwise. [23]

Name Change and Birth Certificate

If the petitioner petitioned to change the child's name, then the adoption order would change the name of the child. [25]

The child will be issued a new birth certificate after a Certificate of Adoption and a copy of the final order granting the adoption is mailed to the Vital Statistics Unit, Texas Department of State Health Services in Austin, Texas along with the required fee.

Conservatorship and Rights and Duties

The presumption in Texas is for parents to be appointed Joint Managing Conservators of the child unless appointing both parents as Joint Managing Conservators would not be in the best interest of the child. [26] The alternatives to Joint Managing Conservatorship is naming one parent a Sole Managing Conservator and the other parent a Sole Possessory Conservator. However, it is far less likely for a Family Court to appoint a parent the child's Sole Managing Conservator in an adoption proceeding.

Stepparent Adoption- Current Stepparent

The biological parent and the adoptive parent would be Joint Managing Conservators of the child and share the same rights and duties until a divorce or an Original Petition to Modify the Parent Child Relationship is filed.

Stepparent Adoption- Former Stepparent

The biological parent and the adoptive former stepparent would be named Joint Managing Conservators of the child and share the same rights and duties until an Original Petition to Modify the Parent Child Relationship is filed to modify the parent's rights and duties.

If the adoptive former stepparent has remarried, and the stepparent would be determining the child's primary residence in the final adoption order, it is likely that a Family Court will require that the adoptive former stepparent's spouse be a joint managing conservator of the child, and share at least some of the same rights and duties with the child's biological parent and the child's adoptive parent to ensure that the adoptive former stepparent's spouse can make decisions regarding the child's medical, educational, and financial needs when an emergency arises. [27] The Texas Family Code does not restrict the number of conservators who can be appointed to a suit affecting a child as long as appointing each conservator is in the child's best interest.

Grandparent or Family Member Adoption

A grandparent(s) or a family member(s) would be appointed a Joint Managing Conservator of the child and share the same rights and duties with the other adoptive grandparent or family member who the court also appointed a Joint Managing Conservator of the child.

Similar to a former stepparent adoption, if the grandparent or family member is married, it is likely that a Family Court will require that the grandparent or family member's spouse share at least some of the same rights and duties with the adoptive grandparent or family member to ensure that the adoptive grandparent or family member's spouse can make decisions regarding the child's medical, educational, and financial needs when an emergency arises.

However, in most grandparent and family member adoptions, the petitioner's spouse will also be seeking to establish a parent child relationship with the child, in which case both petitioners would be appointed Joint Managing Conservators of the child and share the same rights and duties until a Divorce or an Original Petition to Modify the Parent Child Relationship is filed.

In most grandparent or family member adoptions, either *both* of the child's biological parents have passed away or the biological parents are deemed unfit by clear and convincing evidence by a Texas Family Court and their parental rights are terminated. Therefore, neither of the child's biological parents would be named a Joint Managing Conservator, Sole Managing Conservator, or Possessory Conservator of the child.

In a grandparent or family member adoption case that only involves *one* of the child's biological parent's parental rights being terminated, the grandparent/family member and the nonterminating parent would be named Joint Managing Conservators of the child and share the same rights and duties until an Original Petition to Modify the Parent Child Relationship is filed.

Foster Parent and Caregiver Adoptions Involving the DFPS

In foster parent and caregiver adoptions, the Department of Family and Protective Services has or will likely terminate the biological parent's parental rights in a termination suit by either establishing clear and convincing evidence of the parents being unfit or the parents voluntarily relinquishing their parental rights. As a result, the foster parent or caregiver would be named a Managing Conservator of the child, and neither of the child's biological parents would be name a Joint Managing Conservator, Sole Managing Conservator, or Sole Possessory Conservator of the child.

Similar to a former stepparent and grandparent or family member adoption, if the foster parent or caregiver is married, it is likely that a Family Court will require that the foster parent or caregiver's spouse share at least some of the same rights and duties with the adoptive foster parent

or caregiver to ensure that the adoptive foster parent or caregiver's spouse can make decisions regarding the child's medical, educational, and financial needs when an emergency arises.

Like grandparent and family member adoptions, in most foster parent and caregiver adoptions, the petitioner's spouse will also be seeking to establish a legal parent child relationship with the child, in which case both petitioners would be appointed Joint Managing Conservators of the child and share the same rights and duties until a Divorce Original Petition to Modify the Parent Child Relationship is filed.

Rights and Duties

In an adoption that includes both the petitioner and their spouse petitioning the court to adopt the child, the final order granting the adoption will not include specifically language as to each conservator's specific rights and duties. Instead, the legal parent child relationship established between the adoptive parent and the child will be treated as any other legal parent child relationship that has not be brought before a family court. Each adoptive parent and, in a current stepparent adoption, the child's biological parent will equally share all the rights and duties as a presumed joint managing conservators of the child.

An instance when the final order granting the adoption will include specific language as to each conservator's rights and duties is in a former stepparent adoption, or an adoption when the petitioner's spouse is not petitioning the court to adopt the child, but the court requires that the petitioner's spouse have at least some of the same rights and duties as the adoptive parent to make decisions regarding the child's medical, educational, and financial needs when an emergency arises.

Sample Rights of Joint Managing Conservators in Former Stepparent Adoptions or Adoptions When the Petitioner's Spouse is not Petitioning the Court to Adopt the Child

The adoptive parents, and when applicable the child's biological parents, may have the following rights as a Joint Managing Conservator:

1. the right to receive information from any other conservator of the child concerning the health, education, and welfare of the child;
2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the child;
3. the right of access to medical, dental, psychological, and educational records of the child;

4. the right to consult with a physician, dentist, or psychologist of the child;
5. the right to consult with school officials concerning the child's welfare and educational status, including school activities;
6. the right to attend school activities;
7. the right to be designated on the child's records as a person to be notified in case of an emergency;
8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child;
9. the right to manage the estate of the child to the extent the estate has been created by the parent or the parent's family;
10. the right to consent for the child to medical and dental care not involving an invasive procedure;
11. the right to direct the moral and religious training of the child.
12. the right during his/her periods of possession, to consent to medical, dental, and surgical treatment involving invasive procedures;
13. the right, to consent psychiatric and psychological treatment.
14. the right, to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
15. the right, subject to the agreement of the other parent conservator, to consent to marriage and to enlistment in the armed forces of the United States;
16. the right, subject to the agreement of the other parent conservator, to make decisions concerning the child's education;
17. except as provided by section 264.0111 of the Texas Family Code, the right, independent right, to the services and earnings of the child; and
18. except when a guardian of the child's estate or a guardian or attorney ad litem has been appointed for the child, the independent right, to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government;

Only One Joint Managing Conservator Will Be Awarded the Following Rights and Duties

1. the exclusive right to receive and give periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child; (oblige)
2. the exclusive duty to make periodic child support payments; (obligor)
3. the exclusive right to determine the child's primary residence within Harris and contiguous counties.
 - a. Alternatively—the exclusive right to determine the child's primary residence without geographical restriction.

Sample Duties of Joint Managing Conservators in Former Stepparent Adoptions or Adoptions When the Petitioner's Spouse is not Petitioning the Court to Adopt the Child

The adoptive parents, and when applicable the child's biological parents, may have the following duties as a Joint Managing Conservator:

1. the duty of care, control, protection, and reasonable discipline of the child;
2. the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;
 1. the duty to inform the other conservator of the child in a timely manner of significant information concerning the health, education, and welfare of the child;
 2. the duty to inform the other conservator of the child if the conservator resides with for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. **IT IS ORDERED** that this information shall be tendered in the form of a notice made as soon as practicable, but not later than the fortieth day after the date the conservator of the child begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. **IT IS ORDERED** that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. **WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE; and**
 3. the duty to inform the other conservator of the child if the conservator establishes a residence with a person who the conservator knows is the subject of a final protective order sought by an individual other than the conservator that is in effect on the date the residence with the person is established, or the conservator resides with or allows unsupervised access to a child, by a person who is the subject of a final protective order sought by the conservator after the expiration of 60-day period following the date the final protective order is issued, or the conservator is the subject of a final protective order issued after the date of the order establishing conservatorship. **IT IS ORDERED** that this information shall be tendered in the form of a notice made as soon as practicable, but not later than the thirtieth day after the date the conservator of the

child establishes residence with the person who is the subject of the final protective order, or the ninetieth day after the date the final protective order was issued if the conservator of the child resides with or allows unsupervised access to the person who is the subject of a final protective order sought by the conservator, or the thirtieth day after the date the final protective order issued against the conservator which is issued after the date of the order establishing conservatorship, as appropriate. **WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.**

Conservatorship

Conservatorship is when a parent or non-parent petitions the Family Court to grant them rights and duties to a child. Conservatorship does not establish a legal parent child relationship with a non-parent conservator, and is not necessarily a permanent process. Any person who is a parent, a competent adult, the Department of Family and Protective Services, or a licensed child-placing agency can be appointed as a managing conservator of the child. [28]

Overcoming the Parental Presumption

Parental Presumption

There is a rebuttal presumption that the child's parents should be appointed joint managing conservators of the child unless there is evidence that appointing the parents as joint managing conservators would not be in the child's best interest and the appointment would "significantly impair the child's physical health or emotional development." In which case, one parent would be appointed the child's sole managing conservator and the other parent would be appointed the child's sole possessory conservator. [29]

The Legislature codified the parental presumption in Chapter 153 of the Texas Family Code, which discusses Original Suits Affecting the Parent Child Relationship, **but** the Legislature did not codify the parental presumption in section 156 of the Texas Family Code, which discusses modifications of the parent child relationships. Therefore, the parental presumption does not apply in modification suits.

Furthermore, the parental presumption would not apply for either parent if there is a preponderance of the evidence before the court that both parents are engaging in activity or there are specific acts or omissions by the parent that would significantly impair the child's physical health or emotional wellbeing. When that occurs, the court should not appoint either parent as a conservator of the child because such appointment would not be in the child's best interest. [30] The primary consideration of a court determining the issues of conservatorship and possession and access must always be the best interest of the child. [31]

Standing to Bring an Original Suit Affecting Parent-Child Relationship or Suit to Modify the Affecting Parent-Child Relationship

Section 102.003 of the Texas Family Code enumerates when a person has standing to commence either an original suit affecting the parent child relationship or a suit to modify the parent child relationship.

The petition should be filed in a Texas Family Court that has exclusive and continuous jurisdiction of the child, and the petitioner *must* be meet one of the following requirements at the time of filing the suit: (1) be a parent of the child; (2) be an authorized representative of the child by a court; (3) a custodian or person having the right to visit with or access the child per a court order in another state or country; (4) a guardian of the person or of the estate of the child; (5) a governmental entity; (6) the Department of Family and Protective Services; (7) a licensed child placing agency; (8) a man alleging himself to be the father of a child per Chapter 160 of the Texas Family Code; (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 no more than 90 days before bringing the action; (10) a person designated as the managing conservator of the child in an revoked or unrevoked affidavit of relinquishment under Chapter 161 of the Texas Family Code or to whom consent to adoption has been given in writing under Chapter 162 of the Texas 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 proceeding 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 Family and Protective Services in the person’s home for at least 12 months ending not more than 90 days before filing the petition; (13) a person who is a relative of the child within the third degree of consanguinity, as determine by Chapter 573 of the Government Code, if the child’s parents are deceased at the time of 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 Texas Family Code regardless of whether the child is born or not. [32]

Computing Time Requirement for Standing

If the petitioner’s standing requirement includes a time period component, “the court may not require that the time period be continuous or uninterrupted but shall consider the child’s principal residence [at the time the suit is brought]. [33]

Additional Options for a Grandparent or Relative to Establish Standing

If the petitioner is a grandparent or other person who does not have general standing per Section 102.003 of the Texas Family Code to bring an original suit requesting managing conservatorship of the child, the petitioner may be able to establish standing if the petitioner meets the following requirements: (1) the petitioner is a grandparent or another relative of the child related within third degree of consanguinity; (2) the petitioner's suit is necessary because the child's current circumstances would significantly impair the child's physical health or emotional development or; (3) both parents, the surviving parent; or the managing conservator or custodian either filed the petition or consented to the suit. [34] However, a grandparent or other relative may not bring an original suit requesting possessory conservator. [35]

Intervening: Substantial Past Contacts

If a grandparent or relative within third degree of consanguinity does not have standing under Section 102.003 or 102.004 of the Texas Family Code, they may be able to intervene into a pending suit if (1) the person has had substantial contact with the child; and (2) 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. [36] The substantial past contact element 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.'" [37]

Other Legal Requirements in Suit Affecting Parent Child Relationship Actions

In addition to the petitioner meeting the standing requirements under Section 102.003 of the Texas Family Code, the petitioner must also show that conservatorship and possession and access to the child is in the child's best interest. [38]. The Legislature does not include a list of factors that the court must consider in determining the best interest of the child, but in *Holly v. Adams*, the Texas Supreme Court provided a nonexclusive list of factors, commonly referred to as the "Holly Factors" to be used to determine the best interest of the child. These factors are the following:

- (1) the desire of the child;
- (2) the emotional and physical needs of the child now and in the future;
- (3) the emotional and physical danger to the child now and in the future;
- (4) the parental abilities of the individuals seeking custody;
- (5) the programs available to assist these individuals to promote the best interest of the child'
- (6) the plans for the child by these individuals or by the agency seeking custody;
- (7) the stability of the home or proposed placement;
- (8) the acts or omissions of the parent that may indicate that the existing parent-child relationship is not a proper one; and

(9) an excuse for the acts or omission of the parent. [39]

Since the “Holly Factors” are simply factors rather than elements, the petitioner is not required to prove each factor to prevail in a suit affecting a parent-child relationship. However, the more factors that the petitioner is able to prove increases the petitioner’s chances of better establishing the best interest of the child element.

A Suit to Modify the Affecting Parent Child Relationship

When a petitioner brings a suit to modify a parent-child relationship, the petitioner is not only required to establish standing and that the modification would be in the child’s best interest, but the petitioner must also show (1) that there has be a material or substantial change that affects the circumstances of the child, a conservator, or another party either since the date of the rendition of the order; or the date of the signing of the mediated or collaborated settlement agreement; (2) the child is at least 12 years of age and has expressed to the court in chambers the person who the child’s prefers to have the exclusive right to designate the primary residence of the child; or (3) the conservator who has the exclusive right to designate the child’s primary residence has voluntarily relinquished the primary care and possession of the child to another person for at least six months. [40]

There are no rigid rules when determining whether a material change of circumstances has occurred, but instead a finding of whether a material or substantial change has occurred will be fact-specific issue. [41] In a modification, material changes may be established by circumstantial evidence. [42] Family courts have found that the following can constitute a material change: (1) marriage of one of the parties; (2) poisoning of the child’s mind by one of the parties; (3) change in home surroundings; (4) mistreatment of the child by a parent or step-parent; (5) a parent’s becoming an improper person to exercise custody.” [43]

Designating Conservators

Biological Parents

As discussed previously, there is a rebuttal presumption *only* in an original suit affecting the parent child-relationship that the child’s parents should be appointed joint managing conservators of the child unless there is evidence that appointing the parents as joint managing conservators would not be in the child’s best interest and the appointment would “significantly impair the child’s physical health or emotional development.” [44]

If the parents are or will be separated, the court shall appoint at least one party as a managing conservator of the child. [45] When the court determines the appointment of the parents,

the court must consider whether any of the following have occurred either two years prior to filing the suit or during the pendency of the suit:

- (1) Whether the party has engaged in a history or pattern of family violence as defined in Section 71.004 of the Texas Family Code;
- (2) Whether a party engaged in a history of pattern of child abuse or child neglect; or
- (3) Whether a final protective order was rendered against a party. [46]

History or Pattern of Physical or Sexual Abuse

A history of family violence involving the parent or child will remove the parental presumption for a parent(s) to be appointed joint managing conservators in an original suit affecting the parent child relationship. [47] The Family Court must consider by a preponderance of the evidence whether there has been a history or pattern of intentional use of physical abuse, abusive force, or evidence of sexual abuse by a party against (1) the party's spouse, (2) a parent of the child, or (3) any person under the age of 18 years of age that was either (1) committed within a two-year period prior to filing the suit or (2) occurred during the pendency of a suit. [48]

If there is credible evidence presented to the Family Court of a "history or pattern of past or present (1) child neglect or (2) physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault [that is] in violation of Section 22.011 or 22.021 of the Texas Penal Code, [and] that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents," the court may not appoint the parents as joint managing conservators. [49]

Furthermore, if credible evidence is presented, then there is a rebuttable presumption that it is not in the child's best interest for the court to appoint the parent who committed acts under Section 153.004(b) to be (1) a sole managing conservator of the child (2) determine the child's primary residence, or (3) have unsupervised visitation with the child. [50]

However, the court may appoint the parent as a possessory conservator, and allow a parent to have limited or restricted access to the child if the court determines that allowing the parent to have access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child. [51] In which case, the court has to render a possession and access order that protects the safety and well-being of the child and each person of family violence that was committed by the parent. [52] The requirements of the possession may include (1) the periods of access be continuously supervised by an entity or person chosen by the court; (2) the exchange of possession of the child occur in a protective setting; (3) ordering the parent

who committed the family violence to not consume alcohol or controlled substance within 12 hours prior to or during the period of access to the child, and/or (4) ordering the parent who committed the family violence to attend and complete a battering intervention and prevent program as provided by Article 42.141 of the Code of Criminal Procedure. [53]

If the petitioner petitions the Family Court not to appoint the other parent as a possessory conservator, the petitioner would have the burden to prove that appointment of the parent as a possessory conservator would not be in the child's best interest and the parental possession or access would endanger the physical or emotional welfare of the child. [54]

Grandparent, Other Persons and Department of Family and Protective Services

If a grandparent, other person, Department of Family and Protective Services, or a licensed child-placing agency has standing to bring a suit affecting the parent child relationship, then a nonparent, the Department of Family and Protective Services, or a licensed child-placing agency can be appointed as either a joint managing, sole managing conservator, or possessory conservator of the child with another nonparent or with a parent of the child. [55]

Voluntary Relinquishment

The presumption that a parent should be appointed or reserved as a managing conservator of the child can be rebutted if the court finds that (1) the parent has voluntarily relinquished actual care, control, and possession of the child to a nonparent, a licensed child-placing agency, or the Department of Family and Protective Services for a period of one year or more, and the nonparent, licensed child-placing agency, or the Department of Family and Protective Services has had the child within the last 90 days prior to intervening or filing the suit; and (2) the appointment of the nonparent, agency, or the Department of Family and Protective Services as the managing conservator is in the child's best interest. [56]

Affidavit of Relinquishment Upon Termination of Parental Rights

A parent may also designate a competent adult, the Department of Family and Protective Services, or an agency to serve as the child's managing conservator of the child if (1) an unrevoked or irrevocable affidavit of relinquishment of their parent rights per the requirements in Section 161 of the Texas Family Code; and (2) the court finds that appointing the competent adult, the agency, or the Department of Family and Protective Services as a managing conservator of the child is in the child's best interest. [57]

Both Parent's Deceased

If both of the child's parents are deceased, and a grandparent, aunt, or uncle, has standing to bring a suit affecting the parent-child relationship, the court could consider appointing the grandparent, aunt, or uncle of the child as a managing conservator of the child. [58]

Annual Report by Nonparent Managing Conservator

If a nonparent is appointed as a managing conservator of the child, they must file a report with the court detailing the child's welfare, whereabouts, and physical conditions each year after the nonparent is appointed as the child's managing conservator. [59]

Rights and Duties of the Conservator

Biological Parents

A parent's rights and duties are listed under Section 151 of the Texas Family Code. However, a parent's rights and duties can be limited under the following circumstances: (1) there is a written finding that limiting the parent's rights and duties is in the child's best interest; (2) another parent, nonparent, licensed child-placing agency, or the Department of Family and Protective Services has been named as a sole managing conservator of the child, which entitles the appointed managing conservator with exclusive rights and duties; or (3) the court has named the parent as a possessory conservator and has limited the parent's rights and duties. [60]

Grandparent, Other Persons and Department of Family and Protective Services

If a nonparent, the Department of Family and Protective Services, or a licensed child-placing agency is appointed as a sole managing conservator or a joint managing conservator of the child, the conservator will have all the rights and duties enumerated in Section 153.371 of the Texas Family Code, unless those rights and duties are limited by a court order or another provision of the Texas Family Code. [61]

Furthermore, if a nonparent, the Department of Family and Protective Services, or a licensed child-placing agency is appointed as a joint managing conservator of a child, the conservator would have the right to access to the child's medical records whether or not the order specifically order such right. [62]

If a nonparent, the Department of Family and Protective Services, or a licensed child-placing agency is appointed a possessory conservator of the child, they will have the following rights and duties: (1) the duty of care, control, protection and reasonable discipline of the child; (2) the duty to provide the child with clothing, food, and shelter; (3) the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; (4) and any other rights and duty ordered by the court. [63]

Child Support

Whether or not a parent is named a managing or possessory conservator of a child and given rights and duties by the court, the parent can still be ordered to pay child support for the child. [64] Typically, the parent or parents who do not determine the child's primary residence will be ordered to financially support the child. [65]

In a Title IV-D case, if neither parent has physical possession or conservatorship over the child, the court can order that the nonparent or the agency that has physical possession of the child receive, hold, or disburse child support payments for the benefit of the child. [66]

Either during an active proceeding with the Department of Family and Protective Services or if a parent's rights have been terminated, the court can still order that each person who is financially able to provide for the child pay child support for the child. [67]

Legal Parent-Child Relationship, Inheritance Rights, Name Change for Nonparent Conservator

Legal Parent-Child Relationship

A parent-child relationship means a legal relationship between a child and the child's parents that has been established under Section 160.201 of the Texas Family Code. [68] The Texas Family Code's definition of a legal parent-child relationship does not include a nonparent conservator. If a nonparent conservator wishes to establish a parent-child relationship, they must adopt the child.

Inheritance

When a nonparent conservator chooses not to legally adopt the child, the nonparent conservator's estate would not pass to the child, but rather pass to the nonparent conservator's children and children's descendants, unless the child's parent is deceased and the child would be the next lineal descendant. [69] Nonparent conservators who want the child to inherit from and through them should update their beneficiary list and have estate planning documents in place that include the child.

In addition, the nonparent conservator would not be able to inherit from and through the child unless the nonparent conservator adopts the child and becomes a parent to the child. [70]

Guardianship

It is more appropriate, and at times required, for a parent or nonparent to apply for guardianship of the estate for a minor child through the Probate Courts rather than conservatorship through the Family Courts when the child inherits, earned, or has been awarded funds or property worth more than \$100,000 because the Family Law Courts do not have mechanisms in place to properly monitor the minor's assets. However, conservatorship, possession and access, and child support issues would be more appropriate for a Family Law Court to handle in a conservatorship.

Parents of the Minor Applying for Guardianship of the Estate

In most cases, parents are considered to be a natural guardian of their minor child without a court appointing them as a guardian of the person, but parents are not natural guardians of their child's estate. A parent who wants to be named their minor child's guardian of the estate, must file an application to be appointed as the child's guardian of the estate.

If the parents are married and live together, only one of them can be appointed the guardian of the estate of the child. [71] If the parents cannot agree on which one will be appointed the child's guardian of the estate, then the court must appoint the parent who is better qualified to serve as a guardian of the estate for the child. [72]

When the parents do not live together, both parents are equal, and the court must appoint one of the parents as a guardian of the minor's estate by *only* considering the best interest of the child. [73] However, if one parent is deceased, then the surviving parent is entitled as the child's guardian of the estate. [74]

Nonparent Applying for Guardianship for a Minor Orphan

If the child's last surviving parent did not appoint a guardian before passing, the nearest *ascendant* in the direct line of the minor child is entitled to guardianship of both the person and the estate of the minor. [75]

When a child does not have an ascendant in the direct line of the minor, the court shall appoint the nearest of kin, and if two persons are in the same of kinship to the minor then the court must appoint one kin after considering the circumstances and the child's best interest.

Child's Preference

The court must make reasonable efforts to allow the child to express their preference, and the court must give due consideration to the child's preference regardless of whether or not the

person was designated as a guardian by declaration. [76] If the child is at least 12 years of age, the child may select their guardian of the estate by filing a written request with the court who they prefer to have as their guardian when the selection is in the child's best interest. [77]

Criminal History Report & Disqualifications

Unlike Family Courts, the Probate Court does require that the guardian file a criminal history report from the Department of Public Safety or the Federal Bureau of Investigation with the court, so the court can use the information when considering the child's guardian of the estate. [78]

A person can be disqualified for being: (1) a minor; (2) incapacitated person; (3) a person who is inexperienced or lacks education or other good reason to prudently managing the child's estate; (4) or a person who has engaged in notoriously bad conduct including, but not limited to, (a) any sexual offense; (b) aggravated assault; (c) injury to a child, elderly individual, or disabled individual; (d) abandoning or endanger a child; (e) terrorist threat or; (f) continuous violence against a family of the child; (5) a person who is a party or their parent is a party to a law suit affecting the welfare of the child; (6) a person who is disqualified in a declaration; (7) the person lacks the certification to serve as a guardian; (8) the person is not a resident of Texas and has failed to file with the court the name of a resident agent to accept service of process for the guardianship proceedings or; (9) a person who is subjected to a protective order under the Family Code. [79]

Annual Reporting

A guardian appointed to the estate of a minor will be subjected to the strict annual reporting requirements under Chapter 1163; Subchapter A of the Texas Estates Code. When a guardian fails to comply with the annual reporting requirements the guardian can be subject to a show cause citation being issued out for the court to (1) order the guardian to file their annual report or if the court does not find good cause for the guardian's failure to file then the court could (a) revoke the guardians letters of guardianship, (b) fine the guardian an amount not more than \$1,000, (c) or do both (a) and (b). [80]

Alternatives to Guardianship

Depending on the factual circumstances, and especially when a person is solely seeking to be named as a child's guardian of the person, the individuals should consider other alternatives to guardianship.

Guardianship of the Estate

Instead of seeking a guardianship, a parent or nonparent can setup a trust account for the child's estate or place the funds in an interest-bearing account with the registry of the court. There are different types of trust accounts that the child's funds or property can be managed in depending on the value of the property or the amount of funds the child has.

For a minor's estate that is less than \$100,000, placing the funds in the registry of the court is the most likely alternative. And, where the minor's estate is more than \$100,000, and if sufficient in size for a corporate trustee, a 1301 Management trust is the most favored option. A similar type of trust is a Chapter 142 trust, which is setup under Chapter 142 of the Texas Property Code, and the trust can last until the child reaches the age of 25. [81] A Section 142 trust is usually funded with a minor's personal injury awards or settlements. Other types of trusts can be found throughout the Texas Property Code and the Texas Estates Code¹. Despite the type of trust that is ultimately created for the ward, the trust are managed by a corporate trustee. [82]

Guardianship of a Minor

The Texas Family Code provides a less restrictive means for appointing relatives and other persons as a child's conservator when the child's parent is deceased or not capable of properly caring for their child. A Family Court can appoint a grandparent, aunt, uncle, or sister as the conservator of a child when the child's parent is deceased. [83]

Furthermore, a nonparent conservator can seek other conservatorship options discussed above under the "Conservatorship" section of this article if they have standing. Seeking a conservatorship rather than a person-only guardianship is usually a more appropriate form of action for a parent or nonparent conservator to take.² Lastly, an individual should understand that if they are seeking guardianship to establish residency to enroll a child in a school or school district, the court will likely deny their application because guardianship was not created for that purpose. [84]

1

See, https://nlrc.acl.gov/Legal_Issues/Guardianship/docs/Guardianship_Paper_alternatives_sections.pdf at "Appendix A" for Less-Restrictive Means to Guardianships.

² See, *Id* for a list of least restrictive alternatives to guardianship of a person.

Comparing the Options at a Glance

	ADOPTION	CONSERVATORSHIP	*GUARDIANSHIP
Termination of Parental Rights?	✓	Possibly	✗
Establish Legal Parent-Child Relationship?	✓	✗	✗
Managing or Possessory Conservatorship?	✓	✓	✗
Rights and Duties (Health, Educational, Financial, Etc.)?	✓	✓	Some Rights
Child Support Obligation of Biological Parents?	✗	✓	✗
Right to Inherit from and through Biological Parents?	✓	✓	✗
Right to Inherit from and through Petitioner?	✓	✗	✗
Name Change?	✓	✗	✗
New Birth Certificate Issued?	✓	✗	✗
Estimated Cost and Expenses	Filing \$284.00 Amicus \$750.00 Social Study \$250 Attorney Fee \$10,000	Original SAPCR \$267.00 Modify SAPCR \$31.00 Amicus \$3,000-10,000 Social Study \$250.00 Attorney Fees \$3,500-7,500	Filing \$400.00 Ad litem \$300-700 Attorney Fees \$5,000

* A guardianship court may use the Family Code when determining issues of access, possession, and support. Where these issues predominate, conservatorship is likely a more appropriate remedy.

- [1] Tex. Fam. Code § 162.001(b)(2); Tex. Fam. Code § 162.002(a).
- [2] Tex. Fam. Code § 162.001(b)(3)-(4); Tex. Fam. Code at §162.002(a).
- [3] Tex. Fam. Code §162.001(b)(1).
- [4] Tex. Fam. Code § 162.001(c).
- [5] Tex. Fam. Code § 162.002(b)(1).
- [6] Tex. Fam. Code § 162.002(b)(2).
- [7] Tex. Fam. Code § 162.010(a).
- [8] *Id.*
- [9] Tex. Fam. Code § 162.502.
- [10] Tex. Fam. Code § 162.001; Tex. Fam. Code § 162.009 Tex. Fam. Code § 162.010(c); Tex. Fam. Code § 153.002; Tex. Fam. Code § 162.016(b).
- [11] Tex. Fam. Code § 162.0085.
- [12] Tex. Fam. Code § 162. 0085.
- [13] Tex. Fam. Code § 162.007.
- [14] Tex. Fam. Code § 162.008.
- [15] Tex. Fam. Code § 162.008.
- [16] Tex. Fam. Code § 162.008 (c).
- [17] Tex. Fam. Code § 162.014
- [18] Tex. Fam. Code § 162.014.
- [19] Tex. Fam. Code §162.016.
- [20] Tex. Fam. Code § 161.206(b).
- [21] Tex. Fam. Code § 162.017.
- [22] *Id.*
- [23] *Id.*

- [24] Tex. Fam. Code § 161.206(b).
- [25] Tex. Fam. Code § 162.016.
- [26] Tex. Fam. Code § 153.131(a)-(b).
- [27] Tex. Fam. Code § 153.005(a)(2).
- [28] Tex. Fam. Code § Section 153.005(a)(2).
- [29] Tex. Fam. Code § 153.131(a); *Troxel v. Grandville*, 530 U.S. 57 (2000).
- [30] *In the Interest of J.A.J., A Child*, No. 07-0511 S.W.3d 611 (Tex. Nov. 2, 2007)
- [31] Tex. Fam. Code § 153.002.
- [32] Tex. Fam. Code § 102.003(a)(1)-(12)
- [33] Tex. Fam. Code § 102.003(b).
- [34] Tex. Fam. Code § 102.004
- [35] Tex. Fam. Code § 102.004(b).
- [36] Tex. Fam. Code § Section 102.004(b).
- [37] *In re C.M.C.*, 192. S.W.3d 866, (Tex. App—Texarkana 2006, no pet.).
- [38] Tex. Fam. Code § 153.002.
- [39] *Holly v. Adams*, 544. S.W.2d at 371-72 (Tex. 1976).
- [40] Tex. Fam. Code § 156.101(a)(1)-(3).
- [41] *In re Z.B.P.*, 109 S.W.3d 772, 779 (Tex.App.-Fort Worth 2003, no pet).
- [42] *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex.App.-Houston [14th Dist.] 2009, no pet.).
- [43] *In re A.L.E.*, 279 S.W.3d 424, 429 (Tex.App.-Houston [14th Dist.] 2009, no pet.).
- [44] Tex. Fam. Code § 153.131(a).
- [45] Tex. Fam. Code § 153.005(a)(2).
- [46] Tex. Fam. Code § 153.005(c)(1)-(3).

- [47] Tex. Fam. Code § 153.131(a).
- [48] Tex. Fam. Code § 153.004(a); Tex. Fam. Code. § 153.004(d).
- [49] Tex. Fam. Code § 153.004(b).
- [50] Tex. Fam. Code § 153.004(b); Tex. Fam. Code § 153.004(e).
- [51] Tex. Fam. Code § 153.004(d-1)(1).
- [52] Tex. Fam. Code § 153.004(d-1)(2).
- [53] Tex. Fam. Code § 153.010 (d)(d-1)(d)(2)(A)-(D).
- [54] Tex. Fam. Code § Section 153.191.
- [55] Tex. Fam. Code § 153.372(a); Tex. Fam. Code § 153.006(a).
- [56] Tex. Fam. Code § 153.373(1)-(2).
- [57] Tex. Fam. Code § 153.374(a)-(b).
- [58] Tex. Fam. Code § 153.431.
- [59] Tex. Fam. Code § 153.375.
- [60] Tex. Fam. Code § 153.027; Tex. Fam. Code § 153.132; Tex. Fam. Code § 153.192.
- [61] Tex. Fam. Code § 153.371.
- [62] *Id.*
- [63] Tex. Fam. Code § 153.376(a)-(b).
- [64] Tex. Fam. Code § 153.075.
- [65] Tex. Fam. Code § 154.001.
- [66] Tex. Fam. Code § 154.001(2)(c).
- [67] Tex. Fam. Code § 154.001(a-1);(2)(b).
- [68] Tex. Fam. Code § 101.025.
- [69] Estates Code. §201.001.

[70] Tex. Fam. Code § 151.001

[71] Estates Code. §1104.051(a)

[72] *Id.*

[73] Estates Code. §1104.051(b)

[74] Estates Code. §1104.051(c)

[75] Estates Code. §1104.052(2)-(3)(A)-(B)

[76] Estates Code. §1104.0002

[77] *Id.*; Estates Code. §1104.051(b)

[78] Estates Code. §1104.402; Estates Code § 1104.409.

[79] Estates Code. §1104.351-1104.358.

[80] Estates Code. §1163.151.

[81] <http://brazoriacountytx.gov/departments/guardianship-office/frequently-asked-questions>.

[82] *Id.*

[83] Tex. Fam. Code. § 153.431.

[84] Estates Code. § 1101.101(a)(2)(C).