INSIDER SECRETS FOR WINNING NON-PARENT CUSTODY CASES IN TEXAS

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Testimonials

"I thoroughly enjoyed having Holly as my attorney and an advocate for my daughter and me. We worked together for about 3 years. We often joked about having my picture in her office for being her longest tenured client. Holly cares about protecting parental rights. As my case morphed, it was obvious Holly was fighting for something bigger. We've both testified on several occasions for stronger protection of parental rights after my case was done.

Holly is an amazing writer and spent countless hours writing hundreds of pages for my case. She is always prepared, focused, organized, and very strategic. One of my favorite moments of our case was when she got the opposing parties to testify I was a great dad. That was gold for our case.

Holly is a great human and someone I have the utmost respect for. Holly had a role in 2 important events of my life. She championed and won our case at the Supreme Court and she helped my wife adopt my daughter."

- Chris, aka C.J.C.

"First and most importantly, Holly appealed my case and won! Hiring her to handle my appeal was the best decision I've ever made for my daughter. She is truly an expert on family law, and her briefing and oral argument to the Court of Appeals was brilliant. She and her firm are very approachable and responsive. As a mother who had to endure the trauma of a 3-year court battle, Holly and her team provided the support and expertise I needed to keep fighting. Simply put, she is the best in her field, and I am very fortunate to have had the opportunity to work with her."

- April (Google)

"Holly helped me in a case to educate the judge on the current state of the law resulting from a case Holly argued, and won, in the Texas Supreme Court. That particular point of law is very complex and extremely confusing, even to the most experienced and knowledgeable lawyers and judges, and she was successful in this case as she usually is. Holly is an excellent attorney and a good person. She literally dropped what she was doing so to speak to help me on my case. I can't speak highly enough of her, and her legal abilities and knowledge. Anyone would be fortunate to have Holly represent them."

- Steve (Google)

Introduction

In June of 2020, the Texas Supreme Court issued the landmark parental rights opinion *In re C.J.C.*, wherein the Court affirmed the constitutional rights of fit parents to make decisions regarding the care, custody and control of their children free from government interference. I am the attorney who represented the father in *C.J.C.* Through that case, I became one of the foremost experts in Texas on the issue of parent vs. non-parent litigation. I have spoken at dozens of bar association meetings and CLE events since the summer of 2020, sharing my knowledge on the topic. I continue to see both attorneys and judges who do not understand *C.J.C.* and who confuse and conflate the two parental presumptions that exist under Texas law.

This book will provide an in-depth analysis of the *C.J.C.* opinion, including the distinction between third party standing and entitlement to relief and the difference between the statutory parental presumption contained in Section 153.131 of the Texas Family Code and the constitutional

fit parent presumption as set forth in *Troxel* and *C.J.C.* The book will also discuss more recent cases interpreting *C.J.C.*, and the unanswered questions that remain in child custody litigation between parents and non-parents. My hope is to give family lawyers and judges a better understanding of the rights of parents and non-parents in custody litigation to help promote greater uniformity across the state in these types of cases.

Chapter 1

Parental Rights are Constitutional Rights

In the United States, parental rights are some of the oldest, most protected fundamental rights we have as citizens. The Fourteenth Amendment, also known as the Due Process Clause, states that "[N]o state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Due Process Clause has been used to protect a whole host of rights considered fundamental in this country. It extended the rights specifically enumerated in the Bill of Rights (freedom of speech, freedom of religion, right to bear arms, etc.) to apply to the states. It also protects a number of rights that are not specifically spelled out elsewhere in the constitution. Over the years the United States Supreme Court has looked to the Due Process Clause to protect rights deemed

fundamental even in the absence of specific enumeration in the constitution. For example, in *Roe v. Wade*, the Court relied on the due process clause to protect abortion rights, and in *Obergerfell v. Hodges*, the Court found that the Due Process Clause protected the right to marry someone of the same sex.

As of the writing of this book in 2022 following the overturning of *Roe v. Wade*, it remains to be seen to what extent our current Supreme Court will strip away rights previously found to be protected by the Due Process Clause, but it is very unlikely parental rights will make it to their chopping block. The fundamental nature of parental rights has historically not generated much controversy. Courts around the country have routinely found that parental rights are one of our oldest and most sacred fundamental rights, and I would fully expect the Court to continue protecting parental rights for years to come.

The United States Supreme Court has recognized the fundamental nature of parental rights in the care and custody of their children, going back at least as far as *Meyer v. Nebraska* in 1923, but the landmark Supreme Court case on the issue came much more recently. In 2000, the United States Supreme Court expressly held that the due process clause protects the fundamental rights of fit parents in *Troxel v. Granville*[1].

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[1] *Troxel v. Granville*, 530 U.S. 57 (2000)

Troxel involved a Washington statute that allowed any interested person to file a custody suit, and the court could award visitation if it believed it was in the best interest of the child. In *Troxel*, the father died, and the paternal grandparents sued for visitation rights. Prior to the father's death, he and the mother were separated, and he lived with the paternal grandparents. At first, the mother continued to allow the grandparents to have access to the children, but she later wanted to limit their access to once a month. The trial court awarded the grandparents visitation one weekend per month, one week during the summer, and four hours on each of the grandparents' birthdays. Ultimately, in a plurality opinion by Justice O'Connor, the U.S. Supreme Court overturned the trial court's award and held that "so long as a parent ***adequately cares for his or her children*** *(**ie: is fit**)*, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[2]

The trial court had placed the burden on the parent, requiring her to show that it would not be in the children's best interest to have visitation with the grandparents. The U.S. Supreme Court found this burden to be improperly placed on the mother. Instead, the burden should have been

[2] *Troxel*, 530 U.S. at 68

on the grandparents to show that the mother was an unfit parent. "The Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."

Although courts around the country have been quick to distinguish *Troxel* as a case only addressing standing and as a case where the standing statute at issue was exceptionally broad, the underlying holdings in *Troxel* extend well beyond those limited issues. Courts distinguishing *Troxel* also often point out that it was "just" a plurality opinion. (Justices Rehnquist, Ginsberg, and Breyer joined Justice O'Connor in the plurality opinion. Justices Souter and Thomas each issued concurring opinions, and Justices Stevens, Scalia and Kennedy each issued dissenting opinions.) However, *Troxel* is considered the biggest case on the issue of constitutional parental rights, and its holding provides the basis for the protection of this fundamental liberty interest.

Chapter 2

Texas's Response to Troxel

Troxel happened to be a case involving standing, and it happened to be a case involving grandparents. As a result, Texas laws with respect to standing for grandparents and other family members seeking conservatorship or access changed following *Troxel* to require a showing of significant impairment. Specifically, Section 102.004(a)(1) of the Texas Family Code was amended to require a showing of significant impairment for a relative to have standing to seek conservatorship. Likewise, Section 153.433(a)(2) of the Texas Family Code, otherwise known as the Grandparent Access Statute, was amended to require a showing of significant impairment for a grandparent to obtain possession and access. These changes meant that following *Troxel*, in order for a grandparent or other relative to obtain conservatorship or an order for possession or access, that relative must first overcome the high threshold necessary to overcome the presumption that a fit parent acts in the best interest of his child.

The significant impairment standard has long been used in Texas law for protecting parental rights. Before *Troxel*, Texas incorporated the significant impairment standard when it created a parental presumption in favor of parents over non-parents in original suits. Specifically, the family code included a presumption that a parent or parents should be appointed managing conservator over a non-parent unless the appointment of the parent or parents would significantly impair the child's physical health or emotional development.[3] This has commonly been referred to amongst family lawyers as the "parental presumption" for decades, and leading up to *C.J.C.*, family lawyers generally treated this as the *only* presumption applicable to parents in child custody litigation.

[3] Texas Family Code § 153.131

Chapter 3

In re C.J.C.

Texas family lawyers and judges alike have long believed that the only presumption in favor of parents was the statutory parental presumption contained in Section 153.131 of the Texas Family Code. However, in taking this issue before the Texas Supreme Court in *In re C.J.C.*[4], we argued that a parent does not lose constitutional rights simply because that parent is involved in a modification rather than an original proceeding. The Texas Supreme Court agreed.

Background

C.J.C. began as an ordinary, simple modification between a mother and a father related to a child ("Abigail[5]") who was, at that time, three years old. Mother and Father were

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[4] *In re C.J.C.*, 603 S.W.3d 804, 807 (Tex. 2020)

[5] The Texas Supreme Court referred to the child as Abigail, choosing to use an alias. Because the Texas Supreme Court called her Abigail, this book will do the same.

appointed joint managing conservators in a prior order, with Mother having the exclusive right to designate Abigail's primary residence. The agreed prior order included a custom possession schedule that gave Mother slightly more than fifty percent of the time with the child and gave Father more than he would have had under an expanded standard possession order. In January of 2018, Mother filed suit, seeking to modify possession and access and child support based on an alleged material and substantial change in circumstances. Father moved to deny relief, alleging there had been no material and substantial change in circumstances, but the motion was never heard.

In July of 2018, Mother was tragically killed in a car accident. Abigail began living exclusively with Father at that time, but she saw her maternal grandparents ("Grandparents") numerous times in the weeks following her mother's death. Before the end of the month, Grandparents intervened in the lawsuit, seeking to be named joint managing conservators with Father and alleging that the appointment of Father as sole managing conservator would significantly impair Abigail's physical health or emotional development. Because Grandparents' petition failed to meet any possible grounds for standing under the Texas Family Code, Father moved to strike their intervention, seeking to have them dismissed for lack of standing.

Shortly thereafter, Mother's fiancé ("J.D.") filed his own petition in intervention, claiming he had standing because Mother and Abigail had lived primarily with him since August of 2017 and claiming he had actual care, custody and control of the child for more than six months. Father moved to strike J.D.'s intervention, arguing that J.D. also lacked standing. Grandparents and J.D. both amended their petitions in intervention to add more specificity to their grounds for standing. Father likewise amended his motions to strike.

The trial court held a hearing on standing. Despite clear evidence that grandparents lacked standing, the trial court denied Father's motions to strike and chose not to dismiss Grandparents or J.D. for lack of standing. This led to the first mandamus in the case, *In re Clay*[6].

Mandamus #1 – In re Clay

In Father's first petition for writ of mandamus, he argued the trial court abused its discretion in failing to grant his motions to strike and in failing to dismiss Grandparents and J.D. based on lack of standing. The Fort Worth Court of Appeals granted the mandamus in part and denied it in part,

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[6] *In re Clay*, No. 02-18-00404-CV, 2019 WL 545722 (Tex. App. – Fort Worth 2019, orig, proceeding) (mem. op.)

finding that Grandparents lacked standing but J.D. did not. Because Texas's response to *Troxel* was to require a showing of significant impairment for a grandparent or other relative to obtain standing in a child custody case, Grandparents could not get past the initial standing hurtle. In contrast, because J.D. had lived in the child's primary residence for more than six months, J.D. claimed standing under both Section 102.003(a)(9) and 102.003(a)(11) of the Texas Family Code.

Under Section 102.003(a)(9), a non-parent has standing if he 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 filing of the petition." In this case, the evidence showed that J.D. lived in the same home as the child for about 54% of the time over a period of 10-11 months. I argued in *In re Clay* that it should not meet the six month requirement because the cumulative total of time J.D. had with the child did not total six months. The Fort Worth Court of Appeals disagreed, finding that the non-parent must only live in the child's primary residence for six calendar months, regardless of how much time the non-parent actually lived with the child. I also argued that J.D.'s level of involvement with the child did not constitute "actual care, control and possession." He was never really responsible for the care of the child, but rather he was just there with the mother, who always maintained control during her periods of

possession. The Court of Appeals found that taking the child to the doctor once, occasionally getting up with her in the middle of the night, and getting her chocolate milk in the morning was enough to constitute "actual care, control and possession." As a result, J.D. was in under 102.003(a)(9).[7] It is important to note that 102.003(a)(9) does not require that a parent died. Would the Court of Appeals have reached the same conclusion had the mother not been killed and had the mother and J.D. broken up?

J.D. also sought standing under Section 102.003(a)(11), which gives standing to "a person with whom the child and the child's…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…parent is deceased at the time of the filing of the petition." This is commonly referred to as the "Step-Parent Statute," but it does not actually require that the non-parent be a step-parent. It could be anyone who just happened to live in the home, such as a live-in boyfriend or girlfriend, roommate, nanny, distant relative, or friend. I really thought that this case would end up being about the constitutionality of this statute, since it provides absolutely

[7] I still do not think a non-parent with the level of involvement J.D. had with a child should be enough to get in the door on standing. I think the *In re Clay* opinion creates a slippery slope for letting live-in boyfriends or girlfriends, roommates, or anyone else who happened to be living in a child's primary home and had any remote level of involvement with the child into a custody lawsuit.

no protections for the rights of the surviving parent. But, because the Court of Appeals found J.D. had standing under 102.003(a)(9), it was not relevant to the end result.[8]

Father subsequently petitioned the Texas Supreme Court as to J.D.'s standing, but the Court denied the petition without requesting full briefing. Grandparents also petitioned the Texas Supreme Court, in an attempt to overturn the Court of Appeals' ruling as to them, but their petition was denied without even requesting a response from Father.

Temporary Orders

Following the first mandamus and Grandparents' subsequent dismissal from the case, the trial court held a hearing on temporary orders. J.D. requested to be named joint managing conservator with Father, and he sought possession and access of Abigail. Despite evidence that Abigail was doing very well in her Father's exclusive care and would regress if J.D. were awarded possession and access, and despite no evidence whatsoever that Father was anything but a fit parent, the trial court named J.D. as a possessory conservator, with more rights that a non-parent possessory conservator under the family

[8] Should you find yourself fighting against a non-parent claiming standing solely based on 102.003(a)(11), I would absolutely make constitutional arguments against this provision.

code, and awarded him a stair-step visitation schedule. In addition to the standard rights given a non-parent possession conservator, the trial court gave J.D. the right to confer with the child's counselor, the right to receive information regarding school activities, and the right to attend school activities accompanied by the maternal grandmother and/or grandfather, at the Grandparents' election.

The rights and duties now required Father to provide J.D., a non-relative with limited history with Abigail, with important information concerning the health and welfare of the child. Even though Grandparents were dismissed for lack of standing, the trial court ordered that the maternal grandmother and/or grandfather attend all periods of possession with J.D. during his first phase of possession.

Father filed a motion to reconsider temporary orders, claiming the trial court's decision to grant J.D. possessory conservator rights and possession violated his constitutional rights as a fit parent and set forth problems that had already occurred as a result of the ruling. Father filed a supplemental brief in support of his motion, including affidavits from Father and the child's counselor detailing how Abigail had regressed since being forced to have visits with J.D. and being forced to return to the home she had not been back to since her mother died. Father specifically requested the opportunity to put on testimony to ensure the trial

court had all the relevant information before ruling, but the judge denied the motion without allowing testimony or argument.

Mandamus #2 – In re C.J.C.

Following the trial court's decision to grant temporary possessory conservator rights and possession to J.D., Father filed his second petition for writ of mandamus. This is the mandamus that ultimately led to the *C.J.C.* opinion. Father began by filing his petition for writ of mandamus in the Fort Worth Court of Appeals. That court denied the petition without requesting a response from J.D. (Our theory was that the court of appeals already wrote us one opinion, so they were punting this one to the Texas Supreme Court, but who really knows). Father then filed his petition for writ of mandamus in the Texas Supreme Court.

When you file in the Texas Supreme Court, you start with filing a shorter petition where your principal goal is convincing the Court to take your case. The Texas Supreme Court is generally not interested in a singular case. They want to take cases that matter to the law and that matter to a great number of cases within the state. Your petition starts by setting out your "Reasons for Review," a short introductory section that lays out why your case is important to the

jurisprudence of the state and why the Court should take it. Here was our "Reasons for Review" section from our petition to the Texas Supreme Court in *C.J.C.* (with some citations and record cites omitted):

Reasons for Review

The Due Process Clause of the Fourteenth Amendment is supposed to protect the rights of a fit parent to parent his or her child free from state interference. The Texas legislature has guaranteed those protections in standing statutes related to grandparents and family members by requiring a showing of significant impairment to overcome the presumption that a fit parent is acting in the best interests of his or her child. *See* Tex. Fam. Code § 102.004 (a)(1) (requiring a showing of significant impairment for a relative to have standing); Tex. Fam. Code § 153.433 (a)(2) (requiring a showing of significant impairment for a grandparent to have standing to seek possession and access). Unfortunately, numerous standing statutes, such sections 102.003(a)(9) and 102.003(a)(11) of the Family Code (the ones relied upon to give J.D. standing in this case), do not require a showing of significant impairment, thus opening the flood gates to allow live-in boyfriends, roommates, nannies, and other non-parents

with relatively minimal involvement with a child into conservatorship suits against fit parents.

This Court's narrow 5-4 opinion in *In re H.S.*, (allowing standing in a suit affecting the parent-child relationship under Family Code section 102.003(a)(9) to maternal grandparents who lived with the child in the child's principal residence for a long time while the mother was away) paved the way for J.D., an unrelated man who lived with Mother and Child for a little more than half the time over a period of ten or eleven months and who never had any actual involvement with Child outside of Mother's involvement, to have standing to file for conservatorship against a fit father.

Standing is one thing, but giving an unrelated man who had relatively minimal involvement with a child conservatorship rights and a possession schedule over the objections of a fit parent is another. That is exactly what Respondent did when she appointed J.D. as a temporary possessory conservator, gave him more rights than those provided by the Family Code for non-parent possessory conservators, and gave him a generous possession schedule with Child over Father's objections. This Court needs to send a loud and clear message to trial courts that just because someone has standing does not mean the courts can disregard the high threshold of the fit-parent presumption

put in place by the United States Constitution as interpreted by the United States Supreme Court in *Troxel*.

The Texas Attorney General recently issued an advisory opinion on this very issue, stating in unequivocal language that a trial court cannot substitute its own judgment for that of a fit parent about the best interests of a child, and courts must presume the fit parent is acting in the child's best interests when making decisions about access to a child. Unfortunately, an advisory opinion from the Texas Attorney General was not enough to keep Respondent from giving a non-parent conservatorship rights and possession over a fit parent's objections, in clear violation of *Troxel* and Father's constitutional rights. An opinion from this Court is vitally important to ensure all fit parents in Texas have their constitutional rights protected in light of the generous standing awarded to non-parents by statutes not requiring a showing of significant impairment, such as Texas Family Code §§ 102.003(a)(9) and 102.003(a)(11).

Father's Arguments

Father argued that the trial judge violated his due process constitutional rights when she awarded rights and possession to a non-parent over the fit Father's objections. The United States Constitution protects the rights of fit parents to handle

the care, custody, and control of their children free from state interference. Texas laws were changed following *Troxel*, but only with respect to grandparents and other relatives. Father argued *Troxel*'s holding is not limited only to family members, but it must be extended to all non-parents seeking conservatorship to protect parents' constitutional rights.

Father argued that the constitutional fit parent presumption must be distinguished from the parental presumption contained in Section 153.131 of the Texas Family Code, and the fit parent presumption must be applied in both original suits and certain modifications.

We knew that the Texas Supreme Court did not want to find statutes unconstitutional if at all possible, so in the interest of constitutional avoidance, we had to find a way for the Court to read the fit parent presumption into the current Texas Family Code. If that could not be done, numerous standing statutes and the entirety of Chapter 156 of the family code would have been unconstitutional for failing to protect the constitutional rights of fit parents. We encouraged the Court to read the fit parent presumption into the best interest analysis, which is ultimately what the Court did.

Fiancé's Arguments

The fiancé argued that the fit parent presumption and the parental presumption found in Section 153.131 of the family code were the same. As such, he argued the long-standing position that the parental presumption does not apply in modification proceedings. He relied heavily upon *In re V.L.K.*[9]

Majority Opinion

The Texas Supreme Court ruled 9-0 in favor of Father, making clear that the constitutional fit parent presumption applies not just in original suits, but also in modification proceedings where the parent had previously been appointed a managing conservator and a non-parent enters the suit for the first time. Justice Bland wrote the majority opinion, with Justice Lehrmann writing a concurring opinion.

The question presented to the Court was whether the presumption that fit parents act according to the best interest of their children applies when modifying an existing order that names a parent as the child's managing conservator. "Because a fit parent presumptively acts in the best interest of his or her child and has a 'fundamental right to make decisions concerning the care, custody and control' of that

[9] 24 S.W. 3d 338 (Tex. 2000).

child," the Court held that it does.[10] It is important to note that this case involved an unquestionably fit parent, where the fiancé made no attempt to argue Father was unfit.

Although the non-parent standing threshold in Texas is higher than the exceptionally broad standing statute at issue in *Troxel*, the standing statutes that gave J.D. standing did not incorporate a fit parent presumption into a custody modification proceeding. "Those who establish such standing face a different burden under the modification statute – a court may modify a custody order if it is 'in the best interest of the child' and 'the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed.'"[11]

Because neither the standing statutes nor the modification statute included the fit parent presumption, the Court determined that it must be read into the best interest determination. This is not merely one factor to be weighed against others in a traditional best interest analysis. This means that the first steps of any best interest analysis in a case against a non-parent must be to determine (a) if the fit parent presumption applies, and (b) if the fit parent presumption has been overcome before moving on to any additional factors. If it applies and has not been overcome,

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[10] *C.J.C.*, 603 S.W.3d at 808.

[11] *Id.* at 816.

the non-parent is not entitled to any rights or possession over the objections of the fit parent.

The Court held that in awarding J.D. visitation and overnight possession over the fit father's objections, the trial court substituted its determination of the child's best interest for her father's. This is exactly the opposite of the fit parent presumption that must be applied. "[A] court must apply the presumption that a fit parent – not the court – determines the best interest of the child in any proceeding in which a non-parent seeks conservatorship or access over the objection of a child's fit parent."[12] Further, the burden of overcoming the fit parent presumption must be on the non-parent.

[12] *Id.* at 817.

Concurring Opinion

In her concurring opinion, Justice Lehrmann pointed out that this ruling leaves unanswered the question of the burden of proof required to overcome the fit parent presumption. Because there was no evidence Father was unfit and J.D. made no attempt to make that argument, it was unnecessary for the Court to determine the standard for overcoming the fit parent presumption.

Chapter 4

Key Take-Aways

Key Take-Away #1 – C.J.C. is Not About Standing

C.J.C. is not about standing. It is about whether a non-parent is entitled to any relief in a case against a parent. Certain standing statutes incorporate the constitutional protections of the fit parent presumption, but many, such as 102.003(a)(9) and 102.003(a)(11), the two standing statutes used to give the fiancé standing in *C.J.C.*, do not. *In re C.J.C.*, 603 S.W.3d 804, 816 (Tex. 2020).

Section 102.003(a)(9) gives standing to a non-parent who has had "actual care, control and possession" of the child for at least six months ending not more than 90 days before filing the petition. Whether or not a non-parent meets this criteria does not, in and of itself, address the fit parent presumption.

Section 102.003(a)(11) gives standing to a non-parent "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." This provision requires no level of involvement in the child's life from the non-parent other than having lived in the same home for the requisite time, and it very clearly does not incorporate the fit parent presumption.

Standing gets a party in the door to filing a lawsuit. It does not mean that the party has any right to relief. In cases involving non-parents, courts must ask not just if a party has standing but if that party can overcome the fit parent presumption. If he cannot, the court cannot award any rights or possession to that non-parent over the objections of the fit parent.

Key Take-Away #1 - The Parental Presumption vs. The Fit Parent Presumption

Texas family lawyers and judges alike have long believed that the only presumption in favor of parents was the statutory parental presumption contained in section 153.131 of the Texas Family Code. However, in taking this issue before the Texas Supreme Court in *In re C.J.C.*, we argued that a parent does not lose constitutional rights simply because that

parent is involved in a modification rather than an original proceeding. The Texas Supreme Court agreed, at least in certain types of modifications.

Texas law has two distinct, different presumptions – the statutory parental presumption found in Section 153.131 of the Texas Family Code and the constitutional fit parent presumption as set forth in *Troxel* and *C.J.C.* Many lawyers and judges confuse and conflate these two presumptions.

Texas Family Code § 153.131 is a statutory presumption that it is in the best interest of the child that a parent be appointed sole managing conservator over a non-parent unless the appointment would significantly impair the child's physical health or emotional development. Tex. Fam. Code § 153.131(a). The statutory presumption only provides a presumption that a parent should be appointed sole managing conservator over a non-parent and does not prevent a court from awarding rights, duties, and possession to a non-parent. Tex. Fam. Code § 153.131.

The statutory presumption applies only in original suits, as it was explicitly excluded from the Chapter 156 modification statute. Modification suits raise additional policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases. When you have a modification between the same two parties, the first

judgment between the parties is *res judicata* of the question of the child's best interest and of custody.

In contrast, *C.J.C.* addressed a *constitutional* presumption that a fit parent is presumed to act in the best interests of his or her child. The constitutional presumption discussed in *C.J.C.* prevents a court from giving a non-parent *any* rights, duties, or possession over the objections of a fit parent in certain situations.

The *constitutional* fit parent presumption, as discussed in *Troxel* and *C.J.C.*, is a presumption separate and apart from the statutory parental presumption. The constitutional presumption provides that "a court must apply the presumption that a fit parent – not the court – determines the best interest of the child in any proceeding in which a non-parent seeks conservatorship or access over the objections of a child's fit parent."[13]

Key Take-Away #2 - When does the fit parent presumption apply and when does it not?

The constitutional fit parent presumption set forth in *Troxel* and *C.J.C.* applies in original suits involving a non-parent and in certain modifications. Specifically, it applies in modifications where the parent or parents were previously

[13] *C.J.C.*, 603 S.W.3d at 817.

appointed managing conservator(s) and a non-parent enters the case for the first time. The Court in *C.J.C.* stated that its holding does not alter the burden of proof for modifications of prior orders in which neither parent was named a managing conservator. "But when non-parents seek court-ordered custody of a child subject to an existing order, under which one or both fit parents were appointed managing conservators, that parent or parents retain the presumption that protects their fundamental right to determine their child's best interest."[14]

Although *C.J.C.* was a modification, its holding is not limited only to modification proceedings. It necessarily must also apply in original suits. The statutory parental presumption is insufficient to protect the constitutional rights of fit parents because it only addresses whether the parent or the non-parent should be named managing conservator. It does not prohibit a court from awarding possessory conservatorship or visitation to a non-parent if the parent is fit. If the constitutional fit parent presumption did not apply in original suits, we would be giving greater protections to parents when a non-parent files into a case with a prior order than when a non-parent files against a parent in an original suit. Such a result would be illogical and unconstitutional.

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[14] *C.J.C.*, 603 S.W.3d at 819.

There are certain modification scenarios where a parent is not entitled to this constitutional fit parent presumption. If the parent were named as a possessory conservator in the prior order, that parent is no longer entitled to the presumption in a future modification. It does not matter if the managing conservator is a parent or a non-parent. The rationale is that the parent was found to be unfit in the prior case, as evidenced by the possessory conservator designation, and has lost the benefit of that presumption going forward.[15] Keep this in mind when you have a client considering agreeing to be named as a possessory conservator, even if a non-parent is not currently in the picture.

Additionally, if a parent and non-parent were appointed as joint managing conservators in a prior order, the parent is not going to be entitled to the benefit of the fit parent presumption in a future modification. Although *C.J.C.* did not involve a modification proceeding in which a parent and non-parent were previously appointed joint managing conservators in a prior order, the Court's opinion gave a clear

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[15] *See In re B.B.*, 632 S.W.3d 136 (Tex. App. – El Paso 2021) (holding that because the father was previously the equivalent of a possessory conservator, not a managing conservator, in a California order, he was not entitled to the fit parent presumption); *Interest of H.V.S.*, No. 04-20-00217-CV, 2020 WL 5646472 (Tex. App. – San Antonio 2020) (finding that because the mother was not a managing conservator in the prior order, she was not entitled to the benefit of the fit parent presumption).

indication as to what the result would be in such a situation: the prior order is *res judicata* and the parent is no longer entitled to any presumption in favor of that parent.[16] Keep this in mind when you have a client considering agreeing to let a non-parent into a final order in any capacity.

Similarly, if a parent was appointed a managing conservator and a non-parent was appointed a possessory conservator in the prior order, the parent is not going to be entitled to the benefit of the fit parent presumption either. The non-parent had to overcome the fit parent presumption in the prior order to be entitled to receive *any* rights or possession, so if that non-parent was named a possessory conservator, the non-parent necessarily overcame the fit parent presumption in the prior suit.

Key Take-Away #3 - What is the standard?

As Justice Lehrmann pointed out in her concurrence, *C.J.C.* did not set forth the standard a non-parent must meet to successfully overcome the fit parent presumption. "I write

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[16] *C.J.C.*, 603 S.W.3d at 819, FN 78 ("As the Nevada Supreme Court has stated in construing a modification statute without a parental presumption: 'When a non-parent obtains visitation through a court order or judicial approval, they have successfully overcome the parental presumption and are in the same position as a parent seeking to modify or terminate visitation.' *Rennels v. Rennels*, 127 Nev. 564, 257 P.3d 396, 401 (2011)").

separately to highlight an equally important issue that the Court appropriately does not reach but with which trial courts will undoubtedly continue to struggle: the proper evaluation of whether the fit-parent presumption has been overcome in a particular case."[17]

Following *Troxel*, both the Texas legislature and the Texas Supreme Court required proof of significant impairment to rebut the presumption that a parent acts in the child's best interest with regards to standing for grandparents and other relatives.[18] Texas case law is clear that the significant impairment burden is very difficult to overcome. Texas appellate courts have found the following evidence sufficient to establish significant impairment:

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[17] *C.J.C.*, 603 S.W.3d at 821.

[18] *See* Tex. Fam. Code § 102.004(a)(1) (requiring a showing of significant impairment for a relative to have standing); Tex. Fam. Code § 153.433(a)(2) (requiring a showing of significant impairment for a grandparent to obtain possession and access); *In re Derzapf,* 219 S.W.3d 327, 330 (Tex. 2007) (finding no significant impairment where the father had relinquished care to the grandmother following the mother's death and a court-appointed psychologist found it might be harmful to cut off the grandmother's access to the children); *In re Scheller*, 325 S.W.3d 640, 643 (Tex. 2010) (orig. proceeding) (per curiam) (finding no significant impairment when the grandparent presented evidence the children displayed anger, a child was wetting the bed and having nightmares, witnesses testified that denying contact between the children and grandfather would impair the children's physical or emotional development, and the grandfather was the only remaining maternal familial connection).

- *In re L.D.F.*, 445 S.W.3d 823, 831-32 (Tex. App. – El Paso 2014, no pet.) - Significant impairment found when the parent assaulted family members, was hospitalized for drug use and mental health reasons five times in five years, and refused ongoing therapy or medication for his mental health issues;

- *Compton v. Phannenstiel,* 428 S.W.3d 881, 884 (Tex. App. – Houston [1st Dist.] 2014) – Significant impairment found where the parent used drugs, physically and verbally mistreated her children, was extremely neglectful and had been arrested four times in the six months before the final hearing;

- *In re R.T.K.*, 324 S.W.3d 896, 904 (Tex. App. – Houston [14th Dist.] 2010) – Significant impairment found when the parent was incarcerated for much of the child's early life, was absent from the child's life for more than two years, and repeatedly failed to exercise visitation rights;

- *Taylor v. Taylor*, 254 S.W.3d 527, 537-37 (Tex. App. – Houston [1st Dist.] 2008, no pet.) – Significant impairment found when the parent was physically violent, favored the children of his girlfriend, refused

to seek help after learning the child was possibly sexually abused; and

- *In re C.R.T.*, 61 S.W.3d 62, 68 (Tex. App. – Amarillo 2001) – Significant impairment found where the parent had a drug problem, did not support her children, and was irresponsible.

In contrast, courts in the following cases have found the circumstances did not constitute significant impairment:

- *Gray v. Shook*, 329 S.W.3d 186, 198 (Tex. App. – Corpus Christi 2010) (*rev'd in part on other grounds*) – No significant impairment found when the child would be uprooted from the life and people who had cared for her for five years;

- *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990) – No significant impairment found where the parent was an abused spouse, was unemployed, and lived in crowded conditions;

- *In re S.T.*, 508 S.W.3d 482, 497-98 (Tex. App. – Fort Worth 2015, no pet.) – No significant impairment found when father had a history of substance abuse

and criminal activities, but he had not continued since being released on parole, had appropriate housing and income, had completed parenting classes, and was compliant with medication for mental illness;

- *Critz v. Critz*, 297 S.W.3d 464, 477-78 (Tex. App. – Fort Worth 2009) – No significant impairment found when the parent had a history of drug abuse, did not own a vehicle, lived with boyfriend's parents, and was unemployed;

- *Whitewell v. Whitewell*, 878 S.W.2d 221, 223 (Tex. App. – El Paso 1994, no writ) – No significant impairment found when the Australian parent intended to move with a child who had significant health issues from the United States to Australia against the intervening grandparents' wishes;

- *In re W.G.W.*, 812 S.W.2d 409, 414-15 (Tex. App. – Houston [1st Dist.] 1991, no writ) – No significant impairment found when the parent moved several times, brandished a fireplace poker in front of her

children, and tried to stab a non-parent in front of the children;

- *Neely v. Neely*, 698 S.W.2d 758, 760 (Tex. App. – Austin 1985, no writ) – No significant impairment found when a parent had let the house get "pretty bad" and paid more attention to one child than another; and
- *In re K.R.B.*, No. 02-10-0021-CV (Tex. App. – Fort Worth 2010, no pet.) (memo op,; 10-7-10) – No significant impairment found where the parent had a history of drug abuse and associating with drug users but had passed all drug tests in the twenty months before trial.

It is clear based on *C.J.C.* that the burden to overcome the fit parent presumption must be high because it is of constitutional dimensions. Further, the Texas legislature has previously found the significant impairment threshold to be the appropriate standard when it incorporated that burden into certain standing statutes in response to *Troxel*.

As you will see more fully discussed later, Texas courts of appeals have started to land on the significant impairment threshold as the correct standard for overcoming the fit parent presumption.

Chapter 5

Post C.J.C. Cases

As of the writing of this book (September 2022), there have been only a dozen cases substantively interpreting *C.J.C.* Two cases addressed the application of the fit parent presumption. The remainder fall into one of two categories: cases heavily favoring parents or cases heavily deferring to trial courts.

A. Cases Addressing Application of the Fit Parent Presumption

To date, two cases have addressed whether a parent is entitled to the benefit of the fit parent presumption when that parent was not appointed as a managing conservator in the prior order.

1. In re B.B., 632 S.W.3d 136 (Tex. App. – El Paso 2021)

This was a CPS case where DFPS removed the child from the mother's home and the father sought custody. The department was granted temporary

managing conservatorship of the child, and the father filed a petition for writ of mandamus. The father lived in California, and the mother resided in Texas. The mother had moved away when the child was only one year old, and the father had visited only a handful of times in the past six years. The Court distinguished the case from *C.J.C.* because the father was not previously named a managing conservator of the child. He held the equivalent of possessory conservatorship in California. The Court determined that because he was not previously named as a managing conservator, he was not entitled to the fit parent presumption.

2. *Interest of H.V.S.*, No. 04-20-00217-CV, 2020 WL 5646472 (Tex. App. – San Antonio 2020)

This was also a CPS case. The trial record showed evidence of the mother's improvement since the beginning of the CPS case, and the court of appeals agreed the mother's position had materially and substantially changed. The Court found that because the mother was not a managing conservator in the original order, she did not receive the benefit of the fit parent presumption. The Court referenced in a footnote the line from *C.J.C.* stating that it did not

alter the burden of proof for modifications when neither parent was named as a managing conservator in the original order.

B. Cases Ruling in Favor of Parents

1. *Interest of S.K. and L.K.*, No. 13-19-00213-CV, 2020 WL 4812633 (Tex. App. – Corpus Christi 2020)

This is a CPS case. When L.K. was born with opiates in his system, the parents entered into a family-based safety plan with the Department that resulted in the children being placed with their maternal grandmother. The affidavit alleged the mother continued to use illegal drugs and the father was verbally abusive toward the mother. The department was named temporary managing conservator, and the parents were ordered to complete services. The children were placed with the maternal grandmother for more than twelve months. The maternal grandmother intervened, seeking to be named sole managing conservator or, alternatively, a possessory conservator. The Department recommended the court name the father sole managing conservator with the grandmother as a possessory conservator.

Evidence at trial showed the mother did not complete her services and did not regularly visit the children, but the father had successfully completed his service plan, including a psychological evaluation, individual counseling, and anger management. The children were bonded to the father and were happy when they learned they were going to live with him. The testimony showed the children were very bonded to the maternal grandmother. The caseworker opined that the children would be harmed if the grandmother did not have visitation, and she did not believe the father would permit that visitation without a court order. Both the caseworker and CASA testified they believed it would be harmful for the children to be cut off from the maternal grandmother, who had been their primary caretaker.

The final order dismissed the department, named the father as sole managing conservator, and named the grandmother as a possessory conservator with possession. The father appealed.

The court of appeals initially issued an opinion in favor of the non-parent the day before the *C.J.C.* opinion came out. In light of that opinion, the Court, *sua sponte*, vacated its original opinion and entered a new one in favor of the father. In its new opinion, the

Court found that, pursuant to *C.J.C.*, "to have properly exercised its discretion in ordering visitation over Father's objection, there must have been sufficient evidence presented to the trial court to overcome the presumption that Father acts in his child's best interest. We find no such evidence in the record."[19]

The non-parent petitioned to the Texas Supreme Court, which initially denied the petition. However, following a motion for rehearing, the Texas Supreme Court has now granted full briefing in the case. Watch for an opinion in this case in 2023, which very likely will provide more clarification on the level of proof required to overcome the fit parent presumption.

2. *In re B.F.*, No. 02-20-00283-CV, 2020 WL 6074108 (Tex. App. – Fort Worth 2020)

The father requested mandamus relief from a temporary order that granted a non-parent possessory conservatorship and periods of possession of the child. The parents were named joint managing conservators of the child. The non-parent did not specifically argue the father was unfit but presented "factors" for the court to consider. These factors included a claim that the father had abused methamphetamines in the

[19] *Interest of S.K.*, 2020 WL 4812633 *5.

past. No evidence was presented showing the father was currently using drugs. There was also a claim that there was a current CPS case against the father's girlfriend. Nothing provided to the court relating to the CPS case mentioned the father. Because the court of appeals did not find any evidence of the father being unfit, mandamus was granted based on *C.J.C.*

3. *In re G.B. and L.B.*, No. 05-21-00463-CV, 2021 WL 4071152 (Tex. App. – Dallas 2021)

The father filed for mandamus after the trial court's temporary orders awarded the grandmother possessory conservatorship and access to the children. The mother and father had been named joint managing conservators in their final decree of divorce, with the mother having the exclusive right to designate the primary residence. For at least a year before the mother died in January 2021, that residence was the grandmother's home. After the mother died, the grandmother refused to return the children to the father. The father sought and was granted a writ of habeas corpus, and the children were returned to him.

The grandmother intervened, seeking to be named sole managing conservator. The father moved to strike based on standing. The trial court held a

hearing on the father's motion to strike and the grandmother's request for temporary orders. The court later interviewed the children in chambers. The trial court denied the motion to strike and entered temporary orders appointing the grandmother as a possessory conservator, setting a visitation schedule, and granting her electronic access.

The father argued on mandamus that the trial court abused its discretion in giving the grandmother possession and conservatorship rights because she did not overcome the fit parent presumption. The court of appeals agreed, finding that the facts largely mirrored the facts in *C.J.C.* The father was an involved parent and the only possible evidence against him was that he did not use his Thursday periods of possession. Further, the trial court specifically found that the father was a fit parent, and the court of appeals felt the record supported that finding. The court of appeals overturned the decision because the trial court substituted its opinion of best interest for that of the father when it appointed the grandmother as a possessory conservator over the father's objections.

4. *In re S.D.*, No. 14-20-00851-CV, 2021 WL 3577852 (Tex. App. – Houston [14th Dist.] 2021)

The trial court named mother as temporary sole managing conservator and grandmother as temporary possessory conservator. While they were married, the mother, father and child all lived in the home with the paternal grandmother. When the parents divorced, they were named joint managing conservators, with father having the exclusive right to designate the primary residence. The father continued to live with the paternal grandmother. The parents remained joint managing conservators in a subsequent modification. The father then died, and the child went to live with the mother. The grandmother petitioned to modify, seeking to be the managing conservator with the exclusive right to designate the primary residence or, alternatively, have possession and access of the child. The trial court entered temporary orders naming mother as temporary sole managing conservator and naming the grandmother as a non-parent temporary possessory conservator with a standard possession order.

The mother filed for mandamus. She argued she was necessarily fit based on the trial court's decision to name her as sole managing conservator, and as

such, the court could not name grandmother as a possessory conservator. The grandmother argued that she rebutted any fit parent presumption, as demonstrated by the trial court's decision to appoint her as possessory conservator. The grandmother raised concerns about the mother's decision to remove the special needs child from his private school and the mother's decision to live with her long-time boyfriend. She argued the mother could not provide a safe environment for the child.

The grandmother argued that the trial court was authorized to consider her as a possessory conservator, citing *Shook v. Gray*.[20] The Court of Appeals, in ruling in favor of the mother, found that "the Texas Supreme Court's decision in *C.J.C.* forecloses consideration of Grandmother as possessory conservator over a fit parent's objections." [21]

5. *In re B.A.B.*, No. 07-21-00259-CV, 2022 WL 1687122 (Tex. App. – Amarillo 2022)

The father had been previously named joint managing conservator with the mother. The mother died, and the maternal grandmother and

[20] 381 S.W.3d 540 (Tex. 2012)

[21] *S.D.*, 2021 WL 3577852 at *6.

step-grandfather intervened. The trial court found standing under 102.003(a)(9) and awarded the grandparents conservatorship and possession. The father filed for mandamus.

The grandparents alleged the father voluntarily relinquished the child for over a year, tracking the language of Section 153.373 of the Texas Family Code (rebutting the statutory parental presumption if the trial court finds voluntary relinquishment has occurred). The Court found that the grandparents failed to establish voluntary relinquishment for the requisite time, which suggests the Court believed that voluntarily relinquishment for a period of a year or more would be enough to rebut the fit parent presumption, not just the statutory parental presumption.

The grandparents argued they successfully rebutted the fit parent presumption by presenting evidence the father did not contact CPS when he learned it was investigating Mother for alcohol abuse and that the father's attendance at AA meetings demonstrated his own addiction. The Court noted that the grandparents did not allege grounds, nor did they offer any evidence intended to rebut the presumption that the father was acting in the child's best interest, and it

ultimately concluded the court abused its discretion by awarding rights and possession to the non-parents over the father's objections.

(In reaching its conclusion, the Court noted that the trial court did not make a finding that the father was unfit. It is common for trial courts to enter temporary orders without explicitly making any findings of fact or conclusions of law, and parties are not required to request them following a temporary order ruling. It would be prudent for attorneys to request this specific finding one way or another to support a court's ruling.)

6. *In the Interest of N.H.*, No. 14-21-00409-CV, 2022 WL 2719919 (Tex. App. – Houston [14th Dist.] 2022)

The parties in this case were two women that were formerly in a dating relationship. Mother became pregnant through assisted reproduction. Ex-Girlfriend was involved throughout the process and acted as a second mother to the child for the first 18 months of her life. Ex-Girlfriend did not, however, take any steps to adopt or otherwise become a legal parent while the parties were still together, nor did the parties ever marry. The parties broke up, and Ex-Girlfriend filed a SAPCR.

The trial court simultaneously named Mother sole managing conservator but also found Mother to be an unfit parent for purposes of the constitutional fit parent presumption. As a result, the trial court appointed Ex-Girlfriend as a non-parent possessory conservator with standard possession.

The Court of Appeals found that the record lacked support for the finding that Mother was unfit. The Court rejected Ex-Girlfriend's argument that the child viewed her as a parent, noting that she failed to adopt the child or enter into any kind of gestational agreement naming her as an intended parent.

The Court relied on the grandparent access statute for guidance in setting forth the standard applicable to this situation. Specifically, the Court said "[w]e encourage the Legislature to provide clearer guidance in this area, but until it does so, we believe based on the current state of our laws that a non-parent with standing who has no biological or legal relationship to the child cannot obtain court-ordered possession of a child over the wishes of a fit parent unless the non-parent proves, at a minimum, that the denial of possession would significantly impair the child's physical health or emotional well-being."[22]

[22] *In the Interest of N.H.*, 2022 WL 2719919 at *7

This is an especially noteworthy case because it is the first time any court of appeals has set forth a standard related to the fit parent presumption. Our firm handled this appeal, representing the prevailing Mother. I argued in *C.J.C.* that the Court should adopt the significant impairment standard, but the Texas Supreme Court chose not to address the issue. I have maintained since that time that significant impairment should be the standard, as it is the one that has been used by both the Texas Supreme Court and our legislature to protect parental rights, and it was specifically used in response to *Troxel* as to grandparents and other relatives.

There are a few things to keep in mind when reading this opinion and its significant impairment standard. First, this Court applied the significant impairment standard *after* it determined that the parent was fit. The significant impairment inquiry used was similar to the significant impairment inquiry for grandparent access. I believe you should also look to the significant impairment standard when looking at the fitness of the parent, but in a different way. Do the bad facts against the parent mean that appointment of only the parent(s) would significantly impair the child's physical health or

emotional development, or do we need to allow a non-parent into the picture to avoid significant impairment?

7. *In the Interest of A.V.* - No. 05-20-00966-CV; 2022 WL 2763355 (Tex. App. – Dallas 2022)

I represented the mother on this appeal, and the opinion came out just one week after the opinion in *N.H*. This was an original SAPCR case filed by the maternal grandparents against the mother. Although the father appeared early in the suit, he was uninvolved and did not participate in the trial. The mother gave birth to the child as a teenager and relied on her parents for help. She and the child lived with the grandparents off and on for several years.

The parties did not attend mediation, which meant the trial court limited them to an hour per side at final trial. Only the parties testified, and the grandparents raised only vague concerns about the mother's instability and her history of volatile relationships. The trial court named grandparents as sole managing conservators and mother as a possessory conservator with supervised-only access to the child.

The Court of Appeals reversed, finding that the trial court abused its discretion on all three

issues raised. They did not overcome the statutory parental presumption, the constitutional fit parent presumption, or the presumption that a standard possession order is the minimum amount of time that a parent should have with a child.

Just like the Court of Appeals in *N.H.*, this Court included the significant impairment standard as the standard for overcoming the fit parent presumption. Specifically, the Court found that the non-parent had the burden of showing the parent was unfit *or* that the denial of access to the non-parents would significantly impair the child's physical health or emotional development. (Even though this sounds like the grandparent access statute, this case did not involve any claims under that particular standard. The Court was clearly referring to the standard needed for a non-parent to overcome the fit parent presumption.)

Although the Court of Appeals reversed, it did not render. It remanded the case back to the trial court, noting that the child's and the parties' circumstances might have changed in the past two years and the court should proceed with making a decision consistent with its opinion. I find this decision to remand deeply troubling. The Court is allowing the grandparents, who failed to do discovery and wholly

failed to meet every burden they had at trial, to have a second bite at the apple and to be able to introduce another two years' worth of evidence at a subsequent trial. The Court should have reversed and rendered in favor of the mother. If the grandparents have new evidence to support their claims, they could certainly re-file another case and start that process over.

C. Cases Ruling in Favor of Non-parents

1. *In re C.D.C.*, No. 05-20-00983-CV; 2021 WL 346428 (Tex. App. – Dallas 2021)

The mother and father had been named joint managing conservators in a prior order, with the mother having the exclusive right to designate the primary residence. The mother and child lived with grandparents. Both parents had history of drug use, but the father had no problems in several years leading up to this case. The mother could not stay clean, so the father filed to modify, seeking to become primary. The maternal grandparents intervened, seeking to be named sole managing conservators or to be given the exclusive right to designate the primary residence. They alleged father and mother had neglected the child.

The trial court issued temporary orders that flipped primary custody to the father but named the grandparents and mother as joint managing conservators with a standard possession order. The father argued the evidence could not simultaneously be sufficient to flip primary custody to him but also sufficient for grandparents to overcome the fit parent presumption as to the father.

The three-justice panel of the court of appeals split and issued a majority and dissent. The majority found in favor of the grandparents and found that if there was *any* evidence to support a finding that a parent is unfit, the court of appeals will not overturn it. Justice Pedersen III issued a dissent.

(In my opinion, the majority opinion here is a terrible decision that minimizes the burden one must overcome when a constitutional right is at stake. We took this case to the Texas Supreme Court, who initially declined to take up the case. We filed for rehearing, and the Court requested a response. The trial court would not grant a continuance on the underlying suit, so when the trial court entered a final order that did not give rights or possession to the grandparents, the Texas Supreme Court case was

dismissed as moot. Unfortunately, that leaves this majority opinion standing.)

2. *S.C. v. Texas Dept. of Family and Protective Services*, No. 03-20-00179-CV, 2020 WL 4929790 (Tex. App. – Austin 2020)

This was a CPS case initiated by a report of inadequate supervision. The mother, who had previously been named a managing conservator in the prior order, subsequently failed a drug test and tested positive for methamphetamines. Prior to the trial, the mother tested negative for drugs for nine months, obtained housing, and attended visits with her children. The mother had a history of relapsing and CPS involvement. There was evidence questioning the reliability of the mother's negative drug test results, since the mother rarely tested on her assigned date and failed to submit for a nail test when requested. The trial court named the grandmother as managing conservator and the mother as possessory conservator.

The mother appealed, incorrectly arguing that the court should have applied the statutory parental presumption. The court of appeals found that the statutory presumption did not apply because this

was a modification, but it found that the fit parent presumption set forth in *C.J.C.* did apply.

In applying the fit parent presumption, the Court noted that "evidence of a recent turn-around in behavior by the parent does not totally offset evidence of a pattern of instability and harmful behavior in the past." *S.C.*, 2020 WL 4929790 *3 (citing *Spurck v. Texas Dep't of Family & protective Servs.*, 396 S.W.3d 205, 222 (Tex. App. – Austin 2013, no pet.). The Court also found it reasonable that the trial court weighed the evidence questioning the reliability of the mother's drug tests against mother. The Court ultimately found that the constitutional fit parent presumption had been rebutted, and the trial court did not abuse its discretion in naming a non-parent as managing conservator.

3. *In re Tad Mayfield*, No. 06-21-00115-CV, 2022 WL 363270 (Tex. App. – Texarkana 2022)

The children had been removed from the father in prior CPS cases, but the prior order named the father as a managing conservator. Drug test results came back positive for meth, so CPS filed again to terminate. CPS was named temporary managing conservator and the father was named temporary possessory conservator,

but case was ultimately dismissed after the statutory deadline passed. CPS did not refile. The child had been living with foster parents for 20 months.

Foster parents then filed suit seeking to be named managing conservators, alleging the parents had engaged in a history or pattern of child neglect. The father had only had phone visits and did not provide any financial support. He had been involved in three CPS cases for drug use and admitted to testing positive for meth in late 2019. He testified he had not been tested since July 2020, where he had negative hair follicle and urinalysis tests, that he was subject to random drug testing at work and had never failed, and that he had done everything he could to prove and maintain sobriety.

The trial court found the father to be an unfit parent. The trial court referenced his history of CPS cases and said the father's rights would have been terminated due to instability and drug use had the CPS case not been dismissed for missing the statutory deadline. The judge noted that the father testified contrary to ways he had testified in the past. The trial court named dad and foster parents joint managing conservators, with foster parents as primary, and limited the father to supervised-only possession.

The court of appeals refused to overturn the trial court's factual determination that father was an unfit parent. If there is "some evidence" to support a finding of unfitness, mandamus is not appropriate. The Court cites to *C.D.C.* for the proposition that "the law does not provide a basis for mandamus relief based on the trial court's factual determination and application of the law to that determination." *Mayfield*, 2022 WL 363270 at *4 (citing *In re C.D.C.*, No. 05-20-00983-CV, 2021 WL 346428 at *2 (Tex. App. – Dallas 2001).

(In my opinion, the facts of this case do support the determination that the fit parent presumption was overcome, but it concerns me that the language the Court used suggests it would not overturn any trial court's decision as long as there were "some" evidence to support it. This should be a high burden, and deferring to the trial court places the best interest analysis back into the hands of the trial judge, rather than in the hands of the fit parent.)

Chapter 6

Standing

Following our first mandamus in the *C.J.C.* litigation (*In re Clay*), we realized the crazy state of Texas third-party standing law made it easier for a non-relative who just happened to live in the home with a child to get in the door on standing than a grandparent or other relative who had been actively involved in a child's life since birth. This result seems patently wrong on its face. While *C.J.C.* did not address third party standing, it at least made it clear that standing is not enough. Standing alone does not entitle a non-parent to relief. That non-parent must still overcome the constitutional burden of the fit parent presumption.

It is important to remember that *C.J.C.* is not about standing. It is about whether a non-parent is entitled to any relief in a case against a parent. Certain standing statutes incorporate the constitutional protections of the fit parent presumption, but many, such as 102.003(a)(9) and 102.003(a)(11), the two standing statutes used to give the fiancé standing in *C.J.C.*, do not.

Section 102.003(a)(9) gives standing to a non-parent who has had "actual care, control and possession" of the child for at least six months ending not more than 90 days before filing the petition. Whether or not a non-parent meets this criteria does not, in and of itself, address the fit parent presumption.

Section 102.003(a)(11) gives standing to a non-parent "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." This provision requires no level of involvement in the child's life from the non-parent other than having lived in the same home for the requisite time, and it very clearly does not incorporate the fit parent presumption.

In all cases involving non-parents, if there is any possibility the non-parent lacks standing, the parent should promptly file a plea to the jurisdiction or motion to strike for lack of standing. Standing is jurisdictional and, if a party lacks standing, an order entered involving that party would be void for lack of subject-matter jurisdiction. Do not let a court consider temporary orders or any other substantive relief without *first* addressing the issue of standing. Be sure to get a ruling on this issue. If the court won't give you a ruling prior to moving into temporary orders, be sure to reiterate

your position that the non-parent lacks standing, you object to proceeding with a hearing on temporary orders, and your position that any order entered by the court would be void for lack of jurisdiction.

In the event the court denies your plea to the jurisdiction or motion to strike, just remember that standing gets a party in the door to filing a lawsuit but it does not mean that the party has any right to relief. Continue to argue that the non-parent is entitled to no relief without overcoming the fit parent presumption.

When a potential client is a non-parent, please take a serious look into both standing and the fit parent presumption before agreeing to take the case. Does that non-parent have any legitimate basis for claiming standing under the family code? If so, does that non-parent have any legitimate basis for overcoming the fit parent presumption? If not, it would be wise to decline representation and explain the reason why to the potential client. Do not waste judicial resources and drag parents through expensive litigation when you know there is no proper legal grounds for bringing a case by a non-parent.

Remember that because standing is jurisdictional, the non-parent must have standing at the time suit is filed. This means that a non-parent cannot file suit and then go on a discovery fishing expedition trying to find evidence of significant impairment sufficient for standing under 102.004

or the grandparent access statute. It is often not apparent from the pleadings what type of standing a non-parent claims to have, but if you represent the parent, file your plea to the jurisdiction or motion to strike as soon as possible to prevent that fishing expedition from happening.

If you represent the parent and your initial plea to the jurisdiction or motion to strike is denied but you believe standing is not appropriate, continue to maintain your claim that the non-parent lacks standing throughout the case. If possible, file a mandamus as soon as the judge denies your motion to avoid having to go through expensive litigation only to have orders be rendered void for lack of jurisdiction on standing grounds down the road.

Of note, in the recent case of *In the Interest of D.D.L.*, the Corpus Christi court of appeals suggested that evidence of the ability to overcome the fit parent presumption is required to establish standing.[23] Although I certainly believe this should be the case, I do not think anything else in our current state of the law supports such a position. In fact, one of our key arguments in *C.J.C.* was that just because a non-parent has standing under 102.003(a)(9) or (11) does not mean that non-parent is entitled to relief.

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[23] *In the Interest of D.D.L.*, No. 13-22-00062-CV, 2022 WL 3652496, *4 (Tex. App. – Corpus Christi-Edinburg 2022)

Chapter 7

Temporary Orders

If attempts to dismiss the non-parents from the litigation through a plea to the jurisdiction or motion to strike have been unsuccessful (or if the non-parents clearly do have standing under some provision of the code), you will almost certainly find yourself in a hearing on temporary orders to address rights and possession as between the parent(s) and non-parent(s).

When representing a litigant on either side of a parent vs. non-parent custody case, it is ***critical*** that you focus on the two prongs of the fit parent presumption: (1) the fitness of the parent(s), and (2) that the denial of access to the non-parent(s) would significantly impair the child's physical health or emotional development. If one parent is fit and the other is arguably not, this does not negate the constitutional fit parent presumption as to the fit parent.

Many counties include strict time limits on temporary orders hearing, some giving as little as twenty minutes per side. In my opinion, absent a silver bullet (ie: Parent A shot

Parent B in front of the children), it is going to be extremely difficult, if not impossible, for a non-parent to overcome the fit parent presumption at a temporary orders hearing.

If you are representing a non-parent and need more time to make your case to overcome this constitutional presumption, be sure to fight (on the record) for more time. Ask to put on an offer of proof with your evidence. (I would not expect this to be granted, since the court is limiting your time, but I would still ask.) For either side, consider filing a brief in advance setting forth the law on this issue and how you expect it to be applied in this case. If the court does not give you adequate time to present your case despite objections, consider filing a post-hearing brief explaining the evidence you were not given time to admit. In the event you get an adverse ruling, this will at least give you something to show the appellate court to prove that your limited time negatively impacted your client's ability to put on a case on this issue.

If you are representing a parent, it can be tempting to focus on the bad facts against the non-parent(s). If you are limited on time, *do not waste that valuable time fighting an irrelevant battle*. The key issue is whether or not the non-parent can overcome the constitutional fit parent presumption. Focus your questions on that specific issue. If there are bad facts against the non-parents, try to throw them in at the end, but you really do not want the court to even consider whether or

not the non-parent should have possession. Focus the court on the key issue of the fit parent presumption.

If the court awards rights or possession to the non-parent and you believe the court did not consider the applicable law or did not consider all the evidence, consider filing a Motion to Reconsider. I often use this option when I am hired to represent a parent following an adverse temporary orders ruling where the prior counsel did not appropriately argue the fit parent presumption. I file a Motion to Reconsider setting forth the law, applying the facts from the hearing to that law, and urging the trial court to issue a new temporary order. Then, if it is not successful, I can show the appellate court on mandamus that the trial court was given an opportunity to consider the appropriate law and still chose not to rule correctly.

Chapter 8

Mandamus

If you represent a parent and the trial court has erroneously refused to grant your plea to the jurisdiction / motion to strike or if the trial court has awarded rights and possession to the non-parent(s) without the non-parent(s) overcoming the fit parent presumption, you should be looking to mandamus. Similarly, if you represent the non-parent(s) and the trial court either dismissed you from the case or failed to award you any rights or possession when you believe the fit parent presumption has been overcome, you should be looking to mandamus.

Mandamus is extraordinary relief, but it is available for these situations. It's much more complicated to file a mandamus than an appeal because you need to create your own record. It's very time-intensive and the rules are very specific. If you are not familiar with the mandamus process, I highly recommend finding an attorney willing to mentor you through the process or, alternatively, finding an experienced appellate attorney to handle the mandamus

for you (we love handling mandamuses on these types of issues!). Delay is your enemy when it comes to mandamus, but you cannot file until you have a final, written order from the trial court. Sometimes this means filing a motion to enter on an order you really do not want to be entered solely so you can seek your appellate remedy. Be sure to emphasize in your motion to enter that you do not agree with the ruling but believe your proposed order accurately reflects what the trial court ordered.

The standard for having a mandamus granted is abuse of discretion. In general, trial courts are given very broad discretion in family law cases, but standing and egregious failures to follow the law on temporary orders are legitimate sources of having a mandamus granted.

Non-parent custody cases are often riper for mandamus than your traditional parent vs. parent custody case. First, standing is often very questionable in non-parent custody cases, and any order entered without standing is void. If you think a non-parent lacks standing, do not wait for further litigation to happen. File your mandamus as soon as the trial court denies your plea to the jurisdiction or motion to strike. Second, decisions to give rights or possession to a non-parent over the objections of an arguably fit parent are also proper mandamus issues. The burdens a non-parent must overcome are high, and with time often very limited in temporary

orders hearings, it can be very difficult for the non-parent to overcome that burden.

Although non-parent custody litigation is often ripe for mandamus, be aware that the odds of success on mandamus as a whole are generally low and the procedures for filing a mandamus are complicated and onerous. Filing a mandamus does not guarantee you an opinion or even the requirement of a response from the other side. When you file, the Court of Appeals can choose to request a response from the other side (in which case you have a good shot at getting an opinion) or it can choose to deny the petition without requesting a response.

If you are representing the parent in this type of case and are going to file a mandamus because the trial court granted a non-parent possession and/or rights, you should strongly consider filing a motion for emergency stay of underlying suit and of that portion of the underlying temporary order. If you can get a stay, it will remove the non-parent's rights and possession while the mandamus is pending, and it will also prevent the trial court from moving forward until the mandamus is decided.

If you are not successful in the Court of Appeals, either because your mandamus was denied or because the other side had a mandamus granted, you can consider filing a petition for writ of mandamus in the Texas Supreme Court.

The procedure is different in the Texas Supreme Court than it is in the Court of Appeals. You begin by filing a much shorter brief trying to convince the Court that it should take your case. The Texas Supreme Court generally does not care about the outcome of one individual case. They care about taking cases that will be important to the jurisprudence of the state and that will impact many other cases. If you want the Court to take your case, you need to convince them that your case is exactly that type of case.

When a mandamus is filed in the Texas Supreme Court, it goes through a process that is often compared to a conveyor belt. First, you need to pique the interest of one justice to get the court to request a response to your short brief. As the process goes along, you need to get more and more justices interested in the case to avoid it falling off the conveyor belt to an automatic dismissal. You need at least four justices interested in the case to get to the point of oral argument. Although the odds of success on a mandamus in general are very low (less than 10%), if you get to oral argument, your odds of success are actually quite high.

If your mandamus is successful, it may or may not mean the end of your case. If the appellate court granted mandamus against a non-parent on standing grounds, the case against the non-parent is over due to lack of jurisdiction. If the appellate court granted mandamus because the trial

court abused its discretion by awarding rights or possession to a non-parent without the non-parent overcoming either the statutory parental presumption or the constitutional fit parent presumption, the case might not be over. While a non-parent might have been unable to overcome the fit parent presumption in a twenty minute per side hearing, he might be able to do so in a full day trial. If the non-parent is unwilling to dismiss the case following a loss on mandamus, the parent must proceed with discovery. That could lead to summary judgment, if the non-parent is still unable to produce evidence sufficient to overcome those presumptions. If not, then the parties are headed for trial.

Chapter 9

Discovery, Summary Judgment, and Special Settlement Considerations

Once you get past the temporary orders stage of the case, you will find yourself in the discovery phase and possibly talking settlement. All three of these areas warrant special consideration when the case involves a non-parent.

Discovery

Discovery is particularly important in parent vs. non-parent custody litigation. It gives the parent the opportunity to nail down the non-parent on any evidentiary support for overcoming the statutory parental presumption or the constitutional fit parent presumption. It gives a non-parent the opportunity to obtain information from the parent that might help in overcoming those difficult burdens.

In the age of initial disclosures, it is critically important for parties involved in parent vs. non-parent litigation to address the issues of standing, parental fitness and significant impairment right out of the gates in disclosures. The non-parent should lay out very clearly the grounds under which he or she claims standing and the facts supporting those grounds. The non-parent should also lay out clearly the evidence he or she has to establish a parent is unfit or to establish significant impairment.

After initial disclosures, if you are representing a parent, send out discovery requests specifically targeting the issues of significant impairment and the fit parent presumption. Pin the non-parent down on whatever evidence (or lack thereof) the non-parent has for attempting to overcome those difficult presumptions. Here are some examples of the types of discovery requests a parent should send to a non-parent:

Interrogatories

1. If you contend [Parent] is an unfit parent, please fully describe all evidence supporting such contention.
2. If you contend that not awarding [Non-Parent] rights or possession of the child would significantly impair the child's physical health or emotional development, fully describe all evidence supporting such contention.

3. If you contend that naming [Parent] as sole managing conservator of the child would significantly impair the child's physical health or emotional development, fully describe all evidence supporting such contention.

Requests for Production

1. Produce all documents supporting your contention that [Parent] is unfit.
2. Produce all documents reflecting any history of domestic violence on the part of [Parent.]
3. Produce all documents reflecting that [Parent] has a substance abuse problem.
4. Produce all documents reflecting that [Parent] has an alcohol problem.
5. Produce all documents supporting your contention that appointing [Parent] as sole managing conservator would significantly impair the child's physical health or emotional development.
6. Produce all documents supporting your contention that failing to award [Non-Parent] rights or possession of the child would significantly impair the child's physical health or emotional development.

If you are representing the non-parent and have managed to make it this far, you should use discovery as an opportunity to help beef up your claim of an unfit parent or significant impairment. As mentioned before, the burdens are high for a non-parent, so you want to accumulate as much evidence as possible to support your position. Here are some examples of discovery you might want to request from the parent(s):

Interrogatories

1. Describe any involvement you and/or the child have had with the Texas Department of Family and Protective Services ("TDFPS"), including the dates, nature of TDFPS involvement, any services required by TDFPS, the nature of any investigations and the ultimate disposition of those investigations.
2. If you have taken a controlled substance since [date] for which you did not have a valid prescription, identify the date, the nature of the controlled substance, and the amount taken.
3. If you have been arrested since [date], identify the arresting agency, the date, and the reason for the arrest.
4. Identify any mental health diagnoses you have ever received, including in your response the name of the diagnosing provider, the date of diagnosis,

and the nature of any treatment you received for each diagnosis.

Requests for Production

1. Produce all documents reflecting any criminal charges against you since [date.]
2. Produce all documents reflecting any arrests you have had since [date.]
3. Produce all documents reflecting any treatment you have received for substance or alcohol abuse since [date.]
4. Produce all documents reflecting any involvement you and/or the child have had with the Texas Department of Family and Protective Services since [date.]
5. Produce all documents reflecting any mental health diagnoses or treatment you have received since [date.]

These sample discovery requests are obviously just a starting point. You should dig into any possible avenue that could help support your client's case. You should also conduct third party discovery if there are possible records to support your client's case. School records, TDFPS records, and police records are just a few examples of records you might want to request. (Of note, it can be difficult with a lengthy wait if

you want to obtain records from TDFPS, so do not delay!) Records from third parties can be particularly persuasive because they come from a neutral source rather than a party. You also might want to consider taking depositions, both of parties and non-parties, to help support whatever claims or defenses your client needs to make.

Summary Judgment

Summary Judgments are a relatively rare phenomenon in family law matters, but non-parent custody litigation is one area where you might find them useful. With the new discovery rules for initial disclosures, you can know pretty quickly whether or not the other side has sufficient evidence to overcome the burdens involved in these types of cases. If you are representing a parent and the non-parent produces no evidence of significant impairment and no evidence that the parent is unfit, it's time to seriously consider filing a motion for summary judgment

Texas has two different types of motions for summary judgment – traditional and no evidence. When representing a parent against a non-parent, I would file a motion for summary judgment that addresses ***both*** types of summary judgment. You want to argue that (a) there is no evidence to support a finding that the non-parent has overcome the

required burden(s), and (b) the evidence there is conclusively establishes that the non-parent cannot overcome the required burden(s).

With a no-evidence motion for summary judgment, the rule requires that a sufficient amount of time for discovery has passed. This rule predates the initial disclosure requirements. In my opinion, if the non-parent does not have evidence to overcome the statutory parental presumption and/or the constitutional fit parent presumption in their initial disclosures, the case should be ripe for a no-evidence motion for summary judgment without the need to conduct additional discovery. However, if you want to be safe, consider sending discovery on the limited issues of the burdens the non-parent must overcome prior to filing your no-evidence motion.

The reason you want to include both a no-evidence motion and a traditional motion in your motion for summary judgment is that the burden of showing a "scintilla of evidence" is extremely low. A non-parent might have one example of a parent doing something questionable. While that might get over the "scintilla" hurdle, it is far from sufficient evidence to overcome the statutory parental presumption or the constitutional fit parent presumption.

It would be rare that a non-parent would file a motion for summary judgment based on these types of issues. It is the

parent who would try to kill the case with such a motion. If you represent the non-parent, you will want to be prepared to argue every possible way in which the parent could be unfit, every possible way the parent is not acting in the child's best interest, and every possible way you could prove significant impairment.

If a trial court declines to grant summary judgment, there is no appellate remedy available to the requesting party. However, if the trial court does grant summary judgment, you have a final order that is subject to being appealed.

Special Settlement Considerations

Most good family lawyers are always looking for reasonable opportunities for their clients to settle. Many courts around the state require the parties to participate in mediation prior to a final trial or, alternatively, the trial court might restrict your time significantly if you do not mediate prior to final trial. While the typical policy favoring settlement might work well in parent vs. parent litigation, it can be very risky in parent vs. non-parent litigation if you represent the parent.

When representing the parent, it is critical to remember that if you let the non-parent into a final order now, that non-parent is almost certainly going to be in forever (or at least until that child turns 18). By giving a non-parent

rights or possession in a final order, the parent is (perhaps unknowingly) surrendering the benefit of the fit parent presumption that he or she currently has. It would be very rare that I would ever advise a parent to agree to giving a non-parent rights or possession in a final settlement. If it is going to be done, you need to be darn sure that parent understands the ramifications of what he is doing.

When representing the non-parent, the converse is true. If you can just get your client's foot in the door on a final order, your client will be likely in the door forever and will not have to overcome the fit parent presumption (or statutory parental presumption) again. If the attorney on the other side does not understand this issue, the non-parent's attorney should take full advantage to get his client a seat at the table going forward.

While a court can require the parties to mediate, the court cannot require the parties to settle. If you represent a parent against a non-parent and you feel reasonably confident in the fitness of your client, make it clear that your client will not be signing any agreement that gives rights or possession to the non-parent. Your mediation might end up being short, but why waste everyone's money on a mediation that is destined to fail from the start?

Another important settlement consideration for anyone involved in custody litigation, *regardless of whether or not a*

non-parent is involved, is the primary designation. In *C.J.C.*, the prior order between the two fit parents named the mother as the primary parent even though the parties had close to a 50/50 possession schedule. As a result, the mother's fiancé had standing to seek custody under 102.003(a)(9) and 102.003(a)(11). Both of those standing statutes focus on the "primary residence" of the child. Had the shoe been on the other foot and had the father died, the father's fiancé would not have had standing because he did not designate the child's "primary" residence.

Chapter 10

Trial

If you find yourself making it to a final trial in a parent vs. non-parent custody case, the primary focus of both sides needs to be on the presumptions that apply. If it is an original suit, the non-parent must overcome both the statutory parental presumption and the constitutional fit parent presumption. If it is a modification where a non-parent is entering the litigation for the first time, the non-parent must overcome the constitutional fit parent presumption. If it is a modification where the non-parent was awarded rights or possession in the prior order, there are no longer any presumptions in favor of the parent.

If your case involves these presumptions, I highly recommend filing a trial brief setting out the applicable law and how you believe it should be applied to your case. If you represent the parent, your requested relief should be that the non-parent(s) be denied rights and possession for failing to overcome the applicable presumption(s). If you represent the non-parent, your requested relief should include requests for

a finding that the parent is unfit, the parent is not acting in the best interest of the child, that the appointment of the parent(s) as managing conservator(s) would significantly impair the child's physical health or emotional development and/or that failing to give the non-parent access would significantly impair the child's physical health or emotional development. (Remember, the burden is on the non-parent, not the parent, when it comes to these presumptions. Rather than requesting that the court find a parent is fit (especially when it might be questionable), request that the court find that the non-parent failed to meet a particular burden.)

Whether you represent the parent or the non-parent at trial, always keep in mind the importance of preserving error during the trial. If the judge excludes important evidence, ask to put on an offer of proof. If the judge keeps overruling your objections, don't give up by stopping to object. You are then waiving your right to object in the future on those issues. Remember, you can only appeal based on what is in the record, so do everything you can to be sure the appellate knows what the excluded evidence would have been. If you are not an experienced appellate attorney, you might consider getting one involved for your trial to be sure error is properly preserved throughout.

If your case happens to involve a jury trial, you need to establish what questions the jury can decide and what

decisions a judge must make. Is the fit parent presumption a jury issue or a bench issue? Although a jury can decide conservatorship, I would argue that whether a party can overcome the fit parent presumption is a legal question, not a fact question. As of the writing of this book, there is not currently a pattern jury charge on the issue of the fit parent presumption.

When you receive a ruling after your trial, if you have lost and think the judge got it wrong on the issues of the applicable presumptions, file a motion to reconsider. Use that opportunity to lay out all the applicable law, applying the relevant evidence admitted at trial (and/or the excluded evidence that you believe should have been admitted that would have supported your position). This gives the judge an opportunity to correct the wrong with all of the relevant law placed squarely before him.

If your client has lost at trial, be mindful of appellate deadlines and when they start to run. You do not want your client to miss out on the opportunity for a successful appeal because of a technicality.

Chapter 11

Appeal

Parent vs. non-parent custody litigation is ripe for appeals. If the non-parent gets rights and possession in the final order, the parent has lost the benefit of the fit parent presumption going forward. Similarly, if a non-parent loses at trial, that non-parent might never again have standing to file suit related to this child. This could be the non-parent's only chance, making an appeal worth it.

Many attorneys choose not to handle appeals because they can be quite complicated. If you think your client might have an appealable case but you are not an experienced appellate lawyer, it is wise to consult with one as quickly as possible after you receive the adverse trial ruling. You want to be sure you are not waiving any appellate issues with how the final order gets entered.

Appellate deadlines will be triggered once a final order is signed. They are not triggered by the court's ruling or by the issuance of a judge's memorandum. If your client might want to appeal, request a transcript from the final trial as

quickly as possible. Do not wait for the final order to be signed. An appellate attorney will need to review the record to determine whether an appeal is prudent and, if so, what the appealable issues are. The sooner you get the record, the more time the appellate attorney will have to make appropriate recommendations.

We use the following chart to help us keep track of appellate deadlines:

ACTION	DEADLINE	DATE DUE / DATE DONE	AUTHORITY
Request for Findings of Fact	20 days after Court signs judgment		TRAP 26.1(a)(4) TRCP 296
Court Files Findings	Within 20 days of request		TRCP 297
Notice of Past Due Findings	Within 30 days of initial request		TRAP 26.1(a)(4) TRCP 296
Request for Additional/ Amended Findings of Fact	10 days after Court files findings		TRCP 298
Trial Court Supp. Findings	10 days from request		TRCP 298
Motion for New Trial (MNT)	30 days from order signed		TRCP 324, 329b(a)

MNT Overruled by Operation of Law	75 days from date of order signed		TRCP 329b(c)
Notice of Appeal in Trial Court, and Docketing Statement	If no request for findings of fact or MNT- 30 days from order signed If request for findings or MNT-90 days from signed order		TRAP 25.1 26.1, 32.1
Trial Court loses plenary power (judgment final):	If no MNT- 30 days from order signed If MNT-30 days after MNT overruled		TRCP 329b(d), (e)
Motion to Stay Execution of Judgment in Trial Court	Before execution of judgment		TRAP 24.1, 24.2, TRCP 627
Pay court reporter for record, send written request to court reporter requesting record and list of exhibits, and file copy of request in trial court	At or before deadline to perfect appeal (notice of appeal deadline) -30 or 90 days from order		TRAP 34.6(b), 35.3(b)(3)

Deadline for court clerk/ court reporter to file records	If no MNT: 60 days from order signed If MNT: 120 days from order		TRAP 35.1, 35.3
Appellant's Deadline to File Brief in Court of Appeals	30 days from the date court clerk and court reporter file records (whichever date is later)		TRAP 38.1, 38.6(a), 39.7
Appellee files brief	30 days from date of Appellant's brief		TRAP 38.2, 38.6(b), 39.7
Appellant's Reply Brief	20 days from date of Appellee's brief being filed		TRAP 38.3, 38.6(c)
Court of Appeals Clerk Sends Notice on Oral Argument	21 days prior to date of oral argument		TRAP 39.8
Date of Oral Argument or Written Submission in Court of Appeals	As set by Court of Appeals		TRAP 39.8
Court of Appeals renders Judgment and Issues Opinion	Promptly after oral argument or written submission date		TRAP 43.1, 47.1

The burden of proof on appeal for issues like the fit parent presumption is abuse of discretion. This is a difficult standard to meet, since trial court judges often have a lot of discretion, but we have seen appellate courts regularly reversing trial judges' decisions in *C.J.C.* type cases.

Appeals take a very long time to progress through the system, considerably longer than it takes a mandamus. Some courts of appeals take longer than others to issue opinions. Once all the briefs have been filed, the case will be set for submission either with or without oral argument. It can take many months after the submission date or after oral argument to get an opinion. For example, in *In the Interest of A.V.*, a trial was held in June of 2020, we filed our appellant's brief in November of 2020, we had oral argument in January of 2022, and we received an opinion in July of 2022.

Appeals are challenging but I absolutely love doing them. I love the intellectual debates that happen in appeals. If you have a family law case that you think might be a candidate for an appeal and want to discuss it, please do not hesitate to reach out. Our firm handles appellate family law cases statewide, and we would welcome the opportunity to help your clients with their appeals. If you want to handle the appeal on your own and just need a little advice, feel free to reach out to me for that, too.

Chapter 12

What's Next?

There are obviously unanswered questions left by the *C.J.C.* opinion as to the standard and the burden required to overcome the constitutional fit parent presumption, but we are finally getting some guidance from the appellate courts about what that standard looks like. The two most recent substantive *C.J.C.* opinions as of the writing of this book (September of 2022) both incorporate the significant impairment standard. Specifically, to overcome the fit parent presumption, the non-parent must prove either that the parent is unfit or that denial of access to the non-parent would significantly impair the child's physical health or emotional development. Will the Texas Supreme Court or the Texas legislature adopt that standard?

The Texas Supreme Court has granted full briefing in *In the Interest of S.K. and L.K.*, so I would expect an opinion sometime in 2023 that might give us some guidance on the standard. *S.K.* represents the opposite end of the spectrum from *C.J.C.*, where we had an involved parent that was

unquestionably fit. *S.K.* involves CPS litigation, a situation where the department was named temporary managing conservator (and, therefore, was able to establish the parent was unfit early in the case), and the non-parents had custody for more than twelve months. The opinion tells us that both the caseworker and CASA testified that they did not believe the father would allow the grandmother any access to the children if it were not court ordered, and they believed that would significantly impair the children's physical health or emotional development. Without reviewing the entire record, it's impossible to know if the evidence rose to the level of proving either prong of this standard. However, if the Texas Supreme Court adopts this standard and feels the evidence was sufficient that the denial of access to the grandparent would significantly impair the children, I would expect this appeal to come out in favor of the grandparent.

Issues surrounding the fit parent presumption will often be important in LGBTQ custody litigation, when one parent has a biological connection to a child and the other does not. (See *In the Interest of N.H.)* As it stands, Texas law treats the non-biological "second parent" exactly the same as any other non-parent involved in custody litigation with a parent

unless the same sex couple were legally married.[24] Other states have adopted statutes giving LGBTQ non-biological "second parents" and other "psychological parents" avenues to rights and access, even when the biological parent qualifies as a fit parent. To date, Texas does not have any such laws; however, with the adoption of the second prong of the fit parent presumption being to show that denial of access to the non-parent would significantly impair the child's physical health or emotional development, this does provide an avenue for same sex second parents to gain possession and access over the objections of the fit parent. Remember that the burden is high to show significant impairment, but it can be done.

One thing is clear: the law will continue to evolve in the area of the fit parent presumption in the coming years. As more and more cases are decided, courts will fine-tune the standard and we will have a bank of cases to rely upon in arguing that a non-parent did or did not overcome that standard. As significant cases come out in this area of the law, we will do periodic updates to this book to be sure we have the latest and most relevant information available to you. You

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[24] *See In the Interest of D.A.A.-B.*, No. 08-21-00058-CV, 2022 WL 3758574 (Tex. App. – El Paso 2022) (holding that the non-biological spouse of a same-sex couple had standing when one spouse bore a child through artificial insemination because we must constitutionally read the family code in a gender-neutral way)

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ABOUT THE AUTHOR

Holly J. Draper is the CEO and Managing Partner of The Draper Law Firm, PC in McKinney, Texas. She is board certified in family law by the Texas Board of Legal Specialization. Ms. Draper has become the go-to expert in non-parent custody litigation in Texas after winning *In re C.J.C.* in the Texas Supreme Court 9-0 in 2020 on behalf of a fit father. Since that time, Ms. Draper has routinely represented parties in non-parent custody litigation and appeals throughout the state. She is regularly asked to speak at CLE conferences for local and state bar associations on the topic, and she has testified before both the Texas House and Texas Senate regarding the possible incorporation of the fit parent presumption into the Texas Family Code. In her free time, she loves traveling the world with her husband and two children and investing in short term real estate rentals.