

**POSSESSION WITH BAD FACT PARENTS:
PROBLEMATIC POSSESSION ORDERS**

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Cases

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Hopkins v. Hopkins, 853 S.W.2d 134 (Tex.App. – Corpus Christi 1993, no writ) 10

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Roosth v. Roosth, 889 S.W.2d 445 (Tex.App. – Houston [14th Dist.] 1994, writ denied) 6

Shelton v. Shelton, 2003 WL 22511463 (Tex.App. – Houston [1st Dist.] 2003, no pet.) (mem. op.) 14

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Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990) 3

Wright v. Wentzel, 749 S.W.2d 228 (Tex.App. – Houston [1st Dist.] 1988, no writ)..... 6

POSSESSION WITH BAD FACT PARENTS: PROBLEMATIC POSSESSION ORDERS

I. INTRODUCTION AND SCOPE

The subject-matter and scope of this presentation resulted from a fairly specific concern over cases that include problematic relationships between a parent and a child that have not improved by the time of final trial or final resolution of the suit. Where it is determined that a parent's continued relationship with a child is in the child's best interest and should be sustained despite the parent's limitations, crafting the possession order can pose a difficult task for the court and the attorneys involved. Sometimes the difficulty in the relationship is the result of intentionally harmful activity by the parent and sometimes it is merely due to a prolonged estrangement without any kind of parental fault. What these cases have in common is the challenge of determining how much contact between parent and child is appropriate given the nature of the particular problem and what conditions upon possession, if any, should be included.

The problem identified here is not the same in a temporary orders hearing as in a final trial on the merits. At the juncture of the typical temporary orders hearing, the court can decide to monitor the situation while putting in place safeguards that might include limited possession, the appointment of mental health professionals, the appointment of a child advocate, or any combination of the foregoing. In addition, in many cases, the court can count to some degree on continuation of attorney attention to important matters. The use of such a structure in temporary orders can often result in well-thought-out measures to address problem parent-child relationships by the time of trial. There are, however, cases that reach final trial without having resolved persistent problems.

There is no one-size-fits-all possession order that will be most appropriate for every problem relationship. Constant common-sense evaluation of the case should develop practical solutions and proposals for the court. These proposals should be created by filtering the facts through the statutes and case law precedents. The content choices for this paper begin with a listing of the Texas Family Code provisions most likely bearing upon possession or possession-related issues. Then, an analysis of appellate cases construing non-standard possession orders is undertaken. Finally, some remaining questions are posed with some possible answers.

The fact patterns that commonly present the problem can be roughly approximated as follows:

- Drug or alcohol abuse/addiction
- Mental incapacity/limitations

- Family violence: parent to parent
- Family violence: parent to child
- Parental alienation
- International child abduction
- Parental incarceration
- Voluntary estrangement/shrinking parent
- Extremely non-standard work hours
- Long distances between parents

II. THE STATUTORY FRAMEWORK FOR POSSESSION

Since the basic premise of this paper contemplates that some problem in the relationship between a parent and child makes a Standard Possession Order (SPO) inappropriate (at least initially), the proper starting place in the court's analysis should be the public policies touching upon possession stated in the Texas Family Code and the presumptions absent evidence to the contrary.

A. Possession-Related Code Provisions

Without setting forth at length the entire Standard Possession Order contained at Subchapter F of Chapter 153 of the Texas Family Code, below is a listing of the statutory guideposts that should govern the court's crafting of an appropriate possession order.

1. Public Policy

Texas Family Code § 153.001(a), entitled Public Policy, provides:

“(a) The public policy of this state is to:

“(1) assure that children will have *frequent and continuing contact* with parents who have shown the ability to act in the best interest of the child;

“(2) provide a *safe, stable, and nonviolent* environment for the child; and

“(3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.” (emphasis added)

2. Best Interest

Texas Family Code § 153.002, entitled Best Interest of Child, provides:

“The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.”

3. Appointment of Possessory Conservator
Texas Family Code § 153.006 provides:

“(a) If a managing conservator is appointed, the court may appoint one or more possessory conservators.

“(b) The court shall specify the rights and duties of a person appointed possessory conservator.

“(c) *The court shall specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child.*” (emphasis added)

The crafting of an order that includes conditions not found in the SPO or less time of possession than an SPO must contain specific and enforceable terms of possession for a parent appointed a possessory conservator. *Roosth v. Roosth*, 889 S.W.2d 445, 451-453 (Tex.App. – Houston [14th Dist.] 1994, writ denied). Failing to do so can constitute an abuse of discretion by the trial court. (*See* cases cited at Section III., A. *infra*).

4. Policy and General Application of Guidelines
Texas Family Code § 153.251 provides:

“(a) The guidelines established in the standard possession order are intended to guide the courts in ordering the terms and conditions for possession of a child by a parent named as a possessory conservator or as the minimum possession for a joint managing conservator.

“(b) It is the policy of this state to encourage *frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child.*

“(c) It is preferable for all children in a family to be together during periods of possession.

“(d) The standard possession order is designed to apply to a child three years of age or older.” (emphasis added)

5. Standard Possession Presumed
Texas Family Code § 153.252, entitled Rebuttable Presumption, provides:

“In a suit, there is a rebuttable presumption that the standard possession order in Subchapter F:

“(1) provides *reasonable minimum* possession of a child for a parent named as a possessory conservator or joint managing conservator; and

“(2) is in the best interest of the child.” (emphasis added)

In cases where a problem persists in a relationship between parent and child that makes the SPO inappropriate, the court must find sufficient facts to rebut the presumption in favor of the SPO. The party resisting proposed restrictions to his or her possessory rights might use some or all of the of the foregoing policy statements contained in the Code.

Merely rebutting the SPO does not, by itself, guide the court in crafting a suitable possession order. The court may be called upon to answer whether a parent can safely exercise unsupervised access, what length and interval visits should be, whether a parent can accommodate overnight possession, whether the answers to the foregoing differ with children of different ages, and whether the primary parent is helping or hurting the situation.

6. Parent as Possessory Conservator
Texas Family Code § 153.191, entitled Presumption that Parent to be Appointed Possessory Conservator, provides:

“The court *shall* appoint as a possessory conservator a parent who is not appointed as a sole or joint managing conservator *unless* it finds that the appointment is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.” (emphasis added)

7. Minimal Restriction on Parent’s Possession or Access
Texas Family Code § 153.193 provides:

“The terms of an order that denies possession of a child to a parent or imposes restrictions or limitations on a parent’s right to possession of or access to a child *may not exceed* those that are required to protect the best interest of the child.” (emphasis added)

Many of the cases contained in Section III., A. below analyze the minimal or conditional possession of a possessory conservator in view of the mandate under Texas Family Code § 153.191 that a parent cannot both be a possessory conservator and be prohibited from all contact with his or her child on the basis that it is not in the best interest of the child and parental possession or access would endanger the emotional welfare of the

child. In other words, if the trial court has appointed a parent a possessory conservator, it may limit or condition possession or access with very specific terms, but it may not prevent all access. *See In re. Walters*, 39 S.W.3d 280, 286 (Tex.App. – Texarkana 2001, no pet.)(explaining that appointment of parent as possessory conservator implies that court determined that allowing parent to have some type of access to child will not endanger physical or emotional welfare of child); *In re. M.A.H.*, 224 S.W.3d 838 (Tex.App. – Texarkana 2007, pet. denied)(since possessory conservatorship was awarded, some form of access must be permitted).

8. Standard Possession Order Inappropriate or Unworkable

Texas Family Code § 153.253 provides:

“The court shall render an order that grants periods of possession of the child *as similar as possible* to those provided by the standard possession order if the work schedule or other special circumstances of the managing conservator, the possessory conservator, or the child, or the yearround school schedule of the child, make the standard order unworkable or inappropriate.” (emphasis added)

It is interesting to note that Texas Family Code § 153.253 requires the court to consider the structure of the SPO and then grant a possession order “*as similar as possible*” to the SPO if there are special circumstances that make the SPO unworkable or inappropriate. It might reasonably be argued that Texas Family Code § 153.253 requires the court to explore all reasonable methods of ensuring as similar an amount of time as that provided by an SPO, even though some parenting problem persists, *if* sufficient safeguards permit the parent-child contact.

9. Factors for Court to Consider

Texas Family Code § 153.256 provides:

“In ordering the terms of possession of a child under an order other than a standard possession order, the court *shall be guided by the guidelines established by the standard possession order* and may consider:

“(1) the age, developmental status, circumstances, needs, and best interest of the child;

“(2) the circumstances of the managing conservator and of the parent named as a possessory conservator; and

“(3) any other relevant factor.” (emphasis added)

The trial court is given wide latitude in determining the best interest of a minor child. *Gillespie v. Gillespie*, 644 S.W.2d 449, 451 (Tex. 1982). The judgment of the trial court will be reversed only when it appears from the record as a whole that the court has abused its discretion. *Id.* at 451. The test for abuse of discretion is whether the trial judge acted without reference to any guiding rules or principles; in other words, whether the act was arbitrary or unreasonable. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

B. Allegations or Findings of Family Violence

Often, problematic possession cases are marked by a history or pattern of family violence. Careful attention to this issue is required since the Code severely limits both the conservatorship and the possession available to a person found to have engaged in a history or pattern of family violence, unless the court makes specific findings to protect the child and others from any future similar acts of violence.

1. History of Domestic Violence

Texas Family Code § 153.004 states:

“(b) *The court may not appoint joint managing conservators* if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. *It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child* if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

“(c) The court *shall* consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

“(d) *The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence*

during the two years preceding the date of the filing of the suit or during the pendency of the suit, *unless* the court:

“(1) finds that awarding the parent access to the child would not endanger the child’s physical health or emotional welfare and would be in the best interest of the child; and

“(2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent...

“(e) *It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child* if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child. (emphasis added)

Attorneys should always be careful about the far-reaching effects of a finding of family violence upon rights of conservatorship and possession. Texas Family Code § 153.004(b) creates a bar to a parent’s appointment as a joint managing conservator if the parent has engaged in a history of pattern of family violence. *See In re. R.T.H.*, 175 S.W.3d 519, 521 (Tex.App.-Fort Worth 2005, no pet.)(explaining that a single act of violence may constitute a "history" of abuse under section 153.004). Texas Family Code § 153.004(b) also creates a presumption that the party having engaged in family violence should not be awarded primary care of a child or children. Additionally, Texas Family Code § 153.004(d) prevents all access by a person found to have engaged in a history or pattern of family violence, *unless* the additional safeguards at sub-section (1) and (2) of section (d) are met. Finally, a presumption favoring supervised possession is contained at section (e) if the finding of family violence is made.

C. Statutory Tools the Court Can Employ

1. Visitation Centers and Visitation Exchange Facilities

If the facts demonstrate that direct contact between the parent and the child would be harmful to the child yet the relationship should be sustained, the court can order the parental access to occur in a supervision facility if there is one available within close proximity to the parties. Texas Family Code § 153.014 provides:

“A county may establish a visitation center or a visitation exchange facility for the purpose of

facilitating the terms of a court order providing for the possession of or access to a child.”

2. Electronic Communication With Child by Conservator

In addition, since 2007, the court may now include in its order provisions for electronic communication between a parent and child to facilitate communication and contact. If direct physical contact between parent and child is a cause for concern to the court, the use of new technological innovations might provide regular communication in a manner as near as possible to in-person interaction without running the same risk of physical harm. Electronic communication could serve as a stepping stone within a possession order that eventually includes greater terms of contact. Electronic communication is also uniquely well-suited for long-distance communication between parent and child.

Texas Family Code § 153.015 provides:

“(b) If a conservator of a child requests the court to order periods of electronic communication with the child under this section, the court may award the conservator reasonable periods of electronic communication with the child to supplement the conservator’s periods of possession of the child. In determining whether to award electronic communication, the court shall consider:

“(1) whether electronic communication is in the best interest of the child;

“(2) whether equipment necessary to facilitate the electronic communication is reasonably available to all parties subject to the order; and

“(3) any other factor the court considers appropriate.

“(c) If a court awards a conservator periods of electronic communication with a child under this section, each conservator subject to the court’s order shall:

“(1) provide the other conservator with the e-mail address and other electronic communication access information of the child;

“(2) notify the other conservator of any change in the e-mail address or other electronic communication access information not later than 24 hours after the date the change takes effect; and

“(3) if necessary equipment is reasonably available, accommodate electronic communication

with the child, with the same privacy, respect, and dignity accorded all other forms of access, at a reasonable time and for a reasonable duration subject to any limitation provided by the court in the court's order.

“(d) *The court may not consider the availability of electronic communication as a factor in determining child support. The availability of electronic communication under this section is not intended as a substitute for physical possession of or access to the child, where otherwise appropriate.*

“(e) In a suit in which the court's order contains provisions related to a finding of family violence in the suit, including supervised visitation, the court may award periods of electronic communication under this section only if:

“(1) the award and terms of the award are mutually agreed to by the parties; and

“(2) the terms of the award:

“(A) are printed in the court's order in boldfaced, capitalized type; and

“(B) include any specific restrictions relating to family violence or supervised visitation, as applicable, required by other law to be included in a possession or access order.” (emphasis added)

D. When the Court's Order Varies from the SPO and Appeal is Likely

When the trial court has rendered a possession order that does not conform to the SPO and the attorney or client is inclined to challenge the ruling on appeal, it is imperative that the a request for findings is sought in accordance with Texas Family Code § 153.258, which states:

“Without regard to Rules 296 through 299, Texas Rules of Civil Procedure, in all cases in which possession of a child by a parent is contested and the possession of the child varies from the standard possession order, on written request made or filed with the court not later than 10 days after the date of the hearing or on oral request made in open court during the hearing, the court shall state in the order the specific reasons for the variance from the standard order.”

The ability to actually demonstrate reversible error is severely diminished without the findings required by Section 153.258. When the trial court files

no findings of fact and conclusions of law, the Court of Appeals may presume that the trial court made all findings necessary to support its judgment. *BMC Software Belg., N.Y. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). If the appellate record includes the reporter's and clerk's records, the implied findings are not conclusive and may be challenged for legal and factual sufficiency in the appropriate appellate court. *Marchand* at 795. Legal and factual insufficiency challenges are not independent grounds for asserting error in custody determinations, but are relevant factors in assessing whether the trial court abused its discretion. *Niskar v. Niskar*, 136, S.W.3d 749, 753 (Tex.App. – Dallas 2004, no pet.). In such cases, the appellate court must affirm if the judgment can be upheld on any legal basis supported by the pleadings and the evidence. See *Point Lookout W., Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex.1987); *Worford*, 801 S.W.2d at 109.

III. CASE LAW REVERSING LESS THAN STANDARD POSSESSION

In order to understand manner in which the court may restrict the possessory rights of a parent, an inspection of the cases construing trial court awards of less than standard possession is instructive.

A. Case Law Reversing “As Agreed” Possession Orders

The first category of cases below construe trial court rulings that essentially make all contact with the child dependent upon the consent of the parent in primary possession. There is a split of authority among the courts of appeal that have addressed whether a trial court may render a final order that makes one parent's possession entirely dependent upon the consent of the other conservator parent. The cases immediately following have reversed trial court orders that make a conservator's possession or access completely dependent on the consent of the other conservator.

1. Pre-Code Precedent Reversing Possession Conditioned Upon Other Conservator's Consent

Hill v. Hill, 404 S.W2d 641 (Tex.Civ.App. – Houston 1966, no writ). In *Hill*, the appellate court reversed and remanded a trial court ruling that the father have possession “by first obtaining the written consent” of the mother. The appellate court held that if the trial court determines that limitations and safeguards are required, the frequency and duration of the visits shall be more precise than the wording “reasonable times and places.” In addition, the court stated that alternative, conditional, or contingent judgments are not favored in the law. The trial court

erred in making father's visitation contingent on mother's written consent, having determined that the father's visitation was in the best interest of the children.

2. "At Times Mutually Agreed" Reversed; Factors Might Support Denial of Possessory Conservatorship But Not Denial of Possession

Roosth v. Roosth, 889 S.W.2d 445 (Tex.App. – Houston [14th Dist.] 1994, writ denied). In *Roosth*, the Court of Appeals found an abuse of discretion where the trial court had awarded possession "only at times mutually agreed to in advance." The appellate court in *Roosth* stated as follows:

"Certainly, the order in this case does not set out specific times and conditions for possession or access. As good cause for this lack of specificity, the trial court listed the following factors: (1) the facts and conditions surrounding the separation and appellant's leaving the home, (2) the inadequate support by appellant, and (3) appellant's conduct since the separation, including his use of physical force with the children and appellee when the children refused to go on scheduled visitation, his lack of sensitivity to school, religious, and cultural activities, and his failure to provide adequate physical facilities to accommodate the children during their visitation with him (one bedroom apartment, air mattresses instead of beds). In our opinion, while some of these factors could serve as grounds for denying appellant status as a possessory conservator, they are not good cause for refusing to enter specific orders regarding possession or access. Because the trial court granted appellant status as a possessory conservator, the trial court must have implicitly found that appellant's possession or access to the children would *not* endanger the physical or emotional welfare of the children. Limitations upon appellant's right to possession of or access to the children may not exceed that required to protect the children's best interest." *Roosth* at 451.

3. "All Times Mutually Agreed Between the Parties" Reversed; Even Though Facts Are Concerning, Not Specific Enough

In re. Walters, 39 S.W.3d 280 (Tex.App. – Texarkana 2001, no pet.). In *Walters*, the appellate court reversed the trial court's order limiting the mother's possession to "all times mutually agreed between the parties." The trial court findings stated that the SPO was not in the child's best interest, that the mother was an alcoholic both before and during the marriage, that she had hidden her alcohol consumption,

that she placed her son in a potentially harmful position by becoming intoxicated to the point of passing out while she was alone with him, and that it would be in the child's best interest for her to exhibit a three-year period of sobriety before implementation of the SPO. The appellate court found that although there was sufficient evidence to support deviation from the SPO, the trial court erred in not sufficiently specifying the times and conditions for the mother's possession of or access to the child.

4. *Pro Se* Mother Named Possessory Conservator and Awarding Visitation "At Times Mutually Agreed" Without Any Evidence Whatsoever Reversed

In re. S.C., 220 S.W.3d 19 (Tex.App. – San Antonio 2006, no pet.). In *S.C.*, the Court of Appeals reversed and remanded a conservatorship and possession order that named mother possessory conservator without evidence to rebut the presumption in favor of joint managing conservators. The mother was awarded possession at times mutually agreed between the parties, but the grounds for the reversal had more to do with the trial court's having violated her right to due process and the failure to receive any evidence supporting its judgment.

5. Requiring a Conservator's Consent for Possession is Not Enforceable by Contempt and is Therefore a Complete Denial of Access

In re. M.A.H., 224 S.W.3d 838 (Tex.App. – Texarkana 2007, pet. denied). The Court of Appeals reasoned that since the mother was named a possessory conservator, and since TFC 153.191 prohibits such an appointment where it is not in the best interest of a child and parental possession or access would endanger the physical or emotional welfare of the child, the mother poses no threat that cannot be remedied by restrictions. Therefore, some form of access should be permitted. In addition, since TFC 153.006 requires specific orders of possession and access absent good cause that is in the best interest of the child, the requirement of the grandmother's consent to permit access is unenforceable by contempt and therefore effectively a complete denial of access.

6. "Agreed" Possession for Possessory Conservator Mother Rejected

Wright v. Wentzel, 749 S.W.2d 228 (Tex.App. – Houston [1st Dist.] 1988, no writ). In *Wright*, the Court of Appeals reversed a possession order that was contingent upon the father's consent because there was no showing of good cause why specific orders would not be in the child's best interest.

7. Visitation “Whenever Possible” in Temporary Order Rejected

In re. Lemons, 47 S.W.3d 202 (Tex.App. – Beaumont 2001, no pet.). In *Lemons*, the Court of Appeals ordered the trial court to vacate its order providing that the father would have possession of the child and the mother would have visitation “whenever possible.” The appellate court held that the order gave the father complete discretion to determine when, where, and if the mother could have possession of or access to the child and was unenforceable by the mother and thus effectively denied the mother her right of visitation with the child even though the order purported to grant the mother liberal, free access to the child.

8. Possession to Possessory Conservator Mother “At Reasonable Times and Places as Determined by Father” Reversed

In re. A.P.S. and A.M.S., 54 S.W.3d 493 (Tex.App. – Texarkana 2001, no pet.). In this modification proceeding, the appellate court reversed the trial court’s order for the mother to have possession of the children “at reasonable times and places as determined by [the father],” because the father failed to show good cause why specific orders were inappropriate. The appellate court held that although the evidence was sufficient to find that the mother was not entitled to standard possession of the children (the mother was suicidal and had been abusive to the children), in the absence of a showing of good cause, the trial court was required to specifically articulate the times and conditions of the mother’s access to the children.

9. “No Possession” Reversed Although Finding of Significant Impairment of Physical Health or Emotional Development Affirmed

In re. E.N.C., 2009 WL 638188 (Tex.App. – Austin 2009, no pet.)(mem.op.)(not designated for publication). In *E.N.C.*, the appellate court reversed a trial court order that appointed a mother possessory conservator but awarded her no possession of or access to her child. The mother had initially intended to place the child for adoption and voluntarily placed the child in the possession of the intended adoptive parents for nine months. She later changed her mind and sought return of the child. The intended adoptive parents then initiated a suit for conservatorship. The trial court received numerous facts indicating that the mother subjected herself to physically abusive and threatening relationships, continually ceased them but then would reconcile them, and exposed her other child (not before the court) to her boyfriends’ abusive conduct. Although the parental presumption did apply, the court affirmed the finding that it had been rebutted by

evidence that the mother would significantly impair the child’s physical health or emotional welfare.

The court, however, reversed the order to the extent it denied all access to the mother. Despite her proclivity for abusive relationships, there was evidence that she was a good mother to her older daughter, helped her with educational and extracurricular activities, and kept her healthy and well-nourished. In addition, she had a steady job, was responsible with money, and supported herself and the older child.

Interestingly, the court based its reversal on what it determined was a heightened standard where parental rights and complete denials of access are concerned. It stated:

“Because the right that exists between a parent and [her] child is one of “constitutional dimensions” and due to the extreme nature of a determination cutting off all access and possession, courts review complete denials of access under a heightened standard.”

Id. (citing *Allison v. Allison*, 660 S.W.2d 134, 137 (Tex.App. – San Antonio 1983, no writ). The court expressly incorporated this “higher standard” in its holding to reverse the trial court ruling.

B. Case Law Reversing Summer Only or Summer and Holidays Only

1. Possession Limited to Summer Only Reversed

Thompson v. Thompson, 827 S.W.2d 563 (Tex.App. – Corpus Christi 1992, writ denied). In *Thompson*, the Court of Appeals found an abuse of discretion and reversed the trial court’s order that had the effect of granting the father possession only during the summer months since there was no specific finding or record of evidence sufficient to show that the order was in the best interest of the child.

2. Possession Limited to Christmas Holidays and Summer Only Reversed

Panozzo v. Panozzo, 904 S.W.2d 780 (Tex.App. – Corpus Christi 1995, no writ). In *Panozzo*, the Court of Appeals reversed the trial court’s possession order made at a default prove-up, finding it was an abuse of discretion to award only Christmas holidays and summer possession to the father, since no evidence was introduced suggesting that the standard order was unworkable or that it would endanger the children’s health or well-being. Although there was concern expressed that the father would remove the children from the country, the appellate court said the trial court could have constructed an order to manage that potential problem.

IV. CASE LAW AFFIRMING LESS THAN STANDARD POSSESSION

A. Case Law Affirming “As Agreed” Possession Orders

1. Possession “At Times Mutually Agreed to in Writing and in Advance” Affirmed

In re. R.D.Y., 51 S.W.3d 314 (Tex.App. – Houston [1st Dist.] 2001, pet. denied; see also 92 S.W.3d 433 (Tex. 2002), dissenting from the denial of the motion for rehearing of the denial of the petition for review). In *R.D.Y.*, the Court of Appeals held that the trial court properly delegated the power of setting the mother’s visitation to the custodial grandmother “at times mutually agreed to in writing and in advance,” where there were five reports of abuse with Child Protective Services in a six-year period, the child showed signs of physical abuse, the mother abandoned the child at a daycare center and the child was dirty and had not eaten, the mother’s home was unsanitary, and the mother was involuntarily committed to a psychiatric hospital. The appellate court distinguished *Roosth v. Roosth* (discussed above) in which the court reversed an order for possession “only at times mutually agreed to in advance,” by stating that in *Roosth*, there was no evidence suggesting that visitation would endanger the physical or emotional welfare of the children.

In arriving at its conclusion, the majority or the court actually stated:

“If Grandmother abuses her power to evaluate whether or not Mother is in an appropriate condition to visit with Child, Mother can file another motion to modify.”

Id. at 324. No explanation was provided by the court for how the principle of *res judicata* might bear on the demonstration the mother would have to make in order to obtain the suggested modification.

Three Texas Supreme Court Justices wrote an opinion dissenting from the Supreme Court’s denial of the motion for rehearing of the denial of the petition for review. The dissenting opinion states that there is disagreement among the courts of appeal as to whether, or under what circumstances, it is permissible for a court to order that a parent’s possession of a child is solely at the discretion of a managing conservator, and those three Justices felt that the petition should have been granted in order to resolve the issue.

2. Order That Possessory Conservator Father “Shall Have No Possession or Access Unless Mutually Agreed to in Advance” Affirmed

In re. C.U., No. 13-03-566-CV, 2004 WL 1921227 (Tex.App. – Corpus Christi 2004 no pet.)(mem. op.). In *C.U.*, the Court of Appeals

affirmed the trial court’s order that the possessory conservator father “shall have no possession or access to the child unless mutually agreed to in advance” by the mother. The appellate court found that the restriction was supported by evidence that the father was in prison at the time of the hearing and off and on for the preceding fifteen years, the child was 15 years old, and the child had never visited the father and they “never really had a relationship of any kind.”

3. “At Times Mutually Agreed to in Advance” Affirmed.

Conn v. Rhodes, 2009 WL 2579577 (Tex.App. Fort Worth, 2009, no pet.)(mem. op.)(not designated for publication). In *Conn*, the appellate court affirmed a trial court possession order stating that the conservators shall have possession of the child at times mutually agreed to in advance between the parties. Even though the court cited extensive precedent holding that a possession order must be specific enough to permit the conservator to enforce the judgment by contempt, it did not precisely adhere to that standard because the father had stated in his testimony that he did not intend to exercise his visitation rights in any way. Consequently, the court reasoned that a reversal with instructions to enter an order with specific, enforceable-by-contempt visitation schedule “would be a meaningless exercise in futility.” *Id.*

B. Case Law Affirming Substantially Less Than Standard Possession

1. Award of Nine Hours on First and Third Saturday to Possessory Conservator Father When Child Turns Three Affirmed

In re. C.B.M., 14 S.W.3d 855 (Tex.App. – Beaumont 2000, no pet.). In *C.B.M.*, the appellate court affirmed the trial court’s award of a graduated possession schedule which was less than the SPO, where the trial court found good cause for deviating from the SPO. The schedule awarded to the possessory conservator father was as follows: (1) until the child turned three, one hour in the presence of the mother on the first and third Monday of each month, plus all times mutually agreed in advance; (2) from age 3 to age 6, the first and third Saturday of each month from 8:00 a.m. until 5:00 p.m.; and (3) from age six forward, on the first, third, and fifth weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m. The appellate court found that the trial court had acted within its discretion in limiting the visitation since the father had previously been arrested for public intoxication, the mother testified that the father had a temper, the father had long work hours and did not seem to grasp the import of a question regarding how he would care for the child during the week in light of

his work hours, there was insufficient testimony about the father's ability to care for the child, there was a lack of contact between the father and the child up to the time of trial, and there was evidence of the father's instability and past irresponsible actions. NOTE: There was also a vigorous dissent that faulted the majority opinion for the quantum of proof necessary to rebut the presumption in favor of the SPO.

2. Award of Four Twenty-Four Hour Weekends Each Year to Possessory Conservator Father When Child Turns Three Affirmed

In re. T.J.S., 71 S.W.3d 452 (Tex.App. – Waco 2002, pet. denied). In *T.J.S.*, the appellate court affirmed the trial court's order limiting the possessory conservator father to four twenty-four hour weekend periods per year after the child reaches his third birthday, plus holiday and birthday visitation. Primary custody of the child was given to two prospective adoptive parents who had been the primary caretakers of the child since he was two days old (the adoption had been prevented when the father contested the termination of his parental rights). The trial court's deviation from the SPO was supported by evidence of the father's lack of effort in establishing a relationship with the child, the unique working schedules of the joint managing conservators, the father's young age and his school/work schedule. The father was 18 years old, was still in high school, and was living with his mother, more than a hundred miles away from the joint managing conservators. The father's mother, who would be the father's primary helper in caring for the child, had a DWI charge, used marijuana, and had lost custody of two sons.

The father also did not seek findings from the court for its variance from the SPO according to Texas Family Code § 153.258. The appellate court was compelled to consider only the evidence "most favorable" to the trial court's judgment and uphold the judgment on any legal theory that finds support in the evidence.

3. Award of Less Than Standard Summer Visitation Affirmed in Split Custody Situation

In the Interest of Doe, 917 S.W.2d 139 (Tex.App. – Amarillo 1996, writ denied). In *Doe*, the appellate court affirmed an award of less than the applicable 42-day period of summer possession. Because the parents each had sole managing conservatorship of one child, each parent could not have 42 days in the summer with both children. The primary basis of the trial court's decision was to allow both children to be together during the summer.

4. Elimination of Weekday Possession Affirmed

In re. Davis, 30 S.W.3d 609 (Tex.App. – Texarkana 2000, no pet.). In *Davis*, the appellate court reversed the trial court's refusal to accept the father's Sunday overnight election, but affirmed the trial court's decision to decline the father's Wednesday overnight election. The prior order had granted the father the SPO, and the father filed suit to modify, requesting the Sunday and Wednesday overnight elections. The appellate court confirmed that the Sunday night election is mandatory (under the statute as it then existed), but that the court may decline to enforce the extended Wednesday (now Thursday) night election if the court finds that such election is not in the best interest of the child.

At the time *Davis* was decided, the statute regarding the mid-week return to school included the exception "unless the court finds that it is not in the best interest of the child," but the Monday return provision contained no such exception. Now, §153.317 contains the "best interest" exception from the mandatory language for both return times.

5. Elimination of Mid-Week and Holiday Extending Weekend Affirmed.

Voros v. Turnage, 856 S.W.2d 759 (Tex.App. – Houston [1st Dist.] 1993, writ denied). In *Voros*, the appellate court upheld a trial court's elimination of Wednesday possession and holidays that extended weekends. The basis for this variance was the children's schedule and mid-week activities, the father's failure to bring the children to games during his periods of possession, disruption during possession exchanges, the distance between the parents' homes, and the results of an in-chambers interview with the children.

Mr. Voros' two children were interviewed by the trial judge in chambers *at his request* and Mr. Voros did not request that a record be made of the in-chambers interviews, although he had a right to do so. Accordingly, he could not complain on appeal of the lack of such a record and the appellate court was compelled to presume the evidence received by the court in chambers was supportive of its judgment.

6. Elimination of Wednesday Affirmed

Fair v. Davis, 787 S.W.2d 422 (Tex.App. – Dallas 1990, no writ). In *Fair*, the appellate court affirmed a judgment reflecting a jury's finding that the Wednesday period of possession should be eliminated, based in part on the fact that the parents lived forty-five minutes apart and the children often spent 1½ to 2 hours of a 5-hour visitation period on the road. There was also evidence that the Wednesday possession was disruptive to the children's schoolwork and extracurricular activities and that the father had refused

to take the children to their activities on some occasions.

7. Change from Alternating Months to Less Than SPO Upheld

Randle v. Randle, 700 S.W.2d 314 (Tex.App. – Houston [1st Dist.] 1985, no writ). In *Randle*, the appellate court affirmed the trial court’s modification from a schedule where the parents alternated months to a schedule where the father had only two weekends per month plus special days and vacation periods. There was evidence that during the father’s month of possession, the child was passed from family member to family member (primarily the child’s mother) and involved late night and early morning transfers of the child, and that the father’s actual time with the child usually consisted of weekends plus the night hours from about 8:00 or 9:00 p.m. until sometime before 5:00 a.m.

8. Award of Less Than SPO to Nonprimary Joint Managing Conservator Mother Affirmed

Davis v. Davis, No. 13-01-707-CV, 2003 WL 21355239 (Tex.App. - Corpus Christi 2003, no pet.)(mem. op.)(not designated for publication). In *Davis*, the appellate court affirmed the trial court’s award of less than the SPO to the mother (the specific schedule was not disclosed in the opinion), who was appointed a nonprimary joint managing conservator, finding that the trial court had discretion to take into consideration the acrimony between the parties and to hold that it was in the best interest of the child to reduce the number of contacts required between the parents during exchanges of possession.

C. Case Law Affirming Supervised Access

1. Two Hours Every Other Sunday Supervised Affirmed

Hopkins v. Hopkins, 853 S.W.2d 134 (Tex.App. – Corpus Christi 1993, no writ). In *Hopkins*, the appellate court affirmed the trial court’s limitation of father’s access to two hours every other Sunday under the supervision of two competent adults selected by the mother. The trial court found that the father had drug related convictions, had used drugs in front of the children, had abused the mother and children, and had unsanitary and unsafe living quarters. The appellate court reversed, however, that portion of the order failing to appoint him a possessory conservator. It found that a trial court must appoint a parent a possessory conservator unless a finding is made that neither possession nor access is in the child’s best interest and that parental possession or access would endanger the physical or emotional welfare of the child. Since some form of access was awarded (albeit

supervised), the trial court was compelled to appoint the father a possessory conservator.

2. Supervised Possession Upheld

Johnson v. Johnson, 804 S.W.2d 296 (Tex.App. – Houston [1st Dist.] 1991, no writ). In *Johnson*, the appellate court upheld a requirement of supervised possession where the trial court found that the father, a former police officer, had a history of alcohol abuse, was abusing alcohol at the time the order was made, and had all types of firearms to which the children would be exposed during the father’s possession.

3. Specific Terms of Supervision Not an Unauthorized Delegation of the Court’s Authority and Upheld

George v. Jepperson, 238 S.W.3d 463, (Tex.App. – Houston [1st Dist.] 2007, no pet.). In *George*, the trial court ordered a mother’s access to her children supervised by the S.A.F.E. program in Houston twice monthly, during S.A.F.E. program hours, until each child reaches majority or is discharged by the program. The mother’s main contention was that the delegation of the supervising function by the court to the S.A.F.E. program was not specific enough to comply with Texas Family Code §153.191, was unenforceable due to lack of specificity, and therefore the order was voidable. The appellate court ruled that the mother’s possession of and access to the children are ascertainable from the judgment, which is, therefore, enforceable and not voidable.

4. Supervised Possession to Prevent International Child Abduction Upheld

In re. Sigmar, 270 S.W.3d 289 (Tex.App. – Waco 2008, orig. proceeding). In *Sigmar*, a father’s petition for writ of mandamus was denied where the trial court found, under Texas Family Code §153.503, credible evidence of potential international child abduction. The trial court rendered a temporary order in a modification suit requiring supervised access and enjoining disposition of the father’s assets pending a hearing on mother/former wife’s equitable bill of review attacking the divorce judgment. The trial court found that the father speaks five different languages, has a degree from MIT, traveled abroad extensively, has international business interests in the petroleum industry, regularly travels to Mexico on business, reported threats on his and mother’s lives from persons in Mexico, and had recently engaged in planning activities that could facilitate the child’s removal from the U.S. The appellate court determined that the mother had carried her burden of proof by making a *prima facie* showing that the father had liquidated a substantial asset (sold a building for \$453,000) and that it was incumbent upon the father to produce evidence

that he could *not* facilitate the removal of the child. Viewing the evidence in the light most favorable to the trial court's ruling, the appellate court denied the father's request for a writ of mandamus.

5. Drug Testing Pre-Condition Sufficiently Specific and Upheld

In re. A.L.E., 279 S.W.3d 424 (Tex.App. – Houston [14th Dist.] 2009, no pet.). In *A.L.E.*, where a mother was ordered to submit to drug and alcohol testing and was granted unsupervised possession according to a standard possession order, but could prospectively change to supervised possession if the mother tested positive, the appellate court upheld the trial court ruling as meeting the requirements of specificity and enforceability. The trial court crafted a possession order that carefully detailed each of the specific requirements with which the mother must comply in order to maintain unsupervised visitation. The order also left no room for the father to exercise any discretion – and the mother needed no agreement from him – to exercise her visitation rights.

6. Restricted Possession to Prevent International Child Abduction Affirmed.

Osojie v. Osojie, 2009 WL 2902743 (Tex. App. – Austin 2009, no pet.)(mem. op.)(not designated for publication). In *Osojie*, the appellate court affirmed a trial court award of three one-week visits per calendar year with 21-days written notice where the uncontroverted evidence in the record showed that a father had quit his job in the United States; he was employed by a bank in Nigeria and, therefore, lacked any financial reason to stay in the United States; he had engaged in a pattern of transferring his assets from the United States to Nigeria; he had familial and cultural ties to Nigeria; and he had a history of ignoring and/or violating the trial court's orders.

V. WHAT CAN THE COURT DO WITH NEUTRALS?

Often, improving a troubled relationship between a parent and a child can be accomplished with the aid of certain mental health professionals. An advocate who senses significant opposition to the client's possession of or exposure to a child should develop options that include trained professionals. Doing so can give the court a sense of assurance that the child will be appropriately insulated from concerning behavior, if any, from the client. At the same time, the client is also educated about tools to better the relationship.

There is always the temptation to grant authority to such mental health neutrals over questions that involve amounts of possession and access or conditions

to possession or access. Legitimate questions can be leveled concerning the extent of the neutral's authority.

In addition, with some exceptions, there is a fairly distinct ethical line between mental health professionals who perform a *therapeutic* role and those that perform a *forensic* role. These roles are distinct and generally should not be blended. See Greenberg and Shuman (1997), *Irreconcilable Conflicts Therapeutic and Forensic Roles. Professional Psychology: Research and Practice*. Vol. 28, No. 1, 50-57; American Psychological Association (1994). *Guidelines For Child Custody Evaluations in Divorce Proceedings. American Psychologist*, 49, 677-680; Luftman, V.H., Veltkamp, L.J., Clark, J.J., Lannacone, S., and Snooks, H. (2005). *Practice Guidelines in Child Custody Evaluations for Licensed Clinical Social Workers, Clinical Social Work Journal*, Vol. 33, No. 3, Fall 2005; Patel, S.H. and Jones, K.D. (2008), *Assessment of Family Custody Issues Using Mental Health Evaluations: Implications Using Mental Health Counselors, Journal of Mental Health Counseling*, Vol. 30, No. 3, P. 189-199.

Before resorting to the mental health profession as the best answer to the problem relationship, attorneys should know whether the chosen mental health professional can or will voluntarily testify in court proceedings or whether the mental health professional's communication with a parent or child is confidential, privileged or both. It may not always be necessary to have the mental health professional testify, but it is advisable to consider whether testimony would be needed or wanted prior to involving the professional.

While a full discussion of the differing ethical roles of psychologists in participation with court proceedings is beyond the scope of this paper, the reader should be aware that, generally, a psychological evaluation will involve a psychologist providing a *forensic* role, while a psychologist or other mental health professional assisting adults or children in understanding behavior or interpersonal dynamics provides a *therapeutic* role.

Whether the reason be cost or just general efficiency, there can be an impulse to use one mental health profession for both the therapeutic and then the forensic role in a single custody case. Do not be surprised if the professional in question resists on the basis of professional ethical standards governing the professional's field of practice.

A. Psychological or Psychiatric Evaluations

It is not uncommon for a court to order psychological testing in a conservatorship case as an aid to understanding a party's parental strengths and weaknesses. While many family lawyers may be under the impression that such orders for testing are simply

within the court's discretion as a result of its authority over the best interest of the child, more specific authority is provided by the Texas Rules of Civil Procedure.

Specifically, Rule 204.4, Tex. R. Civ. P., entitled Cases Arising Under Titles II and V, Family Code, provides:

“In cases arising under Family Code Titles II or V, the court may – on its own initiative or on motion of a party – appoint:

“(a) one or more psychologists or psychiatrists to make any and all appropriate mental examinations of the children who are the subject of the suit or of any other parties, and may make such appointment irrespective of whether a psychologist or psychiatrist has been designated by any party as a testifying expert;

“(b) one or more experts who are qualified in paternity testing to take blood, body fluid, or tissue samples to conduct paternity tests as ordered by the court.”

B. Court-Ordered Counseling

There is also Code authority for the inclusion of mental health professionals in the *therapeutic* capacity in conservatorship cases.

1. Attendant to Divorce

Texas Family Code § 6.505, entitled Counseling, provides:

“(a) While a divorce suit is pending, the court may direct the parties to counsel with a person named by the court.

“(b) The person named by the court to counsel the parties shall submit a written report to the court and to the parties before the final hearing. In the report, the counselor shall give only an opinion as to whether there exists a reasonable expectation of reconciliation of the parties and, if so, whether further counseling would be beneficial. The sole purpose of the report is to aid the court in determining whether the suit for divorce should be continued pending further counseling.

“(c) A copy of the report shall be furnished to each party.

“(d) If the court believes that there is a reasonable expectation of the parties' reconciliation, the court may by written order continue the proceedings and direct the parties to a person named by the court

for further counseling for a period fixed by the court not to exceed 60 days, subject to any terms, conditions, and limitations the court considers desirable. In ordering counseling, the court shall consider the circumstances of the parties, including the needs of the parties' family and the availability of counseling services. At the expiration of the period specified by the court, the counselor to whom the parties were directed shall report to the court whether the parties have complied with the court's order. Thereafter, the court shall proceed as in a divorce suit generally.

“(e) *If the court orders counseling under this section and the parties to the marriage are the parents of a child under 18 years of age born or adopted during the marriage, the counseling shall include counseling on issues that confront children who are the subject of a suit affecting the parent-child relationship.*” (emphasis added)

2. In Conservatorship Suits

Texas Family Code § 153.010, entitled Order of Family Counseling, provides:

“(a) If the court finds at the time of a hearing that the parties have a history of conflict in resolving an issue of conservatorship or possession of or access to the child, the court may order a party to:

“(1) participate in counseling with a mental health professional who:

“(A) has a background in family therapy;

“(B) has a mental health license that requires as a minimum a master's degree; and

“(C) has training in domestic violence if the court determines that the training is relevant to the type of counseling needed; and

“(2) pay the cost of counseling.

“(b) If a person possessing the requirements of Subsection (a)(1) is not available in the county in which the court presides, the court may appoint a person the court believes is qualified to conduct the counseling ordered under Subsection (a).”

C. Parenting Coordinators

Difficult cases can be aided by the existence of either a parenting coordinator or a parenting facilitator. The parameters of these roles are detailed and specified in the Texas Family Code. If the case appears to the trial court to include problematic elements that are

likely to continue for some time after a final order, the inclusion of a parenting coordinator or parenting facilitator can help provide the parties satisfactory answers to periodic problems without the need to resort to continued litigation.

1. Appointment of Parenting Coordinator

Texas Family Code § 153.605, entitled Appointment of Parenting Coordinator, provides:

“(a) In a suit affecting the parent-child relationship, the court may, on its own motion or on a motion or agreement of the parties, appoint a parenting coordinator or assign a domestic relations office under Chapter 2031 to appoint an employee or other person to serve as parenting coordinator.

“(d) An individual appointed as a parenting coordinator *may not serve in any nonconfidential capacity in the same case*, including serving as an amicus attorney, guardian ad litem, or social study evaluator under Chapter 107.2 as a friend of the court under Chapter 202.3 or as a parenting facilitator under this subchapter.” (emphasis added)

2. Limitations of a Parenting Coordinator

While the use of a parenting coordinator to resolve conflict can be a clear benefit, there are limitations to the parenting coordinator’s function. Texas Family Code § 153.605(b) provides:

“(b) The appointment of a parenting coordinator does not divest the court of:

“(1) *its exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child*; and

“(2) the authority to exercise management and control of the suit.

“(c) *The parenting coordinator may not modify any order, judgment, or decree.* (emphasis added)

In addition, Texas Family Code § 153.608, provides:

“A parenting coordinator shall submit a written report to the court and to the parties as often as ordered by the court. *The report must be limited to a statement of whether the parenting coordination should continue.*” (emphasis added)

The role appears to be best suited to deal with potential problems where one or both of the parties are inclined to be more forthcoming in a confidential forum. Common sense would also indicate that the requirement of confidentiality would promote less party posturing about factual drivers for the conflict and more honesty in the problem-solving effort.

D. Parenting Facilitators

The parenting facilitator statute appears to be designed to permit professionals experienced in dealing with family conflict and family dynamics to aid the court in an evidentiary manner. *See* Texas Family Code § 153.6051. Specifically, the parenting facilitator’s function is similar to the parenting coordinator role, but the parenting facilitator may testify “relating to or arising from the duties of the parenting facilitator, including as to the basis for any recommendation made to the parties that arises from the duties of the parenting facilitator.” (*See* Section V., D., 3. *infra.*).

1. Limitations of Parenting Facilitator

Similar to the parenting coordinator, Texas Family Code § 153.6061(c) and (d), provide:

“(c) The appointment of a parenting facilitator does not divest the court of:

“(1) *the exclusive jurisdiction to determine issues of conservatorship, support, and possession of and access to the child*; and

“(2) the authority to exercise management and control of the suit.

“(d) *The parenting facilitator may not modify any order, judgment, or decree.* (emphasis added)

2. Report of a Parenting Facilitator

Texas Family Code § 153.6081, entitled Report of Parenting Facilitator, provides:

“A parenting facilitator shall submit a written report to the court and to the parties as ordered by the court. The report may include a recommendation described by Section 153.6082(e) and any other information required by the court, *except that the report may not include recommendations regarding the conservatorship of or the possession of or access to the child who is the subject of the suit.*” (emphasis added)

3. Recordkeeping of a Parenting Facilitator

There are some interesting measures included in the Code as a result of the ability of the parenting facilitator to testify. Specifically, the parenting coordinator is required to keep accurate records of communications with parties, attorneys, or other persons involved in the suit.

Texas Family Code § 153.6083(a) – (d), entitled Communications and Recordkeeping of Parenting Facilitator, provides:

“(a) Notwithstanding any rule, standard of care, or privilege applicable to the professional license held by a parenting facilitator, a communication made by a participant in parenting facilitation is subject to disclosure *and may be offered in any judicial or administrative proceeding, if otherwise admissible under the rules of evidence. The parenting facilitator may be required to testify in any proceeding relating to or arising from the duties of the parenting facilitator, including as to the basis for any recommendation made to the parties that arises from the duties of the parenting facilitator.*

“(b) A parenting facilitator shall keep a detailed record regarding meetings and contacts with the parties, attorneys, or other persons involved in the suit.

“(c) A person who participates in parenting facilitation is not a patient as defined by Section 611.001, Health and Safety Code, and no record created as part of the parenting facilitation that arises from the parenting facilitator’s duties is confidential.

“(d) On request, records of parenting facilitation shall be made available by the parenting facilitator to an attorney for a party, an attorney for a child who is the subject of the suit, and a party who does not have an attorney. (emphasis added)

It is worthwhile to note that nearly all licensees of mental health professionals regulated by Texas state law require those licensees to maintain client confidentiality under Section 611.001 of the Health and Safety Code. Texas Family Code § 153.6083(c) specifically varies those laws. If you have a mental health professional with a license normally requiring confidentiality and he or she is designated as parenting facilitator, it would be advisable to inform that professional of Texas Family Code § 153.6083(c).

4. Conflicts and Bias of Parenting Facilitator

Without setting forth at length the provisions of Texas Family Code § 153.6102, there are extensive measures included there that are designed, in general, to prevent the engaging of persons as parenting facilitators who would have a conflict of interest or would otherwise be engaging in dual roles. Interestingly, there is no companion statute for parenting coordinators on the topic of conflicts or bias.

E. Case Law Regarding the Role of Neutrals

Where trial courts have appointed a neutral to play a role in the continued possession structure, the courts of appeal have had to address challenges from a variety of different perspectives. Most often, the complaint either addresses the specificity and enforceability or order or the extent to which the court is permitted to delegate its authority over conservatorship and possession cases; and sometimes both. What follows is an assortment of appellate cases that include problematic possession and the common legal challenges to trial court final awards.

1. Possession “Per the Recommendation of the Court-Appointed Psychologist” Reversed

Shelton v. Shelton, 2003 WL 22511463 (Tex.App. – Houston [1st Dist.] 2003, no pet.) (mem. op.)(not designated for publication). In *Shelton*, the Court of Appeals reversed the trial court’s order that “possession of the child shall be per the recommendation of Dr. Dru Copeland.” The appellate court found that the order was not sufficiently specific to be enforceable and it therefore constituted an abuse of discretion.

2. Graduated Possession Schedule Subject to Continued Psychological Treatment Affirmed

In re. L.M.M. and S.D.M., 2005 WL 2094758 (Tex.App. – Austin 2005, no pet.)(mem. op.)(not designated for publication). *L.M.M.* was a modification of conservatorship case. The case does not reveal whether the prior order was agreed or the result of a contested trial. The prior order, however, appointed the parents joint managing conservators, awarded an SPO and awarded the father the right to designate the primary residence of the children. The procedural history included numerous competing motions to modify and both parties had been held in contempt several times on separate occasions. The evidence included: (1) the mother slapping her daughter and causing a scene at the child’s school after the child “flipped her the bird”; (2) the mother planted a recording device in a child’s backpack and gave the child instructions about how to draw the father into a fight; (3) the mother instructed the children to write letters about the father’s shortcomings and about their desire to live with her; and (4) the mother’s

admissions that each of the foregoing behaviors violated prior orders of the court. The mother appealed the trial court's ruling that the prior order be modified to appoint her a possessory conservator and restrict her possession and access. The court rendered a graduated possession order requiring first that she have no contact with the children until she began treatment with a psychologist and provide proof of such fact. Thereafter, the graduated schedule provided:

- after providing proof of beginning counseling, she could begin telephone contact with the children;
- beginning 30 days after she began treatment with the psychologist, she could have supervised visitation for four hours on second and fourth weekends;
- if she continued her psychological treatment she could have supervised possession from 9:00 a.m. to 10:00 p.m. on second and fourth Saturdays;
- if she continued her psychological treatment, the 9:00 a.m. to 10:00 p.m. possession on second and fourth Saturdays would become unsupervised;
- provided she complied with the remainder of the court's terms, she would have standard possession within a six-month timeframe from the rendition.

In addition, if the court-appointed psychologist for the mother *and* the children's therapist agree in writing that any specific period of possession is not in the best interest of the child, that period of possession shall not occur.

The court of appeals ruled that the terms of what the mother was required to do in order to obtain and enhance her rights of possession and access were unambiguous, specific and enforceable. In addition, Texas Family Code § 153.010(a) specifically authorizes the trial court to order parties to participate in counseling with a mental health professional.

On the issue of whether the trial court improperly delegated to a psychologist the authority to make judicial determinations, the court distinguished cases reversed because the other conservator was awarded the absolute discretion to deny possession by finding that here, a neutral psychologist and not a party is the decision-maker and the direction given by the court to the neutral psychologist in this case is much more specific than in the other authorities. The court stated:

“While it may not be appropriate in all cases for the trial court to delegate such authority to third parties, here the decision-makers were

mental health professionals appointed by the court, and the trial court maintained the power to review their decisions if challenged by the parties.”

3. No Contact Until Age 18 or Until Therapist Recommends Reversed

Hale v. Hale, 2006 WL 166518 (Tex.App. – San Antonio 2006, pet. denied). In *Hale*, although a father admitted to having sexually abused two step-daughters in the past, the appellate court reversed a trial court order that the father would be a possessory conservator but allowed no contact with his daughter until she turned 18 or until a therapist recommends visitation. The court held that the order was insufficiently specific, does not name a therapist and does not provide any guidelines to ensure that the best interests of the child are protected. Consequently, the father would have no ability to enforce the judgment by contempt.

4. Graduated Possession Schedule That Psychologist and Child Therapist Can Halt Affirmed and Not an Unconstitutional Delegation of Authority

In re. J.S.P., 278 S.W.3d 414, (Tex.App. – San Antonio 2008, no pet.). In *J.S.P.*, the appellate court upheld the delegation of authority over a father's possession to “work with [father] to develop a transitory program leading to unsupervised possession, and, at such time as Dr. Larsen determines is appropriate, standard possession.”

The trial court's findings of fact included:

- the child had special needs, including ADHD, a history of explosive outbursts, and qualified for special education due to emotional disturbance;
- the father was limited in his abilities to make appropriate judgment decisions due to cognitive impairment resulting from a closed head injury;
- the father had exercised only supervised possession during the pendency of temporary orders;
- there had been 11 documented incidents of intervention during father's supervised possession;
- there was limited evidence of any support system available to the father outside of the court and supervision system;
- given the special needs of the child and the limitations of the father, the father's possessory rights needed limitation to protect the child; and

- the father had participated in the child's therapy with the child's psychologist and Dr. Larsen.

The father challenged both the designation of the court's authority over his possession as unconstitutional and the trial court's failure to make specific orders of possession. After reviewing similar cases (including L.M.M., *supra*), on the issue of delegation of authority, the court said:

“While we cannot, and do not, condone a wholesale delegation of judicial authority over and issue of access or possession, we recognize that there are limited circumstances, as in the instant case, where delegation of some authority to a third party may be necessary to both protect the interest of the child and comply with the Family Code's mandate to minimize, when possible, the restrictions placed on a parent's right to possession of and access to his child.”

Interestingly, on the topic of the trial court order's specificity, the father's complaint was sustained and the issue remanded for more specific orders. The court noted that while the order names a specific therapist and orders him to develop a transitory program leading to unsupervised visitation, the trial court failed to state: (1) a date by which the transitory program should be developed; (2) a date by which the standard possession order should begin; or (3) a deadline by which the therapist must report reasons why the transitory program could not be developed or why standard possession could not commence. Since the father could not enforce the order by contempt, the trial court must be more specific.

PRACTICAL TIP: The case law precedents illustrate the limits of what a trial court can do to include neutrals in a contested trial context. If the parties settle their case pretrial, however, and voluntarily enter into an agreement to grant a neutral powers larger than a trial court could, it is unlikely that either party can or would appeal. While the order may or may not be enforceable by contempt, it may nonetheless serve the practical goal of including a trained professional to assist in working out disputes once the case is concluded.

VI. PREPARATION OF THE OPTIONS

A. Have a Proposal for the Court

In preparing and researching this topic, perhaps the most prominent concern voiced by judges was the

lack of prepared options by some litigants and counsel. Apparently, cases are still routinely presented to the court by attorneys without having crafted any serious proposals in light of concerning problems. Clearly, the better result will follow the better preparation and thought in the presentation. Conversely, a lack of well-thought-out options can lead to a final order more likely to generate additional problems.

B. A Clause Anticipating Future Proceedings

While you will try to craft a final result that will not need future court attention, it is sometimes advisable to include some kind of clause that permits the parties to “come back” to the courthouse to address requirements that are not working out. Included neutrals may change professions, move out of the area, or pass away. When attorneys craft specialty clauses not seen on an every-day basis, the potential to include conditions or requirements without customary consequences is increased. A reasonable anticipation of future problems makes sense and, whenever possible, a process to address those anticipated problems should be included in the order.

VII. CONCLUSION

The Texas Family Code and the case law precedents should provide the boundaries for what can or cannot be included within a possession order designed to address a problematic relationship. Within the fairly broad boundaries of what is permissible, attorneys should constantly evaluate options and be creative in developing solutions. Although there are some cases that simply will not permit good solutions, most cases (even very difficult ones) can improve relationships, reduce conflict, and avoid a return to the courthouse if the right combination of resources is included in a final order.

