

EDUCATION & OTHER RELATED CONSERVATORSHIP RIGHTS

HON. JEFFREY N. KAITCER, *Fort Worth*
Associate Judge, 322nd District Court

CHRIS NICKELSON, *Fort Worth*
Law Office of Gary L. Nickelson, P.C.

KRISTAL C. THOMSON, *San Antonio*
Langley & Banack, Inc.

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CHAPTER 2

JEFFREY N. KAITCER
ASSOCIATE JUDGE
322ND JUDICIAL DISTRICT COURT OF TEXAS
200 E. Weatherford Street
Fort Worth, Texas 76196
Telephone: (817) 884-3030
Email: jnkaitcer@tarrantcounty.com

LAW DEGREE: University of Texas, 1979

UNDERGRADUATE DEGREE: University of Dallas, Summa Cum Laude, 1976

CERTIFICATION BY THE TEXAS BOARD OF LEGAL SPECIALIZATION: Board Certified in Civil Trial Law (1993, recertified 1998, 2003, 2008, 2013, 2018)
Board Certified in Family Law (1993, recertified 1998, 2003, 2008, 2013, 2018)
Board Certified in Personal Injury Trial Law (1995, recertified 2000, 2005, 2010, 2015, 2020)

FAMILY LAW ACTIVITIES: President-Tarrant County Family Law Bar (2011-2012)
President-Elect-Tarrant County Family Law Bar Association (2010-2011)
Treasurer-Tarrant County Family Law Bar Association (2009-2010)
Director-Tarrant County Family Law Bar Association (2004-2009)
Member-Texas Academy of Family Law Specialists

HONORS, AWARDS, AND APPOINTMENTS: Named 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018 “Texas Super Lawyer” list as published by Thompson Reuters;
Named 2005, 2006, 2007, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, and 2018 Top Attorneys in Tarrant County by Fort Worth, Texas Magazine;
Top Rated Lawyer in “Commercial Litigation” American Lawyer Media
Rated “AV” in Martindale-Hubbell

STATE AND LOCAL BAR ACTIVITIES: Tarrant County Bar Association Volunteer Services Committee 2012-2013
Tarrant County Bar Association Fee Arbitration Committee (2002-2008)
State Bar of Texas Unauthorized Practice of Law Subcommittee (1986-1990)
Member-Family Law Section & Litigation Section State Bar of Texas
Member-College of the State Bar of Texas

Planning Committee for the Family Law Seminar
presented by the Tarrant County Family Law Bar
Association 2013

Course Director for the Family Law Seminar presented
by the Tarrant County Family Law Bar Association
2011, 2012

**LAW RELATED PUBLICATIONS
AND PRESENTATIONS:**

- 2020 “*Judicial Panel Discussion*” presented to Tarrant
County Family Law Bar Association at the
“Advanced on a Shoestring” Seminar
- 2019 “*Emerging Issues in Dealing with Family
Violence Litigation*” presented to Legal Aid of
Northwest Texas/Texas A&M University School
of Law
- 2019 “*Judicial Panel – Practice Before the New
Family Law Judges*” presented to the Tarrant
County Family Law Bar Association
- 2019 “*Judicial Panel Discussion*” presented to the
Tarrant County Family Law Bar Association at
“Advanced on a Shoestring” Seminar
- 2019 “*Tips for Legal Assistants*” presented to the
Fort Worth Paralegal Association
- 2019 “*There Ain’t No Cure for the Summertime Blues
– Visitation Issues, Summer Possession*”
presented to the Texas A&M School of Law
- 2019 “*Policies and Procedures in the 322nd District
Court*” presented to the Tarrant County Family
Law Bar Association
- 2008 “*Tarrant County Family Law Survival Guide*”
published by the Tarrant County Family Law
Bar Association, Editor in Chief
- 2007 “*Family Law Practice-More Than Just the
Family Code*” presented to the Grand Prairie
Bar Association
- 2005 “*Drafting for Enforcement in Family Law
Cases*” presented to the Fort Worth Paralegal
Association, Family Law Section

- 2005 “*Dos and Don’ts in Tarrant County Family Courts*” presented by the Tarrant County Family Bar Association
- 2005 “*Courtroom Testimony*” presented at the 2005 Conference of Texas Association of Domestic Relations Offices
- 2004 “*Temporary Orders Hearings*” presented at The Ultimate Trial Notebook- State Bar of Texas Continuing Legal Education

CHRIS NICKELSON
LAW OFFICE OF GARY L. NICKELSON
5201 West Freeway, Suite 100
Fort Worth, Texas 76107
817-735-4000
FAX: 817-735-1480

EDUCATION

J.D., Texas Tech University School of Law, 1999
B.A., University of Texas at Austin, 1996

EMPLOYMENT

Law Office of Gary L. Nickelson, 2008-present
Partner with Shannon, Gracey, Ratliff & Miller, L.L.P., 2005-2007
Associate with Shannon, Gracey, Ratliff & Miller, L.L.P., 2001-2004
Staff Attorney to Justice David Chew of the El Paso Court of Appeals, 2000
Law Clerk to Justice Ann McClure of the El Paso Court of Appeals, 1999-2000

OFFICES HELD

Chair Elect, Family Law Council, State Bar of Texas Family Law Section 2018-2019
Vice Chair, Family Law Council, State Bar of Texas Family Law Section 2017-2018
Treasurer, Family Law Council, State Bar of Texas Family Law Section 2016-2017
Secretary, Family Law Council, State Bar of Texas Family Law Section 2015-2016
Member, Family Law Council, State Bar of Texas Family Law Section 2010-2015
Chair of District Seven Grievance Committee 2017-present
Member of the District Seven Grievance Committee 2013-present
Director, Tarrant County Bar Association Board of Directors, 2008-2009
Chair of the Tarrant County Bar Association Appellate Section, 2008-2009

HONORS RECEIVED

Board Certified in Civil Appellate Law, 2006-present
SBOT Family Law Section's Dan R. Price Award in 2013
"Joseph W. McKnight Best Family Law CLE Article Award" in 2015 and 2011
Super Lawyer, Texas Monthly Magazine 2014-present
Rising Star, Texas Monthly Magazine 2004-2013
Top Attorney, Fort Worth Magazine, 2007-present

RECENT CLE ACTIVITIES

- Author and Presenter of *Character of Debts*, Advanced Family Law Course, August 2018, San Antonio.
- Author and Presenter of *Temporary Orders During Appeal*, Marriage Dissolution, April 2018, Dallas.
- Co-Author and Presenter of *Wildlings and Other Things Beyond the Wall—The Impact of Character Beyond Dividing the Community Estate*, New Frontiers in Marital Property Law, October 2017, Las Vegas.
- Author and Presenter of *Appellate Issues Affecting Your Family Law Practice*, Advanced Family Law Course, August 2017, San Antonio.
- Course Director, Marriage Dissolution, April 2017, Austin.
- Co-Author and Presenter of *Technology Case Law Update*, Family Law & Technology, December 2016, Austin.
- Co-Course Director, Advanced Family Law Course, August 2016, San Antonio.
- Author and Presenter of *Procedural Tricks and Traps*, Marriage Dissolution, April 2016, Galveston.
- Author and Presenter of *Findings of Fact and Conclusions of Law, What You're Supposed to Write and How it Will Help You*, Advanced Family Law Drafting Course, December 2015, Dallas.
- Author and Presenter of *Who Made This Mess? The Messy Process of Enforcing the Property Division*, New Frontiers in Marital Property Law, October 2015, Denver.
- Author and Presenter of *Jurisdictional Issues*, Advanced Family Law Course, August 2015, San Antonio.
- Author and Presenter of *Evidentiary Predicates*, Marriage Dissolution Course, April 2015, Dallas.

KRISTAL C. THOMSON



LANGLEY & BANACK, INCORPORATED

745 East Mulberry, Suite 700

San Antonio, Texas 78212

210.736.6600

kthomson@langleybanack.com

- LICENSES/CERTIFICATIONS:** State Bar of Texas; 2002
United States District Courts, Western District; 2003
Board Certified – Family Law, Texas Board of Legal Specialization; 2009
Collaborative Law Interdisciplinary Training, CLI-TX; 2014
- EDUCATION:** Juris Doctorate, St. Mary’s University School of Law; 2002
Bachelor of Arts, University of Texas; 1995
- LEADERSHIP POSITIONS:**
(CURRENT) Chair, Family Law Council, State Bar of Texas
Vice-President, Texas Chapter – American Academy of Matrimonial Lawyers
State Bar of Texas, Pattern Jury Charge Committee, Estates & Family Law
Board of Directors, Texas Board of Legal Specialization
Treasurer, Texas Academy of Family Law Specialists
- PROFESSIONAL MEMBERSHIPS:** Fellow, American Academy of Matrimonial Lawyers; *since 2014*
(SELECTED FOR INCLUSION) Sustaining Life Member, Texas Family Law Foundation, *since 2007*
San Antonio Family Lawyers Association
(Past President, 2018-2019)
Fellow, San Antonio Bar Foundation; *since 2006*
Member, Bexar County Women’s Bar Association; *since 2002*
(Prior Board Member, 2004-2009; Bench Brunch Chair, 2006)
Fellow, Texas Bar Foundation; *since 2012*
Member, College of the State Bar of Texas; *since 2003*
- CIVIC ACTIVITIES:**
(SELECTED FOR INCLUSION) Rotary Club San Antonio, *since 2016*
Sustainer, Junior League San Antonio; *since 2014*
Volunteer, Community Justice Program; *since 2003*
- AWARDS & RECOGNITIONS:**
(SELECTED FOR INCLUSION) Leadership San Antonio, Class 300 (43)
2021 Lawyer of the Year, Family Law, San Antonio – *Best Lawyers in America*®
2018 – 2020 “Super Lawyer” – *Texas Monthly*
2018 Standing Ovation Award – *TexasBarCLE*
2017 “40 Under 40” – *San Antonio Business Journal*
2011 – 2020 “Best Lawyer, Family Law” – *Scene in S.A. Monthly*
AV® Preeminent Rating – *Martindale-Hubbell*
- RECENT PUBLICATIONS, LECTURES & CLE:**
(SELECTED FOR INCLUSION) Co-Author & Panelist, *Entities & Marital Property Law*,
New Frontiers in Marital Property, State Bar of Texas, Savannah, Georgia 2019
Panelist, *Fiduciary and Tracing Issues in Probate & Family Law Litigation*,
Annual Meeting, State Bar of Texas, Austin 2019
Course Director, *Advanced Trial Skills for Family Lawyers*,
State Bar of Texas, New Orleans, Louisiana 2018
Course Director, *Advanced Family Law*, State Bar of Texas, San Antonio 2015

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EDUCATION AND OTHER RELATED RIGHTS¹

I. INTRODUCTION

The basics components of a SAPCR are conservatorship (including rights, powers, and duties), possession and access, and child support. This paper provides an overview of those components. This paper focuses on the right of a parent to make educational decisions on behalf of their child and other rights related thereto. It should be noted that no significant attention is given to third parties in this paper, including the Department, who are appointed as conservators.

II. RIGHTS AND DUTIES GENERALLY

Post-*Troxel*, many things changed regarding parents' rights to raise their children as they see fit. Education, health and medical care, and mental health care have had other legal intrusions that make the *Family Code* statutes far more relevant today than they were in 2001 (HIPPA, FERPA, etc.).

Recently, the Texas Supreme Court has enunciated a new presumption as it relates to the rights and duties of the parent – the fit parent presumption. Specifically, the Court held that the presumption in Texas is that a fit parent acts according to the best interest of his or her child and has a fundamental right to make decisions concerning the care, custody, and control of that child.² *CJC* was a case of non-parent vs. parent. However, it stands to reason that even in parent vs. parent cases, the party pleading to retain all rights, will have to prove that the other parent is not fit to exercise the rights and duties of a parent conservator.

The rights and duties of parents discussed in this paper are primarily delineated in the following sections of the *Family Code*:³

- Sec. 151.001 – Right and Duties of Parents**
- Sec. 153.073 – Rights of Parents at All Times⁴**
- Sec. 153.074 – Rights and Duties During Period of Possession**
- Sec. 153.076 – Duty to Provide Information**
- Sec. 153.132 – Rights and Duties of Parent Appointed Sole Managing Conservator**

¹ All references to codes herein refer to Texas statutes unless otherwise stated.

² *In re CJC*, 603 S.W.3d 804 (Tex. 2020).

³ A chart summarizing the details of these rights and duties is included at the end of this paper.

⁴ This is an inappropriately titled statute, because even though it reflects “rights of parents,” the text of the statute clearly indicates that it concerns the rights of parent *appointed as conservators*.

These sections list all of the rights and duties a parent or a conservator has – the ones we award in family law orders. Sec. 151.001 sets out the primary constitutional rights of a parent, and the origin of this section was part of the original codification of the Uniform Parentage Act in 2001.⁵

The *Family Code* tangential statutes to the rights and duties discussed in this paper are:

- Sec. 153.004 – History of Domestic Violence or Sexual Abuse**
- Sec. 153.005 – Appointment of Sole or Joint Managing Conservator**
- Sec. 153.006 – Appointment of Possessory Conservator**
- Sec. 153.071 – Court to Specify Rights and Duties of Parent Appointed a Conservator**
- Sec. 153.072 – Written Finding Required to Limit Parental Rights and Duties**
- Sec. 153.075 – Duties of a Parent Not Appointed Conservator**
- Sec. 153.131 – Presumption that Parent be Appointed Managing Conservator**
- Sec. 153.133 – Parenting Plan for Joint Managing Conservatorship**
- Sec. 153.134 – Court Ordered Joint Conservatorship**
- Sec. 153.192 – Rights and Duties of Parent Appointed Possessory Conservator**

The sections above add definition and structure to the rights and duties of a parent or conservator. In other words, the first group of sections listed is the “what,” and the second group is the “how.”

This paper organizes the rights to aid attorneys in managing and evaluating their cases in relation to these rights. Further, this paper focuses on the education and other related rights of parents and parents appointed as conservators.

III. DESIGNATING THE RESIDENCE OF THE CHILD

Perhaps the most important and fundamental right of a parent, is the right to designate the residence of a child.⁶ The *Family Code* provides that a parent who is appointed a sole managing conservator automatically has the right to determine the primary residence of the child.⁷ When a court appoints joint managing conservators, it must designate which conservator shall have the exclusive right to determine the child's

⁵ See generally Texas Bill Analysis, 2001 Regular Session, House Bill 920, TX B. An., H.B. 920, 7/10/2001.

⁶ TEX. FAM. CODE § 151.001(a)(1).

⁷ TEX. FAM. CODE § 153.132.

primary residence.⁸ When parties enter into an agreed parenting plan, they must designate which one of them shall have the exclusive right to determine the child's primary residence or they must designate a geographic area in which the child's primary residence will be located.⁹

The *Family Code* is written as if the right to determine the child's primary residence is the ultimate and core right of what it means to be a managing conservator. For example, it is the only parental right that can be determined by a jury.¹⁰ Further, if a jury does make a decision regarding which conservator has the right to designate the primary residence of the child, the court may not contravene the verdict.¹¹

Attendant to the right of a jury or court to designate the parent with the exclusive right to determine the primary residence, is the right of the jury, court, or parties to restrict that right (or not), to a specific geographic area.¹² This is true in an original proceeding as well as later modifications.¹³ However, the statutory ability of the court to restrict a parent's residence to a geographic area is not absolute, and later modifications of this right are appropriate.¹⁴

Traditionally, the rationale given for why the code requires a court, jury, or parties to designate which joint managing conservator has the exclusive right to determine the child's primary residence is to settle disputes over which public school district the child should be enrolled when the parents in a geographic area that has more than one school district.¹⁵ In *Doncer v. Dickerson* the court of appeals

explained why a child's primary residence is so important:

"Primary residence" as used throughout the *Family Code* is necessary for two reasons. When a child is spending time in the households of both parents—and in many cases, the time may be divided evenly between the two households—one parent must have the ability to determine residency for purposes of public school enrollment if the parents reside in different districts. And given the heightened mobility of modern society, the right to establish the primary residence of the child factors significantly in the power of relocation. A parent given unfettered discretion to establish the primary residence of the child can move away from the other parent without court approval. Frequently, a parent is authorized to determine the primary residence of the child within a designated geographical area.¹⁶

Nothing in the *Family Code* prohibits the court from awarding the party, who is not awarded the exclusive right to designate the primary residence of the child, any of the other rights and duties listed in Section 151.001(a), whether it does so by awarding the rights and duties exclusively to one party, or jointly or independently to both parties. However, if the court awards the rights and duties, or awards possession and access, in a manner so as to circumvent a jury verdict awarding the exclusive right to determine the primary residence to one party, then the trial court likely abuses its discretion.¹⁷

Next, careful practitioners must be aware that awarding both parties the right to make educational decisions either jointly or independently can potentially lead to some real problems depending upon the court of appeals district in which you practice.

If you practice in the Austin or Beaumont Court of Appeals' districts, and if the parties agreed to exercise the right to make educational decisions jointly or independently, then there is a chance that awarding one parent the right to designate the child's primary residence may not settle the issue of who has the right to determine the school district in which the child

⁸ TEX. FAM. CODE § 153.134.

⁹ TEX. FAM. CODE § 153.133.

¹⁰ TEX. FAM. CODE § 105.002(c)(2)(C).

¹¹ TEX. FAM. CODE § 105.002(c)(1)(D); *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex.2002).

¹² TEX. FAM. CODE § 105.002(c)(1)(D) and TEX. FAM. CODE § 105.002(c)(1)(E).

¹³ *Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex.2002).

¹⁴ *See In re Cooper*, 333 S.W.3d 656 (Tex.App. – Dallas 2009, no pet.) (holding that a trial court's requirement for the custodial parent to use "extreme efforts" to find a job before he will remove the geographic restriction was an abuse of discretion).

¹⁵ *Doncer v. Dickerson*, 81 S.W.3d 349, 361 (Tex.App.—El Paso 2002, no pet.); *see also* John J. Sampson, Harry L. Tindall, et al., *Sampson & Tindall's Texas Family Code Annotated*, Chapter 153, Subchapter C, Introductory Comment, p. 461, and Comment to Section 153.134, p. 465 (Aug.1999 ed.) (discussing amendments to the code in 1979, 1987, 1991, 1993, and 1995 which led to the then current statutory regime and noting that the then current system encouraged courts and parties to resolve issues in their orders "that have a heightened likelihood for future controversy" such as where the child resides and attends school).

¹⁶ *Doncer*, 81 S.W.3d at 361.

¹⁷ *See e.g., Albrecht v. Albrecht*, 974 S.W.2d 262, 265 (Tex.App.—San Antonio 1998, no pet.) ("While the trial court has discretion to set the terms and conditions of possession, that discretion cannot be used to divide custody of a child when the jury has determined that the father will serve as primary care-giver").

should be enrolled.¹⁸ However, if you practice in the Houston 1st District or Fort Worth Court of Appeals' districts then this may not be the case as these courts adhere to the traditional rule that the award to one party of the exclusive right to designate the child's primary residence, settles the issue of the school district in which the child should be enrolled when the parties live in more than one school district.¹⁹ This divide stems from the Austin Court of Appeals' decision in *In re Cole*.

In *Cole*, the parties agreed in their divorce decree to be appointed joint managing conservators, with each party sharing all the rights and duties jointly with the other, except that Mr. Cole had the exclusive right to determine the primary residence of his two children within Travis County, Texas and Dallas County, Texas. Additionally, the decree gave each party the right "subject to the agreement of the other parent conservator, to make decisions concerning the children's education."²⁰

At the time of divorce, Mr. Cole resided in the marital residence, which was located in the Eanes Independent School District. Ms. Cole resided outside the boundaries of the Eanes school district. Mr. Cole continued to reside in the marital residence until it was sold pursuant to the terms of the decree, and he moved to a home in the Lake Travis Independent School District. The parties got into a dispute over where the children should go to school, and a modification action was filed.²¹ Ms. Cole requested that the trial court enter a temporary order requiring the children to attend school in the Eanes School District. Mr. Cole took the position that the children should go to school in the Lake Travis School District because his new home was located in the district and the decree awarded him the exclusive right to determine the children's primary residence in Travis or Dallas Counties.²² At the conclusion of the temporary orders hearing, the trial judge made the following ruling:

"[Father) is the person with the right to establish the primary residence. If you wanted to stay at Eanes, I guess you should have put in some type of agreement or in the decree, but I have a theory. You know, you

can file a -- orders in family law can be modified the day after they walked out. I mean, there's complications that occurred. It's an ongoing process with the children, but I believe under this situation and the way this has come down and these emails that have been -- if -- if there is absolute proof that the transfer has been accepted, I am going to temporarily order these kids to go to Eanes School District."²³

Mr. Cole filed a mandamus with the Third Court of Appeals in Austin. His argument was the court's ruling violated a former version of *Family Code* Section 156.006(b), which at that time stated:

"(b) While a suit for modification is pending, the court may not render a temporary order that has the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child under the final order unless the temporary order is in the best interest of the child, and:

- (1) the order is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development;
- (2) the person designated in the final order has voluntarily relinquished the primary care and possession of the child for more than six months; or
- (3) the child is 12 years of age or older and has expressed to the court in chambers as provided by Section 153.009 the name of the person who is the child's preference to have the exclusive right to designate the primary residence of the child.²⁴"

None of the three exceptions listed in subparagraphs (1) through (3) existed in the *Cole* case. Mr. Cole argued that taking away the right to decide where a

¹⁸ *Int. of C.E.H.*, No. 09-19-00120-CV, 2020 WL 5666081, at *8 (Tex.App.—Beaumont Sept. 24, 2020) (mem. op.); *In re Cole*, No. 03-14-00458-CV, 2014 WL 3893055, at *3 (Tex. App.—Austin Aug. 8, 2014, no pet.) (mem. op.).

¹⁹ *In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216, at *4 (Tex. App. May 23, 2019), reh'g denied (July 11, 2019); *Rogers v. Rogers*, 2016 WL 3162299 (Tex.App. – Houston [1st Dist.] 2016, no pet.) (mem. op.).

²⁰ *In re Cole*, 2014 WL 3893055, at *1.

²¹ *Id.*

²² *Id.* at 1-2.

²³ Eric Robertson, "Legal Meaning of the Phrase 'Exclusive Right to Designate Primary Residence,'" State Bar of Texas, Advanced Family Law Course, San Antonio (2016), at 2016 WL 10609015.

²⁴ Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1999, 76th Leg., ch. 1390, § 15, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1289, § 3, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 1036, § 18, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 916, § 17, eff. June 18, 2005; Acts 2009, 81st Leg., ch. 727, § 2, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 1113, § 27, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 1118, § 2, eff. Sept. 1, 2009; Acts 2015, 84th Leg., ch. 397 (H.B. 1500), § 1, eff. Sept. 1, 2015; Acts 2017, 85th Leg., ch. 91 (H.B. 1495), § 1, eff. Sept. 1, 2017.

child attends public school from the parent with the exclusive right to designate the primary residence had the effect of changing the designation of the person who has the exclusive right to designate the primary residence of the child. In a memorandum opinion, the Third Court of Appeals disagreed, specifically saying the trial court's order that the children continue to attend school in Eanes **did not** deprive Mr. Cole of his right to establish the primary residence of the children.²⁵

The most troubling part of the Austin Court of Appeals' opinion deals with their interpretation of the El Paso Court of Appeals' *Doncer* opinion. The Third Court of Appeals specifically stated: "We do not read *Doncer* as holding that the right to determine a child's primary residence gives the person holding that right the absolute power to decide which public school that child will attend."²⁶ The court further noted: "Kamen [Ms. Cole] and Cole share the right to make decisions concerning the children's education, and must concur in the exercise of that right. Any decision regarding the children's education proposed by one parent is 'subject to the agreement of the other parent.'"²⁷

Thus, within the jurisdiction of the Third Court of Appeals, the right to designate the primary residence of the child does not carry with it the right to determine where the child attends public school in joint managing conservatorships where the order in question requires the conservators to make educational decisions jointly. "As a practical matter, one should always either award the right to make educational decisions exclusively to the party with the right to designate the primary residence of the child, or specify the that the right to establish the primary residence also carries the exclusive right to determine where the child attends public school when the parties live in different school districts."²⁸ "Taken to an absurd extreme, the [Cole] decision would require an agreement prior to the beginning of every school year as to where a child would attend public school. Each August, one parent or the other could say they no longer agree for the child to attend the public school the child attended the previous school year."²⁹

The result reached by the Austin Court of Appeals in the *Cole* case has been criticized and it was later abrogated by subsequent amendments to the family

code.³⁰ However, it is best that you be aware that not all courts of appeals adhere to the traditional understanding of why the code requires courts, juries, and parents to designate one conservator as having the right to designate the child's primary residence. And it is best that you be as clear as possible which party gets to decide the school district in which the child shall be enrolled when the parties agree to exercise the right to make educational decisions either jointly or independently.

IV. SUPPORT OF A CHILD

All parents are required by law to support their children financially.³¹ This is a duty rather than a right, and is specifically defined by statute to include clothing, food, shelter, medical and dental care, and education.³² A parent appointed as a sole managing conservator has the exclusive right to receive support payments and disburse those payments for the child's benefit.³³ Of note are the various historical references that the duty to support the child is primarily imposed on the father.³⁴ In determining that the father should pay support, a 1921 Texas Supreme Court states:

"The duty to support a minor child is imposed primarily on the father in the interest of the child. The chief concern of the state is the child's welfare. It is best for the child to impose the duty in the first instance on the father, because human experience demonstrates that he is best able to perform the duty. It is as much to the advantage of the child that the primary obligation of the father continue after as before the divorce. Being blameless with respect to the fault occasioning the divorce, the child certainly ought not to be thereby deprived of a right of real and continuing value."³⁵

³⁰ *In re J.W.*, 2019 WL 2223216, at *4 ("We question the reasoning in *Cole* because it seems that the father's ability to designate the children's primary residence in Dallas County would indeed be affected by an order requiring the children to attend school about 200 miles away. Regardless the legislature has since amended section 156.006(b) to insert the phrases "creating a designation, or" and "or the effect of creating a geographic area, or changing or eliminating the geographic area, within which a conservator must maintain the child's primary residence." . . . Because the legislature has expanded the type of temporary order that requires additional findings under section 156.006(b), *Cole* is inapposite.") (internal citations omitted).

³¹ TEX. FAM. CODE §151.001(a)(3).

³² TEX. FAM. CODE §151.001(a)(3).

³³ TEX. FAM. CODE §154.132(4).

³⁴ *Gully v. Gully*, 231 S.W. 97 (Tex. 1921).

³⁵ *Gully* at 98-99.

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Robertson, "Legal Meaning of the Phrase 'Exclusive Right to Designate Primary Residence,'" 2016 WL 10609015.

²⁹ *Id.*

The duty to support a child is rooted in the history of our country's jurisprudence.³⁶ As soon as a child is born, the law imposes the duty on a parent to support the child.³⁷ The duty to support a child is guided by and somewhat limited by guidelines in the *Family Code*.³⁸ But the *Family Code* also allows deviation from these guidelines, and some courts have noted that the duty to support a child is not limited to basic necessities.³⁹

Additionally, the duty to support a child is so fundamental in our jurisprudence that a parent may have liability to another person who does support their child.⁴⁰ This is a common law rule that arose in English law centuries before our current statutes.⁴¹

In Texas, the duty to provide support for a child ends when (1) the child turns 18 or graduates from high school (whichever occurs later), (2) the parent-child relationship is terminated, (3) the child begins active service in the armed forces, (4) the child dies, (5) the child remarries, or (6) the child is legally emancipated from their parents (termed the "removal of disabilities").⁴² Child support is discussed in greater detail later in the paper.

V. RECORDS AND INFORMATION OF A CHILD

Several statutes address a parent or conservator's right to consent to medical, dental, surgical, psychological, or educational action on behalf of a child. In addition to consent, some statutes bestow the ability to give and receive information regarding these same rights.

A parent appointed as a conservator has the right to receive information from every other conservator regarding the child's health, education, and welfare.⁴³ Additionally, a parent conservator has the right (but not the duty) to confer with the other parent regarding the child's health, education, and welfare (unless specifically imposed by court order or agreement).⁴⁴

The *Education Code* also gives parents the right to access academic records and states specifically that parents shall be "encouraged to actively participate in

creating and implementing educational programs for their children."⁴⁵ However, this right can be limited by other laws – most notably, the *Family Code*.⁴⁶ The *Education Code* clearly outlines what records a parent has a right to access, namely: attendance records, test scores, grades, disciplinary records, counseling records, psychological records, applications for admission, health and immunization information, teacher and school counselor evaluations, and reports of behavioral patterns.⁴⁷

Other statutes may limit a parent's right to access information. The *Health and Safety Code* limits parents' rights to access a child's mental health records if the mental health provider feels that releasing the information would be harmful to the child's physical, mental, or emotional health.⁴⁸ The Supreme Court has held that the *Family Code* does not give greater rights to a divorced parent versus a parent who is not divorced.⁴⁹

Regardless of a parent's ability to consent to same, a parent conservator has the right to access all of the child's vital information, including but not limited to medical, dental, psychological, and educational records.⁵⁰ This also includes a parent conservator's right to consult with a child's physician, dentist, psychologist, or school official.⁵¹ A parent conservator also has the right to attend school activities, so presumably, this would mean that the parent has a right to consult with, and receive information from, a band director, athletic coach, etc.⁵²

A parent conservator has the right to be designated on their child's records as a person to be notified in case of emergency.⁵³ This right is not limited to school or educational records, so this statute may apply to doctors, psychologists, therapists, camps, extra-curriculars, and field trips.

In addition to access to information of the child from health and educational providers, any person appointed as a conservator has the **duty** to inform the other conservator of the child in a timely manner of significant information concerning the health, education, and welfare of the child.⁵⁴ (This duty also includes the duty of one conservator to inform the other conservator if they so happen to marry or reside

³⁶*Yarborough v. Yarborough*, 290 U.S. 202, 221, 54 S.Ct. 181 (1933) ("...in order that children may not become public charges the duty of maintenance is one imposed primarily upon the parent, according to the needs of the child and their ability to meet those need.")

³⁷*Office of the Attorney General v. Carter*, 977 S.W.2d 159, 160-61 (Tex.App. – Houston [14th Dist.] 1998, no pet.).

³⁸ See generally Chapter 154 of the *Texas Family Code*.

³⁹*Rodriguez v. Rodriguez*, 860 S.W.2d 414 (Tex. 1993).

⁴⁰*Tucker v. Thomas*, 419 S.W.3d 292, 298-299 (Tex. 2013).

⁴¹*Tucker* at 298.

⁴² TEX. FAM. CODE §154.002 and TEX. FAM. CODE §154.006.

⁴³TEX. FAM. CODE §153.073(a)(1).

⁴⁴ TEX. FAM. CODE §153.073(a)(2).

⁴⁵ TEX. EDUC. CODE §26.001(a).

⁴⁶ TEX. EDUC. CODE §26.001(c).

⁴⁷ TEX. EDUC. CODE §26.004.

⁴⁸ TEX. HEALTH & SAFETY CODE §611.04(b).

⁴⁹*Abrams v. Jones*, 35 S.W.3d 620, 624 (Tex. 2000).

⁵⁰ TEX. FAM. CODE §153.073(a)(3).

⁵¹ TEX. FAM. CODE §153.073(a)(4) and TEX. FAM. CODE §153.073(a)(5).

⁵² TEX. FAM. CODE §153.073(a)(6).

⁵³ TEX. FAM. CODE §153.073(a)(7).

⁵⁴ TEX. FAM. CODE §153.076.

with a sex offender, but that duty is not the subject of this paper.)

VI. INCOME AND FINANCES OF A CHILD

Parents have a duty to manage any estate of a child, including the duty to act as an agent on behalf of their child.⁵⁵ In addition to the duty to manage, a parent appointed as a conservator has a *right* to manage the estate of a child to the extent the estate was created by a parent or the parent's family.⁵⁶ A parent appointed as a sole managing conservator has the exclusive right to act as an agent of a child in relation to the child's estate, to the extent (1) no guardian or ad litem has been appointed for the child's estate, and (2) action is required by a state, the United States, or a foreign government.⁵⁷

Parents also have the right to the services and earnings of their child, and during marriage, the parents of a child have the right to control the earnings of an unemancipated minor.⁵⁸ A parent appointed sole managing conservator has the exclusive right to these earnings.⁵⁹ The right of the parent to receive these earnings is permanently removed if the child is placed in the conservatorship of the Department, foster home or a child-care institution.⁶⁰ The ability of the parents to manage the funds or earnings of a child does not allow that parent to use them for their own personal expenses.⁶¹

VII. EDUCATIONAL RIGHTS

All parents have the right to make decisions regarding their child's education.⁶² A parent who is appointed a sole managing conservator has the exclusive right to make decisions concerning their child's education.⁶³ In practice, family lawyers usually explain this right as the choice between private and public school. However, this right is decidedly more complex when the *Education Code* and federal regulations of education and special needs are considered.

As previously discussed, there may be a conflict between the *Education Code* and the *Family Code* regarding who has the right to obtain educational records. Similarly, there may be some conflict between the two codes as to which parent has the right to make

educational decisions. This confusion primarily exists due to the fact that the *Education Code* has their own definition of parent:

"In this chapter, "parent" includes a person standing in parental relation. The term does not include a person as to whom the parent-child relationship has been terminated or a person not entitled to possession of or access to a child under a court order. Except as provided by federal law, all rights of a parent under Title 2 of this code and all educational rights under Section 151.003(a)(10), Family Code, shall be exercised by a student who is 18 years of age or older or whose disabilities of minority have been removed for general purposes under Chapter 31, Family Code, unless the student has been determined to be incompetent or the student's rights have been otherwise restricted by a court order."⁶⁴

All parents stand in "parental relation;" even divorced parents. Also, all conservators (joint, sole, and managing) are entitled to possession of or access to a child. So clearly, just the definition of parent complicates the educational decisions of a child.

Accordingly, a parent's right to participate in the programs related to special education is granted to "parents," and there is no reference to a "parent with the exclusive right to make educational decisions on behalf of the child." And, as stated above, all parents have the right to consult with school officials. But who has the right to approve or disapprove special education services offered by the school? The answer may be found in the *Education Code* section 26.001, which states, "[u]nless otherwise provided by law, a board of trustees, administrator, educator, or other person may not limit parental rights."⁶⁵ Interestingly, the Federal code that governs special education defines parents as broadly as the *Texas Education Code*:

"The term "parent" means—

- (A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
- (B) a guardian (but not the State if the child is a ward of the State);
- (C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

⁵⁵ TEX. FAM. CODE §151.001(a)(4).

⁵⁶ TEX. FAM. CODE §153.073(a)(9).

⁵⁷ TEX. FAM. CODE §153.132(9).

⁵⁸ TEX. FAM. CODE §151.001(a)(5) and TEX. FAM. CODE §3.103.

⁵⁹ TEX. FAM. CODE §153.132(8).

⁶⁰ TEX. FAM. CODE §264.0111(a).

⁶¹ *Taylor v. Taylor*, 680 S.W.2d 645 (Tex.App. – Beaumont 1984, writ refused n.r.e)(holding that the "debt" incurred when using a child's property for personal use is a community debt).

⁶² TEX. FAM. CODE §151.001(a)(11).

⁶³ TEX. FAM. CODE §153.132(7).

⁶⁴ TEX. EDUC. CODE §26.002.

⁶⁵ TEX. EDUC. CODE §26.001(c).

(D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.”⁶⁶

Also, consent for enrollment in services and approval of an individual education plan needs approval from a “parent,” not “parents” or a “parent with the legal right to make educational decisions.”⁶⁷ However, the lack of parental consent does not automatically prevent the child from receiving services.⁶⁸

Additionally, who has the authority to remove the child from school? Unlike the approval of special education services, this is probably more appropriately settled by the parent who is entitled to present possession. However, even this right is hampered by the *Education Code* since “a parent is not entitled to remove the parent’s child from a class or other school activity to avoid a test⁶⁹ or to prevent the child from taking a subject for an entire semester.”

Also, pursuant to the education code, a parent is entitled to request a change in the child’s classes, teachers, curriculum, and early graduation.⁷⁰

VIII. CONSENT TO MARRIAGE

As of 2017, a parent can no longer consent to allow a minor to marry in the state of Texas.⁷¹ However, since some states still allow this practice, the Legislature has not amended the rights and duties portion of the *Texas Family Code*.⁷² A parent who is appointed as a sole managing conservator has the exclusive right to consent to marriage.⁷³ An underage marriage “removes the disabilities” of a minor. Therefore, a marriage would likely abrogate a parent’s right to make educational decisions.

IX. CONSENT TO ENLIST IN THE UNITED STATES ARMED FORCES

A parent can consent to allow a minor to enter the armed forces.⁷⁴ A parent who is appointed as a sole managing conservator has the exclusive right to consent to enlistment in the armed forces.⁷⁵ This right is somewhat inhibited by the fact that the duty to support a child ends if and when the minor child begins services in the armed forces (discussed herein). However, this right is restricted by Federal regulations

that allow enlistment for “able-bodied persons who are not less than seventeen years of age nor more than forty-two years of age.”⁷⁶

X. MEDICAL, DENTAL, AND SURGICAL CARE

The right to consent to medical and dental care is a fundamental right of a parent.⁷⁷ A parent appointed as a sole managing conservator has the exclusive right to consent to medical, dental, and surgical care involving an invasive procedure.⁷⁸

A parent who is appointed as a conservator has the right to consent to medical, dental, and surgical treatment involving an immediate danger to the health and safety of a child.⁷⁹ During their periods of possession, a parent appointed as a conservator has the right to consent to medical and dental care not involving an invasive procedure.⁸⁰ Immunization authority is granted under chapter 32 of the *Family Code*.⁸¹ Interestingly, section 32.101 states that “[i]n addition to persons authorized to consent to immunizations under Chapter 151 and Chapter 153...”⁸² However, although Chapters 151 and 153 give parents the right to authorize medical care generally, there is no reference as to whether immunizations are considered an invasive procedure.

It should also be noted that the *Family Code* provides that during a parent’s possession, that parent has the duty of care, control, protection, and reasonable discipline of a child.⁸³ This could be interpreted to mean medical care, taking care of the child when they are home sick from school, or the duty to determine whether the child should participate in extra-curricular activities. It might also be extended to ADR conferences or parent-teacher conferences (see educational decisions discussed herein).

The Natural Death Act may also limit a parent’s right to consent to medical care.⁸⁴ This act relieves a doctor or hospital from liability if they provide life-sustaining emergency treatment to a child without the parent’s consent.⁸⁵

Consent for medical, dental, and surgical care may be made by a non-parent “when the person having the right to consent as otherwise provided by law cannot be contacted and that person has not given

⁶⁶ 20 U.S.C.A §1401 (2016).

⁶⁷ 20 U.S.C.A. §1414(I) (2016).

⁶⁸ 20 U.S.C.A. §1414(I)(ii) (2016).

⁶⁹ TEX. EDUC. CODE §26.010(a).

⁷⁰ TEX. EDUC. CODE §26.003.

⁷¹ TEX. FAM. CODE §2.003.

⁷² TEX. FAM. CODE §151.001(a)(6).

⁷³ TEX. FAM. CODE §153.132(6).

⁷⁴ TEX. FAM. CODE §151.001(a)(6).

⁷⁵ TEX. FAM. CODE §153.132(6).

⁷⁶ 10 USC §505 (2017).

⁷⁷ TEX. FAM. CODE §151.001(a)(6).

⁷⁸ TEX. FAM. CODE §153.132(2).

⁷⁹ TEX. FAM. CODE §153.073(a)(8).

⁸⁰ TEX. FAM. CODE §153.074(3).

⁸¹ TEX. FAM. CODE §32.101.

⁸² *Id.*

⁸³ TEX. FAM. CODE §153.074(1).

⁸⁴ *Miller ex. rel. Miller v. HCA, Inc.*, 118 S.W.3d 758 (2003).

⁸⁵ *Miller* at 768.

actual notice to the contrary.”⁸⁶ Additionally, in limited circumstances, a child can consent to their own medical, dental, and surgical care.⁸⁷

What adds complexity to the rights delineated in Chapter 153 is that the term “invasive treatment” is not defined in the *Family Code*. There is a reference to an invasive procedure in the *Texas Health and Safety Code* in the chapter that deals with Acquired Immune Deficiency Syndrome and Human Immunodeficiency:

“Invasive procedure means (A) a surgical entry into tissues, cavities, or organs or (B) repair of major traumatic injuries associated with any of the following: (i) an operating or delivery room, emergency department or outpatient setting, including a physician’s or dentist’s office; (ii) cardiac catheterization or angiographic procedures; (iii) a vaginal or cesarean delivery or other invasive obstetric procedure during which bleeding may occur; or (iv) the manipulation, cutting or removal of any oral or perioral tissues including tooth structure, during which bleeding occurs or the potential for bleeding exists.”⁸⁸

Curiously, the only case that cites this code section is a family law case.⁸⁹ In *Brennan v. Cedeno*, the Fort Worth Court of Appeals was tasked with determining whether orthodontia treatment was considered an invasive procedure. In this case, the parents were given the “joint right to consent to medical, dental, and surgical treatment involving invasive procedures.”⁹⁰ The children lived with Cedeno (Mother), but Brennan (Father) was suing on enforcement of health care costs for the orthodontia he authorized for his children, without the (express) joint agreement of Cedeno.⁹¹ The trial and appellate court determined that both parties consented to use the *Health & Safety Code* definition of invasive procedures.⁹² The trial court found that the application of braces was an “invasive procedure,” which would require the joint agreement of both parties, and since Brennan did not get an agreement, Cedeno was not required to pay her portion of the expenses.⁹³ The Court of Appeals reversed and remanded stating that there was insufficient evidence to show that braces “did or did not involve a surgical

entry into the children’s mouths or the ‘repair of major traumatic injuries’.”⁹⁴

XI. CONSENT TO PSYCHOLOGICAL AND PSYCHIATRIC CARE

The right to consent to a child’s mental health care is a parent’s basic legal right.⁹⁵ A parent appointed as a sole managing conservator has the exclusive right to consent to the child’s psychological and psychiatric treatment.⁹⁶ Similar to medical, dental, and surgical care, consent for psychological care may be made by a non-parent “when the person having the right to consent as otherwise provided by law cannot be contacted, and that person has not given actual notice to the contrary.”⁹⁷ Additionally, in limited circumstances, a child can consent to their own psychological care.⁹⁸

As discussed herein, school districts may also make certain decisions related to the psychological testing of a child. However, generally, the *Education Code* requires that the school receive permission from a “parent” prior to conducting a psychological examination, test, or treatment for a child.⁹⁹

Also, a child who is 16 years or older may voluntarily admit themselves to a mental health facility or for outpatient mental health services.¹⁰⁰

XII. REPRESENTING A CHILD IN LEGAL ACTION AND MAKING SUBSTANTIAL LEGAL DECISIONS

The right to represent a child in a legal action is a basic right of a parent.¹⁰¹ A parent appointed as a sole managing conservator has the exclusive right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child.¹⁰² The right to make substantial legal decisions on behalf of a child is an exclusive right that another person cannot exercise.¹⁰³ Further, at least one appellate court has ruled that the right is limited in that a parent cannot waive their child’s right to sue for personal injury.¹⁰⁴

Unlike medical, psychological, and educational decisions, this parental right is not often fought over... until it is. Texas case law is replete with cases where a lawsuit was filed on behalf of a child, and fights

⁸⁶ TEX. FAM. CODE §32.001.

⁸⁷ TEX. FAM. CODE §32.003.

⁸⁸ TEX. HEALTH & SAFETY CODE §85.202(3).

⁸⁹ *Brennan v. Cedeno*, 2010 WL 2089979 (Tex.App. – Ft. Worth 2010, no pet.)(memorandum opinion).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ TEX. FAM. CODE §151.001(a)(6).

⁹⁶ TEX. FAM. CODE §153.132(3).

⁹⁷ TEX. FAM. CODE §32.001.

⁹⁸ TEX. FAM. CODE §32.003.

⁹⁹ TEX. EDUC. CODE §26.009(1).

¹⁰⁰ *Re*. Health & Safety Code §572.001.

¹⁰¹ TEX. FAM. CODE §151.001(a)(7).

¹⁰² TEX. FAM. CODE §153.132(5).

¹⁰³ *Munoz v. II Jazz Inc.*, 863 S.W.2d 207, 209 (Tex.App. - Houston [14th Dist.] 1993, rehearing denied).

¹⁰⁴ *Id.*

ensued over who had the right to represent the child in said lawsuit. This typically occurs when a child is involved in a car wreck or similar accident, resulting in a personal injury claim.

The right to represent a child in a lawsuit is subject to several rules of procedure. Of note regarding the rights and duties of a parent is TEX. R. CIV. P. 44 and TEX. R. CIV. P. 173 et seq. Rule 44 is the Next Friend rule, and provides in part that “[m]inors who have no legal guardians may sue and be represented by next friend...” Conversely, Rule 173 states in part that the [c]ourt must appoint a guardian ad litem for a party represented by a next friend or guardian only if the next friend or guardian appears to the court to have an interest adverse to the party, or the parties agree.”

Therefore, a parent’s right to represent their child in a legal action can be limited if the court determines that there is a conflict between the parent and the minor. This is true even if the court sees a *potential* conflict.¹⁰⁵ However, as soon as the conflict is removed – as is the case when a parent is dismissed as a plaintiff from a lawsuit where the child remains a plaintiff – then the parent’s rights should be immediately reinstated.¹⁰⁶

In *In re KC Greenhouse Patio Apartments*, the 14th Court of Appeal determined that a grandparent, appointed as a guardian ad litem in a wrongful death suit, was an abuse of the trial court’s discretion. The Court of Appeal held that a guardian ad litem could not replace a parent’s right to make legal decisions when there was no real or potential conflict of interest. The majority opinion cited some practical reasons why such an appointment would create conflict between family code rights and the rights of a guardian ad litem:

“The confusion in [the Guardian Ad Litem’s] role may create practical difficulties and further impair [Mother’s] rights. The impetus to [Guardian Ad Litem’s] appointment as guardian ad litem was the discovery directed toward [Child’s] claims. If [Guardian Ad Litem] does not know the answers to written discovery about [Child’s] claims (such as the identification of physicians or teachers), does [Mother] have to allow them to interview [Child]? Is [Guardian Ad Litem] authorized to sign releases for medical and school records? Can [Guardian Ad Litem] compel [Mother] to make [Child] available for deposition or trial? These practical problems bump up against the Texas statute that grants a grandparent access to a minor child only if the grandparent has overcome “the

presumption that a parent acts in the best interest of the parent’s child by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child’s physical health or emotional well-being.”¹⁰⁷

XIII. ASSIGNING RIGHTS AND DUTIES TO OTHERS

The fundamental rights and duties of parents delineated in TEX. FAM. CODE §151.001 can be assigned to another person if a parent signs an affidavit designating another person or agency to act as a managing conservator.¹⁰⁸ Also, a parent who is not appointed as a managing or possessory conservator can still be awarded a parent’s duties, including the payment of support.¹⁰⁹

See also chapter 32 of the *Family Code* that is discussed herein in Section X.

XIV. APPOINTING A MANAGING, POSSESSORY AND JOINT MANAGING CONSERVATORS

A court may appoint a sole managing conservator or joint managing conservators.¹¹⁰ The discretion a judge has to make this appointment is limited 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,” and shall also consider whether a protective order has been entered against a conservator.¹¹¹ Additionally, if the parents are or will be separated, a court **shall** appoint at least one managing conservator.¹¹²

A *parent* must be appointed as either a sole or joint managing conservator, unless the court finds that the appointment of a parent would significantly impair the child’s health or emotional development.¹¹³ In fact, one of the most important presumptions in the *Family Code*, is that the appointment of joint managing conservators is in the best interest of the child.¹¹⁴ This is a rebuttable presumption, and a *finding* of family violence removes this presumption entirely.¹¹⁵

A court can name the parties joint managing conservators if it is in the child’s best interest.¹¹⁶ In

¹⁰⁷ *In re KC Greenhouse* at 178-9.

¹⁰⁸ TEX. FAM. CODE §151.001(d)(3).

¹⁰⁹ TEX. FAM. CODE §153.075.

¹¹⁰ TEX. FAM. CODE §153.005(a)(1).

¹¹¹ TEX. FAM. CODE §153.004(b) and TEX. FAM. CODE §153.005(c)(3).

¹¹² TEX. FAM. CODE §153.005(a)(2).

¹¹³ TEX. FAM. CODE §153.131.

¹¹⁴ TEX. FAM. CODE §153.131.

¹¹⁵ TEX. FAM. CODE §153.131.

¹¹⁶ TEX. FAM. CODE §153.134(a).

¹⁰⁵ *In re KC Greenhouse Patio Apartments, LP*, 445 S.W.3d 168, 176 (Tex.App. – Houston [1st Dist.] 2012, no pet.).

¹⁰⁶ *Id.*

doing so, the court must consider the following factors: (1) whether the physical, psychological, or emotional needs and development of the child will benefit from the appointment of joint managing conservators; (2) the ability of the parents to give first priority to the welfare of the child and reach shared decisions in the child's best interest; (3) whether each parent can encourage and accept a positive relationship between the child and the other parent; (4) whether both parents participated in child rearing before the filing of the suit; (5) the geographical proximity of the parents' residences; (6) if the child is 12 years of age or older, the child's preference, if any, regarding the person to have the exclusive right to designate the primary residence of the child; and (7) any other relevant factor.¹¹⁷ Another factor not directly listed in the *Family Code*, but often considered by the trial court, is the parents' ability to cooperate or the stability of their co-parenting relationship.¹¹⁸

If the court does order joint managing conservatorship, the court order shall: (1) designate the conservator who has the exclusive right to determine the primary residence of the child and establish a geographic area within which the conservator shall maintain the child's primary residence or specify that the conservator may determine the child's primary residence without regard to geographic location; (2) specify the rights and duties of each parent regarding the child's physical care, support, and education; (3) include provisions to minimize disruption of the child's education, daily routine, and association with friends; (4) allocate between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent (see TEX. FAM. CODE §151.001); and (5) if feasible, recommend that the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation, except in an emergency.¹¹⁹

A parent not appointed as a sole or joint managing conservator, may be named a possessory conservator.¹²⁰ Accordingly, the court shall specify the rights and duties of each person appointed a possessory conservator.¹²¹ In doing so, the court is limited to those rights and duties that are contained in Subchapter B of Chapter 153.¹²²

¹¹⁷ TEX. FAM. CODE §153.134(a).

¹¹⁸ *Caldwell v. Garfutt*, 2016 WL 105920 (Tex.App. – Austin 2016, no pet.)(memorandum opinion) citing *Doyle v. Doyle*, 95 S.W.2d 478, 480 (Tex.App. – Austin 1997, no pet.).

¹¹⁹ TEX. FAM. CODE §153.134(b).

¹²⁰ TEX. FAM. CODE §153.006(a).

¹²¹ TEX. FAM. CODE §153.006(b).

¹²² TEX. FAM. CODE §153.192(a).

XV. LIMITING THE RIGHTS AND DUTIES OF A PARENT

When the court appoints a conservator, the court **shall** specify if the rights and duties of a parent shall be exercised (1) independently, (2) joint agreement, or (3) exclusively by one parent.¹²³ However, as it relates to the exclusive award of rights and duties, if the court limits a parent's rights, the court must make a written finding that the limitation is in the best interest of the child.¹²⁴

XVI. AGREEMENT OF THE PARTIES

Texas law, including the *Family Code*, strongly favors out-of-court settlements. So an agreement by the parties to be joint managing conservators shall be approved (rendered as an order) by the court as long as the agreement meets the following criteria: (1) designates the conservator who has the exclusive right to designate the primary residence of the child including the establishment of a geographic area to maintain the residences or a specific reference that there is no geographic limitation – **OR** – doesn't name a conservator with the exclusive right to determine the primary residence but instead limits the geographic residence of the child to a particular area;¹²⁵ (2) specifies the rights and duties of each parent regarding the child's physical care, support, and education; (3) includes provisions to minimize disruption of the child's education, daily routine, and association with friends; (4) allocates between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent (see 151.001); (5) provides that the agreement is voluntarily and knowingly made by each parent and has not been repudiated by either parent at the time the order is rendered; and (6) is in the best interest of the child.¹²⁶

XVIII. CONCLUSION

Although the fundamental parental rights are easy to handle, there are some deeply complex issues which may arise and of which a prudent lawyer must consider addressing. This has been highlighted over the past 12 months when parents have had to tackle unusual issues related to education, family pods, and health and wellness (including vaccinations). The logical conclusion is that the family lawyer must take caution when dealing with parental rights and possession and access. Similarly, precautions should be taken when drafting a settlement agreement, mediated settlement agreement, and final decree of divorce, with due consideration to all of the potential issues cited herein.

¹²³ TEX. FAM. CODE §153.071(a)(2).

¹²⁴ TEX. FAM. CODE §153.072.

¹²⁵ TEX. FAM. CODE §153.133(c).

¹²⁶ TEX. FAM. CODE §153.133(a).

RIGHTS & DUTIES SUMMARY

<i>Where Does it Appear in the Family Code?</i>	Rights & Duties of a Parent §151.001	Rights & Duties of Parent Appointed as a Conservator §153.073	Rights & Duties During Possession §153.074	Duty to Provide Information §153.076	Right & Duties of Parent Appointed SMC §153.132
Duty - Care, Control, Protection & Reasonable Discipline	✓		✓		
Duty - Support ⁱ	✓		✓		
Duty & Right - Manage the Estate ⁱⁱ	✓	✓			✓
Duty – Inform Other Conservator of Significant Information ⁱⁱⁱ				✓	
Right – Designate the Residence of the Child	✓				✓
Right - Physical Possession	✓				
Right - Direct Moral & Religious Training	✓		✓		✓
Right - Services and Earnings of the Child	✓				✓
Right - Consent to Marriage	✓				✓
Right - Consent to Enlistment	✓				✓
Right – Consent to Medical & Dental Care	✓	✓ (Emergency)	✓ (Not Invasive Procedure)		✓
Right – Consent to Psychological & Psychiatric Care	✓				✓
Right – Consent to Surgical Treatment	✓	✓ (Emergency)			✓
Right – Consent to Educational Decisions	✓				✓
Right - Inheritance (By and Through)	✓				
Right - Receive Child Support	✓				✓
Right - Substantial Legal Decisions ^{iv}	✓				✓
Right - Receive Information from Other Conservator(s)		✓			
Right - Confer with the Other Parent Before Making Decisions		✓			
Right - Access to Medical, Dental, Psychological and Educational Records		✓			
Right – Consult with Physician, Dentist, Psychologist		✓			
Right – Consult with School Officials		✓			
Right – Attend School Activities		✓			
Right – Designated as Emergency Contact		✓			

RIGHTS & DUTIES SUMMARY

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- i This includes the duty to provide clothing, food, shelter, medical care, dental care, and education. This duty exists as the child is not emancipated minor and as long as the child is fully enrolled in a secondary school in a program leading toward a high school diploma. See TEX. FAM. CODE §151.001(b) and §154.002(a)(2).
 - ii TEX. FAM. CODE §151.001 indicates that it is a parent's duty to manage the estate of the child. However, TEX. FAM. CODE §153.073 states that it is the right of a conservator to manage the estate of a child to the extent it is created by the parent or the parent's family. It is additionally limited if a guardian or attorney ad litem has been appointed pursuant to TEX. FAM. CODE §153.132.
 - iii Defined as significant information concerning the health, education, and welfare of the child.
 - iii This includes the right to represent the child in a legal action.
 - iv This includes the right to represent the child in a legal action.