Question 11 Selected Answer #1 July 2009

1) The court did not err in appointing Mother sole managing conservator of Child. To deny Mother sole managing conservatorship and to appoint Aunt and uncle as Child's sole managing conservators, the court would have to find that the statutory test used for involuntary termination of parental rights was met. The statutory test requires a showing by clear and convincing evidence that: (1) a statutory factor – generally falling into the categories "abuse" or "neglect" – permitting involuntary termination of parental rights exists; and (2) termination of parental rights would be in the best interest of the child. Here, a statutory factor permitting termination of parental rights has been satisfied since Mother has abandoned and failed to support her child for more than a year. However, even assuming this statutory factor is met, Aunt and Uncle cannot prove by clear and convincing evidence that appointing them rather than Mother as sole managing conservator would be in Child's best interest. The Department has recommended reunification of Child with mother as being in Child's best interest, and the case manager testified that the interactions between Child and Mother have been positive and she has no concerns about Child being returned to Mother. Furthermore, Mother did not "abandon" Child in the traditional sense. Realizing her current inability to care for child, she sought to protect Child's best interest by temporarily relinquishing care, control, and possession of Child to Aunt and Uncle. Now that Mother has resolved her "personal problems," she is once again able to care for child, and appointing Mother as Child's sole managing conservator was not an error.

2) The trial court did not abuse its discretion in denying Aunt and Uncle access to Child; in fact, Aunt and Uncle have no right to demand access to Child, and granting them access likely would have been error, possibly of constitutional magnitude. Under the U.S. Supreme Court's decision in Troxel, parents have a right under substantive due process to make certain parental decisions free from governmental interference – including the decision to deny family members access to the child. In Texas, grandparents have a statutory right to petition for reasonable access to a grandchild if certain statutory requirements are met (eg, at least one parent still has parental rights vis-à-vis the grandchild and the grandparents' child is dead or has had parental rights terminated). However, when a child's parent denies access even to grandparents, the statutory presumption is that the parent is acting in the child's best interest, and the grandparents must overcome this presumption by showing by a preponderance of the evidence that denying access threatens to substantially impair the grandchild's physical or emotional health.

Given the high hurdles placed in front of grandparents petitioning for access, it likely would be impermissible under state law to grant an aunt and uncle's petition for access over a parent's objection. But even assuming that such access may be granted in certain cases, Aunt and Uncle have provided no evidence here that denying them access to Child will substantially impair Child's physical or emotional development. Thus, the presumption that Mother's denial of access is in Child's best interest controls.

END OF EXAM

Question 11 Selected Answer #2 July 2009

1. The trial court did not err in appointing Mother as Child's sole managing conservator. Where a child has a living parent whose parental rights have not been relinquished or otherwise terminated, the presumption is that the best interest of the child is that the parent serves as sole managing conservator. As in any custody plan, the best interest of the child is the court's guiding light. Here, the evidence at trial supported rather than challenged the presumption that Mother was best for Child. The Department, whose involvement likely made it the managing conservator of Child in Mother's absence, recommended through its supervisor's testimony that reunification with Mother was in Child's best interest. The case manager from Mother's residence center likewise reported only positive interactions between Mother and Child.

Aunt and Uncle might have avoided this result by petitioning for involuntary termination of Mother's parental interest in Child, thereby avoiding the parental presumption described above. Although Mother relinquished actual care, control, and possession of Child to Aunt and Uncle, she never executed the Affidavit of Relinquishment of Parent-Child Relationship. Thus, her parental rights in Child persisted. Aunt and Uncle could have petitioned for involuntary termination of said rights (instead of simply seeking managing conservator status or access). To prevail on such a petition, a party must show by clear and convincing evidence that the best interest of the child lies in termination, because the parent has abused the child, been imprisoned for 2 years, used controlled substances, or failed to support the child for 1 year. Aunt and Uncle might have prevailed on this last point because Mother failed to support Child for fifteen months, from the age of 3 months to the age of 18 months. Aunt and Uncle made no such showing, however. What's more, the evidence described above suggests the court could not find by clear and convincing evidence that termination is in Child's best interest.

Because Mother enjoyed an unextinguished parental relationship with Child, the Court did not err in appointing Mother as sole managing conservator.

2. The trial court did not abuse its discretion in denying Aunt and Uncle access to Child. Texas has a visitation-rights statute that permits grandparents to visit the offspring of their deceased children, but only if denial of such access would cause a child physical or emotional harm. Texas enacted the statute in response to Troxel v. Granville, in which the U.S. Supreme Court recognized a parent's substantive due process right to control upbringing of children and, in so doing, limit access of relatives to those children.

Here, it is unlikely that the trial court could have compelled Mother to give Aunt and Uncle access to Child. Texas's visitation-rights statute probably doesn't apply to non-grandparents, and in any event Aunt and Uncle have not demonstrated that denial of access will harm Child physically or emotionally; indeed, the baby's interactions with its mother have been positive. In addition to the limited reach of the statute as written, Mother has a due process right to control Child's upbringing because the parental relationship was not terminated. Therefore, the trial court was correct to deny Aunt and Uncle access.

END OF EXAM

11)

1. The court did not err in appointing Mother the sole managing conservator. It is presumed that appointment of a parent as sole managing conservator, or of both parents as joint managing conservators, is in the child's best interests. In order for the court to appoint someone else as the managing conservator of the child, one of two things must occur. Either the parents must sign a voluntary affidavit of reliquishment of parental rights, or the parents' rights must be involuntarily terminated. Here, Mother did not sign any relinquishment of her parental rights. Although she surrendered the child to Aunt and Uncle, this was not a relinquishment of her parental rights. Since no voluntary reliquishment occurred, the court must find that Mother's rights have been involuntarily terminated and she is thereby precluded from being named sole managing conservator.

TDFPS has standing to initiate involuntary termination proceedings against a parent at any time that they feel it is in the best interests of the child and that one of the statutory grounds has been met. Here, TDFPS already had an interest in the case due to their HHSS safety plan. This likely means that they found no grounds to terminate parental rights at this time, that they found the current placement to be suitable and that they found that a safety plan could adequately protect the child's best interests. For the Aunt and Uncle to have standing to petition for involuntary termination of Mother's rights, they must have had actual possession of the child for 6 months. Had they been foster parents they could have gained standing to terminate Mother's rights if they had possession of the child for at least a year or they had previously adopted (in a prior proceeding) the biological sibling of the child at subject in the current suit. They would not have to meet the year requirement if they were foster parents who had adopted the child's biological sibling. Here, Aunt and Uncle as well as TDFPS have standing to terminate Mother's rights. For involuntary termination to occur, the court must find that termination of parental rights is in the child's best interests, and that one of the statutory grounds for termination has occured. This finding must be based on clear and convincing evidence.

Here, Mother has met at least one of the statutory grounds to be involuntarily terminated. She has abandoned the care of the child for more than a year, and she has failed to support the child for more than a year. Both qualify as statutory reasons to terminate her rights. However, the court must further find that termination of Mother's rights is in the child's best interests. This does not appear to be the case here. TDFPS is recommending return of the child to mother. Furthermore, Mother wants the child back, and it appears from testimony that she has proper interactions with her other daughter, and that her case manager feels she would be able to care

for her other child. Lacking here is any representation of the child's interest. In a termination suit, the court will appoint an attorney ad litem to represent the express desires of the child. The court will also appoint a guardian ad litem to represent the best interests of the child. This is to ensure that the child's interests are represented apart from any parents, family members, or TDFPS itself. The guardian ad litem and attorney ad litem may be the same person if it is shown that the person can fairly and adequately represent both the child's desires and the child's best interests. Here, the child is only 15 months old, so she likely has no express desires as to her placement. The AAL will substitute judgment on behalf of the child, and testify as to what would be in the child's best interests. This is consistent with the duties as a GAL. The court will take all these factors into account when determining best interests. Since under these facts it appears that the court has found that termination of Mother's rights would not be in the child's best interests, it was proper for them to appoint her as sole managing conservator.

2. The court did not abuse its discretion in denying Aunt and Uncle access to the child. The court presumes that the sole managing conservator has the right to determine who has access to the child, and is the proper party to do so. In Troxel, the court found that a biological grandparent may have the right to petition for access to the child. The grandparent could get standing for a suit for access if their child (the biological parent of the grandchild they wanted access to) was deceased, had their rights terminated, or had no rights to possession or control of the child, but the other biological parent's rights had not been terminated. Furthermore, the grandparents must then show that denial of their right to access to the child would substantially impair the child's emotional or physical health or wellbeing and that providing access to the grandparents would be in the child's best interest. It is unlikely that the court would find that this case also granted Aunt and Uncle the right to petition for access. Furthermore, the Texas Legislature has significantly reformed grandparents' rights subsequent to the holding in Troxel, so it is unclear if even grandparents would still have this right. If the holding in Troxel was still good law, and could in fact be applied to Aunt and Uncle, it is still unlikely that they would prevail in gaining access. Aunt and Uncle would need to prove that denial of access would substantially impair the child's emotional and physical health and wellbeing, and there is no evidence that this is so. While it may be quite an adjustment for the child to move from practically the only home she has ever known, and no longer have access to her parent figures, there is still a strong presumption that the Mother has the right to deny access as in the child's best interest. The child will need time to re-form the parental bond with her mother, and this transition could be aided by denying access to Aunt and Uncle for a time to stymie any confusion that the child may have between who she must have an appropriate parental bond with, Mother or Aunt and Uncle.

END OF EXAM