Question 9 – July 2013 – Selected Answer 1

1. Yes the Smiths, as grandparents, do have standing to petition the court to be appointed managing conservators or at the least to petition to gain access to the grandchildren under the Texas Family Code. In order for grandparents to petition for access to their children they must file the petition along with an affidavit in the court of continuing jurisdiction (in this case there doesn't appear to be one because there are no facts relating to prior court orders involving the children) or in the neighboring county where the children/Craig are domiciled. The Smith's must allege that one of the grandchildren's parent is either deceased, incarcerated, or has voluntarily relinquished their parental rights, and the remaining parent (in this case Craig) is keeping the children away from the grandparents. Furthermore, the grandparents must establish that ordering access to the grandchildren, essentially ordering visitation, is in the best interests of the child and that the denial of access by the remaining parent is causing "substantial harm" to the children. In order to petition to be appointed managing conservator, the grandparents would have to file a "Suit Affecting the Parent Child Relationship" in the court where the children and Craig are domiciled, in this case that would be the county where the commune is located.

2. It is unlikely that the Smiths will be able to satisfy the evidentiary requirements for being appointed managing conservators of their grandchildren. When determining conservatorship over children the Texas Family Code requires that courts act in the best interests of the child. When one parent dies there is a rebuttable presumption that appointment of the remaining parent as sole managing conservator is in the best interests of the child. The Smiths would have to overcome that presumption. They could do so by establishing that they were in danger in Craig's custody but there is no evidence to support such a finding. When determining who will be managing conservator of a child, courts will consider a non-exhaustive list of factors called the Holley factors and these include, but are not limited to, the special needs of the child, the age of the child, the preference of the child (especially a child over 12), among others. Here, there is no evidence to suggest that being with Craig is not in the best interests of the child. The grandparents would have to meet a high burden to overcome the parental preference and replace him as managing conservator. Other than the fact that children used to spend time with the grandparents who they no longer see, they have moved to a commune (which we know nothing about i.e. are the provided with suitable shelter, food, education, living arrangements etc.), and that they are being raised as atheists there is nothing to suggest that having Craig as their managing conservator is not in their best interests. Courts give a strong parental preference and this includes a presumption that Craig's decisions regarding how to raise his children is in their best interests, absent evidence otherwise the Smiths will not be able to overcome this preference. The fact that the children are being raised as atheists will not affect the court’s decision because there is nothing to suggest that this is harmful and absent such evidence the courts will not consider religion against a parent (although they may consider keeping a child's traditions and lifestyle consistent). The court could appoint the Smiths and Craig joint managing conservators if it found this to be in the best interests of the child, but this does not require even close to equal access or possession of the children, and given the evidence as discussed above, it is unlikely the courts would override the parental preference and do so. The Smiths cannot satisfy the evidentiary requirements under the Texas Family Code to be appointed managing conservators over their grandchildren.

3. It is unlikely that the Smith's can satisfy the evidentiary requirements to get an order granting them possession of or access to their grandchildren. In all order affecting children the courts are governed by the best interests of the child. But as with the presumption regarding conservatorship, there is a presumption that the parent's decisions are in the best interests of the child. Therefore, in this case the Smith's would have to overcome this presumption to show that Craig's denial of access to the kids by

the Smiths is not in the best interests of the child. Furthermore, with an order for grandparent visitation the Smiths would have to show that the Craig keeping the children from them is causing the children substantial harm. They would have to prove this by clear and convincing evidence. It is very unlikely that the Smith's can meet this burden. Here, we have no facts regarding any harm to the children and the Texas courts have held that this harm must be more than a sadness on the part of the kids. In this case, the Smiths disapprove of Craig's lifestyle and believe it's extremely harmful to their grandchildren but without some factual evidence as to what specifically they disapprove of or what specific harm (some sort of abuse, neglect, etc.) is befalling the children it is unlikely they will be able to overcome the presumption that Craig's decision is in the best interests of the child. It will not be sufficient that Craig is raising them to be atheists (courts generally will not consider the religion of the parents when determining possession (presumably access in this case) of the children although the courts will consider any harm that such religious beliefs may bring to the children. Also, the court will consider the fact that the children spent a lot of time with the grand prior to Jennifer's death in determining whether Craig's decision to keep the children from the Smiths causes them substantial harm and is in their best interest but this factor alone will not be determinative. Without more specific allegations regarding the harm the children are suffering the Smiths will not be able to satisfy the evidentiary requirements for an order granting them possession or access.

Question 9 – July 2013 – Selected Answer 2

1. The Smiths have standing to petition the court to either be appointed managing conservators of, or for gaining possession of or access to, their grandchildren. Under Texas law, grandparents have standing to petition the court if three requirements are met. First, one parent needs to not have had his parental rights terminated. Second, the grandparents must be the natural or adoptive parents of one of the child's parents. Third, the grandparents' child is either dead, incapacitated, in jail for three months, or was not granted possession or access. The procedure for asserting their claim is for the grandparents to file suit in the court of continuing exclusive jurisdiction, along with an affidavit setting forth the relevant facts (discussed in the next question). Here, the Smiths have standing to petition the court to either be appointed managing conservators or of gaining possession or access (visitation) to their grandchildren. First, Craig's parental rights have not been terminated. Second, the Smiths are Jennifer's parents, with Jennifer being the parent of the two children whose custody is in question. Third, the Smiths' child, Jennifer, died in 2010 in a car accident. Thus, the Smiths have standing.

2. The Smiths do not satisfy the evidentiary requirements for being appointed managing conservators of their grandchildren. Under Texas law, parents are appointed either joint managing conservators (JMC) or managing conservator (MC) and possessory conservator. A managing conservator has the right to make decisions for the child and has the right to designate the primary residence of the child. There is a parental presumption in Texas, which is that a parent should be appointed JMC or MC unless it would not be in the child's best interests because it would significantly impair the child's physical or emotional health. The parental presumption is rebutted in two situations. The first is if a parent has committed one of the 21 grounds of involuntary termination of parental rights (such as abuse, abandonment, neglect, use of a controlled substance, failure to support for a year, endangerment, etc.). The second is if the parent gave up care, control, and possession of the child to a nonparent for a year, 90 days of which is before the suit is filed. The court usually considers the 8 Holley factors in deciding how to grant child custody as between two parents, but those factors are still relevant here, even though there is only one parent. The courts tend to look at the desires of the child, the physical and emotional needs of the child, the stability of the environment, the plans for the children, parenting abilities, any acts or omissions by parents that indicate the parent-child relationship is not a good one, and any excuses for those acts or

omissions. Factors the courts cannot consider in awarding custody include race, marriage (whether a parent is married), and religion (unless the religion is a dangerous one). Here, the parental presumption has not been rebutted. Craig has not committed any of the 21 grounds of involuntary termination, and he did not give possession of the child to a nonparent for a year. The court may consider whether the commune Craig took the children to live in is a stable environment, as well as his plans for the children. However, the court cannot consider religion. Craig is raising his children as atheists, and although that may differ from the Smiths' ideas of religion, that is not a reason sufficient to rebut the parental presumption. They have not alleged any facts that show the grandchildren's physical or emotional health to be in danger or that staying with Craig is not in the children's best interests. Lastly, grandparents can be appointed managing conservators of the children if either both parents are dead, both parents agree, or the one live parent agrees. That has not occurred here. Therefore, the Smiths have not satisfied the evidentiary requirements to be appointed managing conservators.

3. The Smiths do not satisfy the evidentiary requirements to get possession and access. At issue are the requirements for grandparents to get visitation rights. The three requirements discussed in question 1 are part of the evidentiary requirements for grandparents to get visitation. There are two additional requirements. First, the grandparents must show that the child's physical or emotional health will be significantly impaired if the grandparents are denied access. Sadness alone in being separated is not sufficient. This requirement is usually met if the child was living with the grandparents for some time. The grandparents must allege facts showing significant impairment in an affidavit to the court. The second requirement is that the other parent is planning to deny or is denying the grandparents access to the child. Here, the second requirement is met, but the first is not. Craig has denied the Smiths access to their grandchildren, but the Smiths have not alleged facts showing significant harm if they are denied access. The Smiths had considerable contact with their grandchildren before Jennifer died in 2010. That was at least a year ago according to the facts. Since then, the children have been raised as atheists and are living on a commune. The intervening gap has been so long that it might harm the children even more to have contact with the Smiths, especially if the Smiths disapprove so strongly of the way Craig is raising them. Furthermore, the children never lived with the grandparents. Thus, the Smiths have not satisfied the evidentiary requirements for being granted possession of or access to the children.

Question 9 – July 2013 – Selected Answer 3

1. The Smiths likely satisfy the Texas Family Code standing requirements to seek access or visitation to the children or to seek to be appointed managing conservators of the children. At issue are the requirements for grandparents to have standing to seek visitation of their grandchildren. The Texas Family Code allows grandparents to petition to be awarded access to--or even to be appointed joint managing conservators--if the following five requirements are met: 1) the grandparent must be the biological elative of the child; 2) at least one of the natural parents of the child must still be a parent; 3) one of the parents must be either dead, in prison for more than three months, or have had their parental rights terminated; 4) the remaining parent intends to totally exclude the grandparent from the child; and 5) it can be shown that denial of visitation with the grandparent will significantly impair the child's physical or emotional health or well-being.

Here, the Smiths are the parents of the children's biological parent. Craig is the biological father, and he has not had his parental rights terminated. The other parent, Jennifer, died in a car crash. Craig has also denied the Smiths complete access to the grandchildren. The first four requirements are therefore satisfied. The Smiths therefore satisfy the standing requirements to bring a claim.

To assert such a claim the Smiths will procedurally need to file a motion to challenge the presumed appointment of Craig. Because there was no official SAPCR decree here following Jennifer's death, there is not likely yet a court of continuing exclusive jurisdiction here. Therefore, the neighboring county in which Craig and the grandchildren currently reside will be the proper county for such a filing, and will have jurisdiction over Craig and the children. In the absence of an official order decreeing conservatorship, remedies such as habeas corpus, tortious interference with child custody, and contempt will not be available to the Smiths. They are seeking to have a judge issue such an order in the first place.

2. The Smiths most likely cannot satisfy the evidentiary requirements to prove that their appointment as managing conservator of the children is in the best interest of the children. At issue is the presumption that a parent is in the child's best interests and the family code factors necessary to rebut this presumption.

The Texas Family Code has a presumption that the child's parent is the managing conservator in the child's best interest. To overcome this presumption it must be shown that the parent as guardian significantly impairs the child's physical or emotional health and well-being, and it must also be established that appointment of the grandparent is in the child's best interest. When determining the appointment of a managing conservator, the court can rebut the parental presumption if it is established that the parent as managing conservator will significantly impair the physical or emotional health or well-being of the children, is likely to commit violence against the children, or is otherwise unsuitable or incapable of taking care of the children. In line with recent Supreme Court jurisprudence (*Troxel*), Texas gives great deference to parental control over their children and the presumption in favor of parents as MC is very strong. Alternatively, the parental presumption can be rebutted by a showing of physical violence by the managing conservator or a showing that appointment of the parent as managing conservator will significantly impair the physical and emotional health and well-being of the children.

As mentioned above, the Smiths will satisfy the standing requirement to bring their claim to be appointed managing conservator of the grandchildren. However, they will not prevail, because they will not succeed in showing that their denied access to the children will significantly impair the emotional health or well-being of the grandchildren. It has been almost three years since Jennifer died, and there is no evidence that the children are suffering or that Craig is otherwise harming them.
Religion (or lack thereof) alone is not grounds for finding a parent is not in the children's best interest, and the Smiths' beliefs are not sufficient to overcome this. In the absence of physically risky religious beliefs (i.e., snake handling or human sacrifice) that present a risk of injury to the children, judges should not consider religion when making a managing conservator determination. There is furthermore no evidence that could support a finding beyond "mere sadness," which alone is insufficient to show significant physical or emotional impairment. Finally, the Smiths cannot prevail because there is no evidence that Craig is unfit as managing conservator, and the presumption therefore is not rebutted.

Assuming in the alternative that there was an order appointed Craig as managing conservator after Jennifer's death, the requirements to challenge an order making a managing conservator decree must be considered. In order to seek to overturn an order appointing a managing conservator more than three years after appointment, the person seeking to overturn must demonstrate that 1) there has been a substantial and material change that entitles them to a new hearing on the issue; OR 2) that the appointed managing conservator has voluntarily relinquished control of the children for a period of six months; OR 3) that there is evidence of family violence that endangers the health or welfare of the children. The only substantial and material change is that Craig moved to a new county. Because the grandparents are not joint managing conservators, or currently have any entitlement to possession of the grandchildren,

however, their rights and the rights of the children have not been jeopardized by such a move. Based on these facts, then, it is unlikely that the Smiths can prevail in seeking an order to overturn Craig's managing conservator status.

In this case, the Smiths will not succeed in their effort to be appointed managing conservator. They are incapable of rebutting the parental presumption or demonstrating that their appointment is in the children's best interests.

3. The Smiths most likely cannot satisfy the evidentiary requirements to establish possession or access to the grandchildren. At issue is whether or not they can demonstrate that their denied access to the grandchildren will significantly impair the physical or emotional health or well-being of the grandchildren.

While the Smiths, as explained above, will meet the statutory requirements to seek visitation or access of their grandchildren, they will not prevail because they will not be able to show that a denial of access will significantly impair the physical or emotional health or well-being of the grandchildren. As noted above, mere sadness is insufficient to demonstrate significant impairment, and, while the grandchildren did have much greater contact with the Smiths while Jennifer was alive, nearly three years have passed and there is no evidence of any emotional harm to the grandchildren. Indeed, it is more likely that the children have moved on and things should stay as they are presently. It is more likely that grandparents can satisfy the burden of showing significant impairment if the grandchildren lived with them at some point, but this is not the case here. In line with recent Supreme Court jurisprudence, therefore, a court should consider the evidence here insufficient to overcome the presumption that a parent acts in the best interest of his or her children.