

Question 1 – February 2014 – Selected Answer 1

1. a. No, the court did not err in denying Janice's motion requesting that the Court interview the children in chambers. In a non-jury trial, a court must interview children over the age of 12 in determining conservatorship issues, and a court may, in its discretion, interview children under the age of 12. Here, both Tony and Olivia are under the age of 12. Therefore, interviewing the children was in the court's discretion. Absent a showing of abuse of discretion, there will be no finding of error if the court declined to do so.

b. Yes, the court erred in disregarding evidence of the August 2012 protective order. The general standard in determining child custody is the best interests of the child, and a court may look at a number of factors in making its determination. Among the factors that the court shall consider is whether there have been instances of family violence and whether there has been any indication of the use of force against a member of the family within 2 years from the date of the petition. Family violence is an act intended to cause bodily injury, physical harm, sexual assault or assault on a member of one's family or household (or the threat of same). The evidence here supports that there was an instance of family violence, as Richie inflicted physical harm and bodily injury on his wife, Janice. Moreover, the violence in question occurred in August 2012, less than two years prior to the proceeding and constituted a use of force against a member of the family. The court therefore was required to have taken the instances of violence underlying the protective order into account in making its determination because they constituted family violence and instances of force within 2 years of the proceeding. The fact that Richie attended counseling and anger management classes, and the fact that Richie was not convicted, does not change the court's responsibility to take the family violence incidents into account. Accordingly, the court's decision to ignore the protective order in making its decision constituted error.

2. Yes, the court erred in its ruling regarding conservatorship of the children. As mentioned above, the general standard in determining issues of child custody is the best interests of the child. In determining what constitutes "best interests," the court generally should look to the Holley Factors, which include: the desires of the child, the emotional and physical wellbeing of the child, the emotional and physical danger to the child, the potential conservators' plans for the child, the stability of the home, the parental abilities of either potential conservator, and the acts or omissions of the potential conservators and any excuses for such acts or omissions. As a general rule, where there are two parents seeking custody of children, it is presumed that appointment as joint managing conservators is in the best interests of the child. However, there are a number of other factors that may rebut that presumption. Specifically, clear evidence of a pattern of abuse or violence prevents a parent from being named a joint managing or sole managing conservator. Here, there is clear evidence that Richie has engaged in abuse or violence -- he punched Janice in the face during an argument, and there is credible evidence from a physician that he sexually abused his very young daughter, Olivia. Therefore, there is evidence that not only rebuts the presumption that Richie should be named a joint managing conservator or a sole managing conservator, but precludes his appointment.

Moreover, a court is not entitled to take certain factors into account when making its determination regarding conservatorship: namely, the court may not look at the marital status, sex, race, or religion of a parent in determining whether that parent should be named a joint managing or managing conservator. Here, the court stated that "it was always better, in awarding conservatorship, for boys to live with their fathers and girls to live with their mothers." This was clear error by the judge -- the court was not entitled to rely on such a generalization based on gender in making its determination.

Finally, there is a presumption that an award of custody separating siblings from one another is not in their best interests. Here, the court separated Olivia and Tony by naming each of their parents sole managing conservators as to one of them. Such a determination is not proper and not supported by any evidence or factual findings, aside from the court's conclusory statement that boys should be with their fathers and girls should be with their mothers. Therefore, there is no evidence that would overcome a presumption that the children be kept together for custody purposes. For all these reasons, the trial court's ruling regarding conservatorship constitutes error and must be overturned.

Question 1 – February 2014 – Selected Answer 2

1. a) The Court did not err in denying Janice's motion requesting that the Court interview the children in chambers.

At issue is whether a Court must interview a child to determine conservatorship. For such young children, the Court has broad discretion in interviewing the children and typically chooses not to. For children over 12 years old, the Court may interview the child if he or she has expressed a desire to change the conservator who has the exclusive right to determine the child's primary residence. The rebuttable presumption is that joint managing conservatorship is in the children's' best interest but evidence of abuse will rebut that presumption in favor of the innocent spouse. The standard for reversing error requires that the ruling be manifestly unjust and a clear abuse of discretion. There has been no claim that the decision was unjust, nor is there any evidence to support this assertion. Since the Court acted within its discretion and there was no unjust ruling, the Court did not err in denying Janice's motion.

b) The Court did err in disregarding the evidence of the August 2012 protective order. At issue is whether a protective order will preclude a parent from being appointed managing conservator. The protective order, which required a signed affidavit by Janice, is valid for two years following its issuance. It is issued when there is a history of violence and violence is likely to occur again. A hearing is held between 48 hours and 14 days after the application is filed and the subject of the protective order has notice of the hearing. Apparently the protective order was granted, so Janice must have provided sufficient evidence for the court to determine that Richie was engaging in physically abusive behavior toward Janice and/or the children. A Court must consider the physical abuse or sexual abuse that has occurred within two years of the filing of the petition or that occurred before the conclusion of the proceedings. The recent nature of the protective order (within two years of filing) precludes both the options of joint managing conservatorship as well as managing conservatorship for Richie. The fact that Richie underwent counseling may be a consideration to permit appointment as a possessory conservator, but a parent who has an active protective order against him for family violence may not be designated sole managing conservator and is effective to rebut the presumption in favor of a joint managing conservatorship. It is not necessary that a subject of a protective order be charged with a crime, nor is a conviction required to rebut the presumption.

2. The Court erred in its ruling regarding conservatorship of the children. At issue is whether a court may make conservatorship appointments based on stereotypes and gender. The basis of a conservatorship decision must be according to the best interest of the children; gender of the parent or child may not be a consideration. Splitting up siblings is highly disfavored unless there is clear and convincing evidence that it is in the child's best interest. Additionally, there is a rebuttable presumption that a joint managing conservatorship is in the best interest of the children. This presumption may be rebutted by evidence of past physical abuse or sexual abuse of either the spouse, child, or member of the household. Because Richie has a history of being abusive toward Janice (and was, in fact, the subject of a protective order) and was suspected of sexually abusing Olivia, a joint managing conservatorship is improper. A parent suspected of abuse may not appropriately be designated as a managing conservator. More appropriately, the Court should have declared Janice the sole managing conservator of Tony and Olivia with the exclusive ability to designate their primary residence. Richie should be permitted possessory conservatorship, although it is likely in the children's best interest that the visits be supervised initially or indefinitely. The presence of abusive behavior and the possible sexual abuse of Olivia is a critical consideration in protecting the safety of the children. Total denial of visitation is extreme so supervised visitation would still permit a parent child relationship while reasonably balancing the important safety concerns. However, the court must submit findings of fact to support the derivation from the presumed joint managing conservatorship and why the sole managing conservatorship is in the best interest of the children. The standard of review is that the order is "manifestly unjust" and a clear abuse of discretion. Designation of an abusive parent as managing conservator is clearly inappropriate and should be reversed.

Question 1 – February 2014 – Selected Answer 3

1a) No, the Court did not err in denying Janice's motion requesting that the children be interviewed in chambers. The issue is whether children under the age of 12 are required to be interviewed for the Court to take into account the children's preferences on which parent they would rather live with. Under the Texas Family Code, in determining issues regarding conservatorship, the Court can take into account several factors. The Court's determination of conservatorship is deemed to be in the best interests of the child or children. When there are children ages 12 and over, the Court must take into account the child's preferences in chambers, in addition to a written affidavit verifying which parent the child may live with. The Court may also take into account the testimony and preferences of children under the age of 16. Here, the children, Tony, age 7, and Olivia, age 4, were so young that the Court did not need to take into account their preferences. Although the Court could have established other factors that may have assisted their determination, the Court was not required to interview Tony and Olivia in chambers to determine which parent they would rather live with. Although Tony and Olivia may have given their personal preferences (as they are both of the age where they might be able to make sound and reasonable decisions), the facts do not indicate whether or not they indeed have made this preferences known. Regardless, the Court was not required to interview them in chambers, and therefore, the Court did not err in denying Janice's motion.

1b) Yes, the Court did err in disregarding the evidence of the August 2012 protective order. The issue is whether the Court can take evidence regarding the despicable spouse's counseling and anger management as evidence that a protective order is no longer valid or needed. Under the Texas Family Code, a spouse can apply for a protective order when it has been determined that the spouse is or has been a victim of family violence. Family violence is an act constituting violence under the Code, regarding a spouse or family member, or a marital child. The family violence does not necessarily need to result in a conviction, and a protective order can still be maintained on that basis. A protective order is valid for two years, and provides several protections in order to uphold its validity and principles. A protective order can provide protections against persons, property and parenting. In providing protection against persons, the protective order means that the spouse against whom the order is sought may not commit family violence against the person named in the protective order or against any other member of the family, including children. The protective order also protects against property, and indicates that a spouse cannot destroy, sell, damage, or intentionally misplace or displace any community property for the purpose of avoiding paying for it or reducing the value. Finally, the protective order also protects against parenting, indicating that the spouse cannot commit family violence against the children or deny child support or do anything that would not be in the best interests of the child or the parenting relationship. Here, Janice obtained a protective order in August 2012 because Richie punched her in the face. In light of this, with the protective order being valid, the Court cannot unilaterally determine that the order is now invalidated because Richie is attending counseling and anger management classes. In addition, Janice presented evidence that Richie may have sexually abused Olivia, which would be in direct violation of the protective order, regardless of how much counseling the spouse is doing. In addition, just because no crime was charged, does not automatically presume that a protective order was not valid when it was issued. The family violence must have been committed within two years prior to the filing of the motion for protective order. Therefore, the Court erred in disregarding evidence of the August 2012 protective order.

2) Yes, the Court erred in its ruling regarding conservatorship. The issue is what factors the Court can take into account when making determinations regarding which parent will be sole managing conservatorship of two children. Under the Texas Family Code, the Court can look at several factors to determine child custody and issues of conservatorship. Any determination of conservatorship is deemed to be in the best interests of the child. When a determination of sole managing conservator is made, it is determined that the factors indicate this is in the best interests of the child. The Court can look at several factors, including the *Holley* factors, to determine where child custody should lie. The *Holley* factors include the ability of the parents to engage in the parenting relationship with the child or children, the geographic restrictions and limits of the home, the child's educational needs, the parents ability to provide for the child, the determination of the child's present health, safety, and mental stability, and as well as future determinations of the child's mental health, safety and well-being. There are however some factors the Court CANNOT use to determine the issue of conservatorship. The Court cannot look at sex or gender (i.e. girls belong with girls, boys belong with boys), race, or religion (unless

the religious practices are harmful to the child). The sole managing conservator is a special designation in Texas and a sole managing conservator will be the "primary" parent, and have the rights to determination the important issues for the children including, primary residence, safety, educational determinations, whether or not the child can marry, etc. Here, the Court committed several errors. First and foremost, the Court stated on the record that, in its opinion, it was always better for boys to live with fathers and girls to live with mothers. This was an incorrect factor to determine where Tony and Olivia should reside. In addition, generally, a conviction for family violence is prima facie evidence that that spouse being sole managing conservator would not be in the best interests of the child. Here, although Richie was not formally charged or convicted, the Court can still consider his family violence against Janice in determining whether the children residing with him would be in their best interests. Although Richie had undergone counseling and treatment, he still had a protective order obtained against him and as indicated in question 1a) above, it should still be in effect. Furthermore, the Court should have considered and stated on the record the evidence of medical records from May 2013 (just 4 months before trial) that Olivia may have been sexually abused by Richie, and this was reported to the authorities because the emergency room physician documented this in Olivia's file. In addition, the Court generally determines that splitting up children is not in their best interests, and it is normally better for brother and sister to stay together with one child. The Court should have stated additional evidence regarding conservatorship on the record, and absent this, it may have abused its discretion in making the conservatorship decision. Therefore, the Court should have determined Janice as the sole managing conservator of both Tony and Olivia, and given Richie visitation rights, and it erred in its ruling regarding conservatorship of the children.