Question 5 – July 2015 – Selected Answer 1

In Texas, when one parent dies, there is a presumption that it is in the best interest of the child for the other parent to become the sole managing conservator. However, that presumption can be overcome by clear and convincing evidence. A grandparent does not generally have standing in a suit affecting a parent-child relationship (SAPCR) unless that grandparent had been living with the child for at least a year, including the six months prior to the filing of the suit and allowing them to proceed would be in the best interest of the child.

Similar to the presumption described above, there is also a presumption that any decisions a parent makes regarding access to the children by other family members, or other possessory and/or control decisions regarding the children, are in the best interest of the child. Again, that presumption can also be overcome with clear and convincing evidence presented by anybody with standing in a SAPCR.

A grandparent seeking possession and/or access to a child must show that one parent is dead, they are the parent of the dead parent, and the other parent has somehow endangered the child, abandoned them, is incapacitated, or otherwise behaving in a manner that is not in the best interest of the child. The grandparent must also show that to deny access to the children by the grandparent would result in substantial harm to the children.

1. Here, the court did not err in dismissing the Grandmother's original suit. She did not have standing to sue because, although she had been living with and caring for the children with Mother since they moved into Grandmother's home and on her own for at least two years after Mother died, she did not have possession of the children in the 6 months leading up to the suit. Therefore, Grandmother did not have standing to assert a SAPCR on her own.

2. The court did err in dismissing Grandmother's intervention petition. As described above, all of the presumptions support Father having a sole managing conservatorship over the children and deciding who may have access to the children. However, those presumptions can be overcome by clear and convincing evidence. Here, Father seeks to have the divorce decree modified to designate him as sole-managing conservator and Grandmother, as a person who has had substantial contact and control over the children in the last several years, can offer substantial evidence to overcome Father's designation. Here, Grandmother seeks possession of the children and can assert that the children would be substantially harmed if possession is denied to her. Even though she did not have possession of the children in the 6 months leading up to the suit, Grandmother can provide evidence to rebut the presumption that Father should be the sole managing conservator. Father has been in and out of homeless shelters and has failed to send the children to school and/or adequately discipline the children. Father's possession could substantially harm the children, if it continues. Grandmother has standing to intervene and provide evidence to refute the presumption that Father's possession of the children would be in their best interest. Even if Grandmother may not be successful in her ultimate goal of obtaining possession, she has asserted enough to overcome a motion to dismiss.

Question 5 – July 2015 – Selected Answer 2

The court that entered the original suit affecting the parent child relationship, will have jurisdiction over the case as the court of continuing and exclusive jurisdiction, so long as the children have not moved within the past 30 days or another statutorily described event that would cause the court to transfer jurisdiction. Since no facts are stated otherwise, the court likely had jurisdiction to hear and rule on the standing of Grandmother for the intervening and original suit.

1) The trial court did not err in dismissing Grandmothers original suit. Under the Texas Family Code, a party must have standing in order to file an original suit for a suit affecting the parent child relationship [SAPCR]. Under the Texas Family Code, a non-parent may not file an original suit for possessory conservatorship unless certain statutory requirements are met. These include the parent relinquishing care and custody to a non conservator for a period of over six months, and of these six months must include the 90 days before the filing of the suit. Here, Grandmother did not have care or possession of the children within the six months leading up to the father's filing of the suit. Since the judge acted in regard to guiding principles of law, he likely did not abuse his discretion.

However, a grandparent has standing to petition the court for visitation and access, what a possessory conservator has, if a certain set of circumstances are met. A grandparent is the only non-parent who can petition for visitation under the Family Code. To have standing, a grandparent must show that they are the parent of one of the parents of the children. They must also show that at least one of the parents has not had their rights terminated and that their child, who is the parent of the grandchildren is dead [or incapacitated or imprisoned for a certain period of time]. Since Grandmother has standing for visitation, it may have been an abuse of discretion to not proceed to the merits of her case. Should the case proceed to trial, grandmother would be required to show that Father intends to cut off her visitation and that the children's emotional and physical well being would be substantially impaired. This requires more than just sadness and the Grandparent is required to attach an affidavit stating the particulars of the potential harm. This affidavit is in response the *Troxel* decision by the Supreme Court that a parent is presumed to act in the best interest of their children. It seems Grandmother may have a reason to show that the children will be substantially harmed by her denial of possessory conservator due to father's failure to find employment or shelter that would allow him to provide for his children. The court will also look at the best interests of the child to determine whether her appointment would be in the best interest of the children. The court will look to the *Holley* factors, as well as history of family violence, false reports of child abuse and sexual abuse of children when making the best interest determination. The *Holley* factors for determining whether an action is in the best interest of the child include the child's wishes, the threat of emotional and physical harm to the child, now and in the future, any parenting plan, any indication the parent child relationship is an improper one and any excuses or explanations for this, and the ability of the parent. The court will also apply the public policy of Texas including promoting a safe and stable home for the children and continued access to parents who have a positive relationship with their children.

2) The trial court erred in dismissing Grandmothers intervention petition.

Under the Texas Family Code, a grandparent can intervene into a modification suit if it is in the child's best interest and the intervention is necessary to prevent substantial harm to the children's physical and emotional well being. The Texas Family Code requires for a modification of the parent child relationship, there must be circumstances that have materially and substantially changed since the original order and the modification must be in the best interest of the children. The court will look at several factors when determining the best interests of the child including the child's wishes, the threat of emotional and physical harm to the child, now and in the future, any parenting plan, any indication the parent child relationship is an improper one and any excuses or explanations for this, and the ability of the parent. The court will also apply the public policy of Texas including promoting a safe and stable home for the children and continued access to parents who have a positive relationship with their children. Parents of children are entitled to a presumption that it is in the best interest of the child for a parent to be appointed a joint/sole managing conservator. However, this presumption does not apply to modification proceedings. Here, there have been substantial and material changes in the circumstances since the original order. Mother has died and children lived with Grandmother for likely over two years and then moved in with their father. These will constitute material and substantial changes. However, the court will also need to look into the best interests of the children when determining conservatorship. Since the children lived with grandmother for a long period of time, including while their mother was alive, there are likely many positive aspects with the children and grandmothers relationship, however, the facts do not give any insight into this relationship. On the other hand, appointing father Sole Managing Conservator is likely not in the children's best interest because he failed to send them to school regularly, adequately discipline them, has not had stable employment and has been in and out of homeless shelters. The court will likely find that these factors make his responsibility to provide for the children as well as make decisions regarding their education and discipline unlikely to be fulfilled. Substantial harm, more than mere sadness, is likely to be shown from these factors as well, giving grandmother standing. Since the judge did not have to apply the parental presumption, he likely abused his discretion in dismissing Grandmother's intervention suit. A judge abuses his discretion when he acts without guidance to legal principles regarding the law and for facts abuses his discretion when he acts arbitrarily or unreasonably. Here, the grandmother likely had standing due to the substantial harm that will face the children if they are placed with their father and it is likely in the best interest of the children for Grandmother to be allowed to intervene.

Question 5 – July 2015 – Selected Answer 3

1.) No, the trial court did not err in dismissing Grandmother's Original Suit. At issue are the requirements necessary for a grandparent to bring a Suit Affecting the Parent-Child Relationship (SAPCR).

In order for a grandparent to have standing to bring a SAPCR over the objection of a parent, the grandparent must prove the following: the parent will deny him or her any and all contact with the child, one of the child's parent is deceased, there will be a significant impairment to the physical health or emotional development of the child, and the petitioner has had actual care, custody and control of the children for at least one year including at least having the child at least forty-five consecutive days before bringing suit. If the child suffers from physical symptoms, then that factor will "benefit" the party seeking standing. These are extraordinarily stringent requirements, and are the result of Troxel. Moreover, there is a presumption that a fit parent will always act in the best interest of the child, which is why Troxel turned out the way it did. In fact, there is a parental preference in that the parent should always be appointed the managing conservator. However, that presumption may be rebutted if the parent relinquished actual care, custody and control to another party for at least one year. Finally, unlike for most of family law, the best interest of the child is not at issue when seeking standing.

Applying the law to the facts here, more facts are necessary to determine if the trial court erred. Even if the facts stated that Father completely denied any and all visitation to Grandmother, the Grandmother still must be able to prove that she had actual, care, custody and control of the children for at least forty-five or sixty days immediately prior to filing suit. However, she did not have the children for that requisite amount of time, and, as a result, she does not have standing to file an original SAPCR over the objections of Father.

2.) Yes, the trial court erred in dismissing Grandmother's Intervention Petition. At issue here is the requirement for a relative or grandparent to intervene in a pending SAPCR.

Generally speaking, it is easier to intervene in a SAPCR than it is to bring one. The policy behind this is that once the best interests of the child are before the court, the court wants as many options as it can in order to effectuate the best interest of the child standard. As a result, the standards for a relative to intervene in a SAPCR are easier to satisfy, and rightfully so. The requirements to intervene in a SAPCR are as follows: substantial past contact with the child and significant impairment to the child's physical health or emotional well-being. While the second prong is identical to the one discussed in question one, the substantial past contact prong differs in that there is no requirement for the children to preside with the petitioner-intervener when the petitioner files. While there is a split of authority between Texas courts regarding what constitutes substantial past conduct (some courts hold that it is at least one year and base it off the standing to bring an original suit while other courts say less than a year is fine, but steadfastly have refused to set a floor on the length of time necessary to satisfy this substantial past conduct standard), it is irrelevant to this discussion because there is no element of immediately residing with the petitioner-intervener in an intervention case.

Since there is no element of immediately residing with the petitioner-intervener and because Grandmother had actual, care, custody and control of the children for at least one year, Grandmother can easily satisfy the substantial past contact prong. The more difficult prong to satisfy will be the significant impairment to the child's physical health or emotional well-being because the facts do not indicate any physical symptom. Even so, the court probably will find that Father's conduct (the result of the children not being with Grandmother) significantly impairs the children's physical and emotional well-being because going in and out of homeless shelters, not being enrolled in school, failure to adequately discipline children, and not having steady income is probably enough to satisfy this stringent standard.

As a result of Grandmother's substantial past contact and due to the significant impairment of the children's physical health and emotional well-being, the court erred in dismissing Grandmother's Intervention Petition because she had standing to intervene.