SAPCR Overview
Presumptions, Burdens, Statutes, and Case Law
Advanced Family Law

- Presumptions
- Burdens
- Constitution
1A. Constitutional Rights

- Right to family privacy
- Fundamental liberty interest
- Protected by 14th A. due process
1A. Standard = Best Interest

If *parents* have a constitutional right to parent, how can the standard focus on *child’s* best interest?
1B. Standard of Proof

Purpose/function:
- Degree of confidence
- Risk of error
- Relative importance
1B. Standard of Proof

Criminal Standard:

- Serious liberty interests
- Almost all risk of error on society
1B. Standard of Proof

Intermediate Standard:

- Important individual interests
- Injury to individual is significantly greater than harm to state
1B. Standard of Proof

Intermediate Standard:

- Termination of parental rights
- Non-parent access?
- Separation of siblings?
1B. Standard of Proof

- “Strong preference”
- “Clear and compelling evidence”
- Yet... “preponderance of the evidence” standard
1B. Standard of Proof

Civil Standard:

- Monetary dispute between private parties
- Minimal concern to society
- Litigants equally share risk of error
1B. Standard of Proof

Family Standard:

- Generally, “preponderance of the evidence”
- Does “fundamental liberty interest” mandate higher standard of proof?
1B. Standard of Proof

Family Standard:

- Custody decisions are revocable, subject to relitigation
- Parent doesn’t suffer “serious” loss of rights
1C. TX Equal Rights Amendm’t

- Federal and Texas law are different
- Sex = suspect classification
- Discrimination improper unless compelling state interest
1C. TX Equal Rights Amendm’t

- **In re McLean**: law that treats unmarried mothers and fathers differently is improper
  - 1. does law discriminate on basis of gender?
  - 2. no other way to protect compelling state interest?
1C. TX Equal Rights Amendm’t

- Evidence of lifestyle, can include marital status
- “Some evidence” of *Holley* factors overrides many due process challenges
2A. Rebuttable Presumption

- Shifts initial burden of producing evidence
- Once evidence is offered, presumption disappears
2A. Rebuttable Presumption

- NOT weighed or treated as evidence
- NO effect on burden of persuasion
2A. Parental Presumption

- Constitutional presumption
- Best interest of child to be with natural parent
- Unless significant impairment
2A. Parental Presumption

- Original suits only
- Applies to “parent” as defined by TFC – not alleged father
- *In re McLean??*
2C. Possessory Conservator

- Court should not exclude from possession
- Deny access only if it would endanger health and welfare
- That would prevent appointment as PC
2D. Rights and Duties

- No presumption for or against joint vs. exclusive vs. independent rights
- Discretionary
2D. Sole Rights

- Court can still place restrictions on parent given exclusive rights
- SMC cannot be ordered to pay child support to PC
3. Geographic Restriction

- No explicit statute, standard, presumption
- Historically – strict presumption against relocation
- New trend – balancing test (per TX Sup Ct!)
4A. Possession Sched

- No Constitutional right to 50% of parenting time
- SPO does not violate fundamental right to parent
4A. Special Findings

- When order varies from SPO, must request special findings within **10 days**
- Otherwise waived, and appellate court will infer
4C. Under Age 4

- Social science consensus
- Regular/frequent involvement of both parents, including overnights
4D. Siblings

- “Preference” for keeping siblings together
- *De La Pena* – increased burden of proof, clear and compelling
- *Gardner* – no higher burden, merely a “factor”
4D. Siblings

- *Coleman* – Did not address burden, found abuse of discretion not to articulate “clear and compelling” reasons to separate
5A. Child Support

- Rebuttable presumption in favor of guidelines
- List of equitable factors may increase/decrease
- Cannot increase above max guideline unless proven needs of child
5A. Above Guideline

- Discretionary – court can decline even if party proves needs of child
- Proven needs not determined by lifestyle or parent’s ability to pay
5B. Intentional Underemployment

- Do not have to prove purpose behind underemployment
- Child support can be based on earning potential even without proof of under-employment
5B. Intentional Underemployment

- Boxing/Football
- Stripping/Porn
- Investment Banking
10A. Nonparent Access

- Preponderance of evidence
- Specific actions of parent will cause
- Serious physical or emotional harm to child
10A. Grandparent Access

- “Grandparent” defined as biological
- Step-grandparent = no standing
- “Presumed father” not necessarily biological, so his parents do not automatically qualify
10B. Confusion re Burden

- “Strong presumption” in favor of parent
- “Heavy burden” on non-parent
- “Significantly” impair child
- \textit{BUT... “preponderance of the evidence”}
10B. Bhan v. Danet

- Appellate opinion
- Dissent
- Texas Supreme Court
- = nobody knows
11C. Going Behind an Order

- Claim preclusion (res judicata)
- Issue preclusion (collateral estoppel)
- Exception – prior acts of misconduct corroborate later similar acts
8B. Religion

Parent’s religious practices (even if weird) can’t be relevant evidence in custody dispute
8B. Religion

- Unless serious bodily/mental injury or neglect
- Courts split over whether failing to object to evidence waives complaint
9A. Family Violence

- If “history” (once) or “pattern” of abuse
- No JMC + presumption against abuser being SMC
- But... cannot appoint PC if access will endanger
9A. Family Violence

- Court may not appoint JMC in original suit
- Does not apply to modification
- Not required to modify prior order to remove parent as JMC
9A. Family Violence

- Court weighs evidence
- Can consider whether abuse allegations are manufactured
19A. Termination

- Intermediate standard = clear and convincing
- Right to appointed and effective counsel in govt termination – not private
19C. Race in Adoption

- No preference to race or ethnicity
- No “race-matching” - Agency may not delay placement, strict penalties
19B. ICWA

- Indian Child Welfare Act
- 2:15 Weds
- Pamela Kemp Parker
20A. Maternity

- Established by giving birth
- Not rebuttable
- No “presumed mother”
20C. Donor Standing

- *Sullivan* says maybe
- *H.C.S.* says never
- Possible loop-hole for AOP?
20E. Embryos in Divorce

- Former spouse is not parent if placed after divorce
- Agreement controls
- No other statute or TX caselaw re embryos