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§201 RULES OF EVIDENCE

The Texas Rules of Evidence apply in suits affecting the parent-child relationship unless the Texas Family Code specifically provides otherwise. See TEX. FAM. CODE §104.001. The Code specifically provides otherwise in several situations involving children. For example, special rules apply to the admission of children's prerecorded statements in certain situations. See TEX. FAM. CODE §§104.002 et seq. See §702.1. Written evidence of a child's choice of managing conservator also receives special attention. See TEX. FAM. CODE §153.008. See §202.1, below.

§202 CHILDREN'S STATEMENTS AND TESTIMONY

§202.1 WRITTEN CHOICE OF MANAGING CONSERVATOR

§202.1.1 Subject to Court's Approval

A child 10 years of age or older may file with the court a written choice of managing conservator. TEX. FAM. CODE §153.008.

The child's choice, whether written or oral, does not guarantee the appointment of the designated parent as the managing conservator. Any choice is subject to the court's approval. See TEX. FAM. CODE §153.008; *Cole v. Cole*, 880 S.W.2d 477 (Tex. App. — Fort Worth 1994, no writ). In *Cole*, evidence that the children's father had allowed the couple's teenage sons to have a beer party at the home, that both boys had been shooting high caliber rifles while drinking beer, and that, on a different occasion, the mother had found "two naked strippers asleep in her bed" was sufficient for the judge to find that the father was not a proper role model and should not have primary managing conservatorship of the boys, regardless of the fact that one of them might prefer the father to fill this role. *Id.* at 479.

§202.1.2 Filing

Section 153.008 does not address the admissibility of a child's written choice as evidence at a contested trial. This statute merely refers to filing the choice with the court. It is arguable that, in a nonjury trial, the judge can consider this written choice without formally introducing it into evidence because the statute provides for filing the request. See, e.g., TEX. FAM. CODE §107.054 (providing for filing of social study).

Practice Consideration

Unlike the social study statute (see §204.4), §153.008 does not specifically provide that the child's written choice becomes part of the record. Nonetheless, upon filing, it would appear that the child's written choice would become part of the record just as any filed pleading, motion, or order would.

In *Boriack v. Boriack*, 541 S.W.2d 237 (Tex. Civ. App. — Corpus Christi 1976, writ dismissed w.o.j.), the court, in construing §14.07(a), the precursor to §153.008, noted that, although the statute provided for filing the child's written choice, no provision specifically required the writing's admission into evidence. The court reasoned, however, that the legislature must have intended that the writing would become evidence and that the fact finder would consider this evidence because "[i]t would be a useless act to file the writing if it were not to be considered." *Id.* at 240.