SUBJECT: Changing possession schedule and right to jury verdict in custody cases

COMMITTEE: Juvenile Justice and Family Issues — favorable, without amendment

VOTE: 6 ayes — Dutton, Goodman, Baxter, Castro, Hodge, Reyna

0 nays

3 absent — Dunnam, J. Moreno, Morrison

WITNESSES: For — Judge Tom Stansbury, Texas Family Law Foundation

Against — Matt Hendrix, Texas Dads for Kids

BACKGROUND: Family Code, sec. 153.312, establishes a standard possession schedule for parents who reside within 100 miles of each other. If the possessory conservator resides within 100 miles of the child's primary residence, the possessory conservator has the right to possess the child as follows:

- on weekends beginning at 6 p.m. on the first, third, and fifth Friday of each month and ending at 6 p.m. on the following Sunday, or beginning at the time the child's school is regularly dismissed and ending at 6 p.m. on the following Sunday; and

- on Wednesdays of each week during the regular school term beginning at 6 p.m. and ending at 8 p.m., or beginning at the time the child's school is regularly dismissed and ending at the time the child's school resumes, unless the court finds that visitation is not in the best interest of the child.

Family Code, sec. 105.002, allows a party to demand a jury trial in all family law cases except adoption suits or suits to adjudicate parentage under the Uniform Parentage Act. In a jury trial, a party is entitled to a verdict by a jury on appointing a managing conservator, appointing joint managing conservators, appointing a possessory conservator, and determining the primary residence of the child. The court is bound by a jury verdict on those issues.

A party is not entitled to a jury verdict on child support, a specific term or condition of possession of or access to the child, or any right or duty of a possessory or managing conservator, other than the issue of primary residence. However, the court may submit those issues to a jury for an advisory decision.

Family Code, sec. 153.136 provides that if a court orders a joint managing conservatorship, the best interest of the child ordinarily requires the court to designate a primary physical residence for the child. Sec. 153.134 requires a court that renders an order appointing joint managing conservators for a child to designate the conservator who has the exclusive right to determine the primary residence of the child and to establish a geographic area consisting of the county in which the child is to reside and any contiguous county in which the conservator must maintain the child's primary residence, or specify that the conservator may determine the child's primary residence without regard to geographic location.

In a child custody proceeding, each party is required to give information under oath, if reasonably ascertainable, in the original pleadings, or in an attached affidavit, about the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period, among other information.

DIGEST:

HB 913 would change the standard possession schedule for a non-custodial parent from Wednesday to Thursday. It also would repeal Family Code, sec. 153.136, requiring the court to designate the primary physical residence of the child when ordering a joint managing conservatorship, and would amend the Family Code to exempt the parties from providing certain information under oath, such as the child's address, if both parties resided in Texas.

HB 913 would entitle a party to a jury verdict, binding on the court, on appointing a sole managing conservator, appointing joint managing conservators, appointing a possessory conservator, determining which joint managing conservator had the exclusive right to designate the primary residence of the child, determining whether to impose a restriction on the geographic area in which a joint managing conservator could designate the

child's primary residence, and determining the geographic area, following such a restriction, in which the child primarily must reside.

HB 913 would prohibit the court from submitting to the jury questions on issues of child support, including support under the Uniform Interstate Family Support Act, a specific term or condition of possession of or access to the child, or any right or duty of a conservator, other than the determination of which joint managing conservator had the exclusive right to designate the primary residence of the child.

HB 913 would make other non-substantive and conforming changes to the Family Code, including changes in terminology.

The bill would take effect on September 1, 2003.

SUPPORTERS SAY:

HB 913 would serve the child's best interest by changing the standard possession schedule for a non-custodial parent from Wednesday to Thursday. Giving the non-custodial parent possession of the child on Wednesdays disrupts the child's schedule, breaks up the week, and deprives the non-custodial parent of more meaningful time with the child. Furthermore, a child who goes to stay with a non-custodial parent on Wednesdays and then weekends often must bring weekend clothes and other overnight items to school on Friday, which can be embarrassing to the child. Changing the standard possession schedule to Thursday would allow the non-custodial parent to have possession of the child continuously from Thursday through the weekend, which would be less disruptive to the child and might save the child the embarrassment of having to bring weekend items to school. On weekends when Friday was a holiday, it would allow the non-custodial parent to spend several uninterrupted, meaningful days with the child.

Changing the standard possession schedule day would not deprive either parent of time with the child, and it would apply only to court orders issued on or after September 1, 2003. Parents who had established a Wednesday routine that was working would not be affected because child support orders entered before that date still would stand. Finally, parties could continue to agree to visitation terms outside of the standard possession order, with the court's approval.

A jury trial is an effective tool for resolving disputes, and HB 913 would ensure that parties got a fair hearing by giving them the option of letting a jury decide whether to impose a geographic restriction and, if necessary, to determine its scope. This would be a natural extension of the authority juries already have to decide the primary residence for the child. Furthermore, the jury process contains the safeguard of involving a panel of decision-makers, rather than just one judge. Judges hear evidence in so many cases that their decisions can become tainted. Many judges make up their minds about geographic restrictions before they even hear the evidence, whereas juries tend to take a fresh look at the issues. Any inefficiencies in the jury trial system would be outweighed by the right of a party to have an impartial jury decide the outcome.

Finally, HB 913 would clean-up numerous provisions of the Family Code to make the terminology consistent and reflect current practice and case law. There is a rebuttable presumption that naming both parents as joint managing conservators in suits affecting the parent-child relationship is in the best interest of the child, and the Legislature has amended the Family Code to reflect this presumption. However, some of the changes to the Family Code used inconsistent or outdated terminology, and HB 913 would correct that problem.

OPPONENTS SAY:

Changing the standard possession schedule from Wednesday to Thursday would not be necessarily in the best interest of the child. Many families find that Wednesday schedules work well, and the bill should allow parties to choose either day based on what is best for the child, rather than restricting them to Thursday. Some parents would rush to modify the standard possession schedule if this statute were enacted, disrupting the child's established routine.

Giving the jury the right to decide whether to impose a restriction on the geographic area would be a step in the wrong direction. Jury trials in child custody cases are detrimental because they tend to be more adversarial than bench trials, take longer than bench trials, and often bring out the worst in all parties. Bench trials, by contrast, tend to focus more on the facts and less on trying to paint an ugly picture of the other party. For these reasons, many states do not allow jury trials in child custody cases at all. Texas should move toward limiting the power of juries, not expanding it, in such cases.