



that [Mother] is mentally and physically capable of properly exercising her visitation with [the child].”<sup>1</sup> The evidence is accurately recited in the court of appeals’ opinion.<sup>2</sup> Suffice it to say that the trial court had ample reason to make Grandmother the child’s principal custodian and to restrict Mother’s possession of the child. The issue is whether the court can delegate to Grandmother the determination of exactly what access Mother will have to the child. The court of appeals concluded that the limitation was within the trial court’s authority and discretion, and that “[i]f Grandmother abuses her *power* to evaluate whether or not Mother is in an appropriate condition to visit with Child, Mother can file another Motion to Modify.”<sup>3</sup>

The courts of appeals do not agree that a managing conservator can be given such “power”. The Sixth Court of Appeals has refused to follow the decision in this case,<sup>4</sup> choosing to rely instead on its prior decision in *In re Walters*.<sup>5</sup> There, it reasoned that giving a parent possession of a child only when both parents agree may well be tantamount to denying all possession, if the other parent fails to agree, and in any event is “somewhat incongruent” with an appointment of the parent as a managing or possessory conservator of the child, which at least implies some specified right of access.<sup>6</sup> In the present case, amicus curiae, Professor James W. Paulsen, also argues that giving a managing conservator of a child sole

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<sup>1</sup> 51 S.W.3d 314, 317, 322 (Tex. App.—Houston [1st Dist.] 2001) (characterizing the trial court’s order).

<sup>2</sup> *Id.* at 318-320.

<sup>3</sup> *Id.* at 324 (emphasis added).

<sup>4</sup> *In re A.P.S.*, 54 S.W.3d 493, 497-499 (Tex. App.—Texarkana 2001, no pet.).

<sup>5</sup> 39 S.W.3d 280 (Tex. App.—Texarkana 2001, no pet.).

<sup>6</sup> *Id.* at 285-288.

discretion to determine visitation and possession is an impermissible delegation of the trial court's authority and may also have the effect of shielding the decision from any meaningful appellate review. On the other hand, it may be as respondent argues that ordering a parent's visitation to be at the discretion of a managing conservator, subject to judicial reexamination in a proceeding on the parent's motion to modify, is both authorized and appropriate in certain circumstances.

The Fifth Court of Appeals, in an unpublished opinion, has taken essentially the same position as the First Court of Appeals in this case.<sup>7</sup> Besides the Sixth Court of Appeals, the Ninth,<sup>8</sup> Thirteenth,<sup>9</sup> and Fourteenth<sup>10</sup> Courts of Appeals appear to have a different view. One noted commentator on family law issues has noted the inconsistency of appellate decisions in this area and the significance of the issue.<sup>11</sup>

I would hear argument and decide the issue.

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Nathan L. Hecht  
Justice

Opinion delivered: June 6, 2002

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<sup>7</sup> *Sedgwick v. Sedgwick*, No. 05-01-00711-CV, 2002 WL 651607 (Tex. App.—Dallas Apr. 22, 2002, no pet. h.) (not designated for publication).

<sup>8</sup> *In re Lemons*, 47 S.W.3d 202, 206 (Tex. App.—Beaumont 2001, orig. proceeding).

<sup>9</sup> *Thompson v. Thompson*, 827 S.W.2d 563, 570 (Tex. App.—Corpus Christi 1992, writ denied).

<sup>10</sup> *Roosth v. Roosth*, 889 S.W.2d 445, 452 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

<sup>11</sup> David N. Gray, *When It's Not Black or White, Only Shades of Gray — Significant Decisions* 8-9 (State Bar of Texas Family Section 27th Annual Advanced Family Law Course Aug. 6-9, 2001) (available by subscription at <http://www.texasbarcle.com/publications/ArticleArchives.asp>).