

The image features a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text is overlaid on the image in a white serif font.

## Texas Supreme Court Update *Opinions Issued June 4, 2021*

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**Defamation Mitigation Act:** *The Act does not necessarily require dismissal of a defamation suit if no timely request for correction, modification or withdrawal of a defamatory statement. However, the court did not reach a consensus about when dismissal is necessary or abatement is appropriate.*

Under [Civil Practice and Remedies Code § 73.055](#), the Defamation Mitigation Act (“DMA”), a plaintiff “may maintain an action for defamation only” after defendant makes or the plaintiff requests a correction, clarification, or retraction (“§73.055 requirements”). The request must be timely – i.e., within limitations – and meet certain criteria. In *Hogan v. Zoanni*, plaintiff initially sued for four allegedly defamatory statements after the §73.055 requirements were satisfied. After limitations expired, plaintiff amended to add nine more allegedly defamatory statements for which the §73.055 requirements were not satisfied.

The first issue was whether the failure to satisfy §73.055 required dismissal of those claims. On one hand, the DMA says that suit for an allegedly defamatory statement can only be “maintained” if these requirements are met, which suggests that dismissal is appropriate for failure to timely fulfill §73.055’s mandate. According to the defendant, dismissal was mandatory for the additional reason that it was impossible to file a *timely* request if limitations had expired. On the other hand, [§73.062](#) provides an *automatic* limited abatement of the entire suit if the §73.055 requirements have not been fulfilled and the defendant files a plea in abatement within thirty days of the answering, which suggests the Legislature did not intend to require dismissal of non-compliant claims.

Under a [plurality opinion](#) written by Justice Devine and joined by three other justices, plaintiff’s failure to make a 73.055 request did not require dismissal of the new defamation claims. The plurality’s analysis begins by first declaring it “antithetical” to the purpose of the statute to eliminate all remedies and allow defamatory statements to “remain uncorrected in perpetuity.” After reciting the usual textualist presumptions that the Legislature chose its words deliberately with the expectation the statute would be interpreted in context and not in isolation. Because the Legislature did not specifically define “maintain,” the plurality resorted to dictionary definitions of the term as meaning “continu[ation]” of something, it explained that use of the word “maintain” did not make dismissal the penalty for failure to make a timely 73.055 request.

The DMA did not specifically define “maintain,” so the plurality looked to dictionary definitions of “maintain” that include the concept of continuation. The notion of continuation dovetailed with the explicit procedures specified in the DMA for failure to make a timely 73.055 request: abatement of the suit, opportunities to cure, and ultimately loss of exemplary damages. The plurality criticized the court of appeals decision for failing to distinguish between limitations which runs from the *publication* date and the DMA timetable which runs from the date of the plaintiff’s *knowledge* of the allegedly defamatory statement. This difference persuaded the plurality the Legislature “contemplated that a plaintiff could provide a sufficient request beyond the limitations period, but it only prescribed a loss of exemplary damages, depending on what a defendant may prove, not dismissal.” The plurality compared the DMA to other statutes such as the DTPA and the Texas Medical Liability Act which specify dismissal for non-compliance to bolster its conclusion the Legislature did not intend to require dismissal under the DMA for want of a timely 73.055 request.

The plurality points out that its analysis of the consequences of the lack of a timely 73.055 request is not authoritative because it was not the consensus of a majority, which the plurality blames on “the fail[ure of the concurrence and dissent] to give effect to the Legislature actually enacted. In his [dissenting opinion](#), in which Justices Blacklock and Huddle joined, Chief Justice Hecht concluded that dismissal was the ineluctable effect of the DMA’s provision that one may “maintain an action for defamation *only if*” §73.055 is satisfied. His dissent is a paean to textualism in which he accuses the plurality of “purposivism” – which he describes as “break[ing] free from the bonds of statutory text to ensure that a preferred public policy [is] achieved.” The plurality rejects that characterization by saying that its analysis relies on the entire statute, not the isolated phrase “maintain only if.” The dissent responds that the appropriate role of the abatement provisions is to “give[] some defendants who do not receive a [timely – i.e., within limitations –]Request before suit is filed a short-fuse mechanism to force a Request from the plaintiff and perhaps pursue settlement.” The dissent also urges that the plurality interpretation undermines the legislative objective of encouraging damage mitigation when the parties’ natural tendencies in defamation suits are to litigate, not mitigate.

In the middle is the [concurring opinion](#) of Justice Boyd, which postulates the Legislature may have made a mistake in its drafting of the DMA but denies the judiciary is empowered to fix it. Justice Boyd begins his analysis with legislative history – in particular the Uniform Correction or Clarification of Defamation Act (UCCDA). The concurrence notes the Texas Legislature chose to omit the UCCDA’s provision that the suit itself could serve as the necessary request and instead engrafted a DTPA-style abatement provision on the DMA. Justice Boyd reasons “[b]oth readings ... neglect key rules that ... [w]e must give undefined words their common, ordinary meaning, give meaning to the statute’s use of different words in different provisions, and ensure that no provision is rendered superfluous or meaningless.” Thus, Justice Boyd “would hold that the DMA requires dismissal when the plaintiff files suit after making a ‘written [R]equest’ that was otherwise insufficient or was untimely, and permits abatement when the plaintiff files suit without having made any ‘written [R]equest’ at all.” The plurality responds that Justice Boyd “confuses what is sufficient with what is necessary” by stating that an action can be maintained only if a request is made within ... limitations ..., and that a defendant is entitled to dismissal if it timely objects to receipt of a timely request.

The result for the litigants is that the case should not be dismissed but remanded to the court of appeals for reconsideration. The takeaway for the rest of us is to pay attention to the court’s splintered approach to statutory construction. Using a photographic analogy, the dissent’s approach to statutory construction is zoomed in on the particular words and denying the ability to interpret statutes more holistically; the plurality zooms out to try to make the statute as a whole make sense, even if the interpretation falls short of fidelity to every word. Justice Boyd attempts to achieve the same objective by different means. Practitioners should consider these disparities carefully in crafting their arguments about contractual or statutory interpretations.

**(More) Statutory Construction:** *The stated purpose of protecting the child's best interests authorizes trial courts to enter non-specific orders contingent on the agreement of the managing conservator despite the general requirement that the terms of access to the child be specific.*

Under the Family Code, a parent who is not appointed as a child's managing conservator must be appointed possessory conservator unless such an appointment is not in the child's best interest. Under Family Code §153.193, restrictions on a parent's access to a child should not exceed those required by the child's best interests. Further, under §153.006(c), possession orders generally must "specify ... the times and conditions for possession of or access to the child, *unless a party shows good cause* why specific orders would not be in the [child's] best interest." (Emphasis added).

[In re J.J.R.S. and L.J.R.S.](#) involved an order concerning possessory conservatorship of a mother whose history included prostitution, drug abuse, failure to send the children to school for two years, and general instability. The children's aunt and uncle were granted managing conservatorship. Because the mother's repeated failures to follow through with scheduled visitations was shown to be upsetting to the children, the trial court entered a non-specific order pursuant to §§153.006(c) and 153.193, that conditioned the mother's visitation rights to those to which the aunt and uncle consented.

Mother argued that §153.006(c) might allow courts to issue less specific orders if doing so was in the child's best interest, but that allowing less specificity did not authorize an order with no specificity. According to the mother, an order that made her visitation rights contingent on the consent of the aunt and uncle lacked all specificity and was functionally a complete denial of access not authorized under §153.006(c). A unanimous court under an opinion by Justice Devine ruled the order was not an outright denial of access to the children but rather a restriction based on the discretion of the managing conservator. As usual, the court began with a textualist approach, examining the language used in the statutes. But the court also kept its eye on the larger picture. It reasoned the restriction was undoubtedly severe and, as such, should rarely be used. However, the evidence was legally sufficient to show that the children's best interests warranted such a restriction.

The court recognized that trial courts with the opportunity to observe the witnesses firsthand could perceive more from the demeanor of the witnesses the court of appeals could infer from the written record alone. It also recognized that what might be in the child's best interests were not subject to hard and fast rules. Determination of the children's best interest reflected a difficult balance of important competing interests.

Requiring termination of parental rights rather than a conservatorship with severe access restrictions would ... force a trial court to either allow access to a child by a possessory conservator who may immediately endanger that child's physical or emotional wellbeing, or ... prematurely sever the parent-child relationship out of fear that immediate access may cause irreparable harm to the child. Such a proposition is antithetical to the purpose of visitation orders, which strive to balance the rights of parents with the importance of protecting children.

In short, the court looked to the larger purpose of the statute to inform its interpretation. The difference between *JJRS* and *Hogan v. Zoanni* was that the court was able to harmonize the specific wording of the statute with the larger objective; in the latter, it was unable to achieve that kind of consensus because various factions felt fettered by the demands of textualism to deny itself the power to ascertain what the Legislature probably intended from the totality of the statute.

The court also rejected the mother's contention that the order of possession was invalid because it was too vague to be enforced by contempt. "[W]hile the Family Code provides that conservators may be subject to contempt ... the Code does not require—nor have we ever held—that trial courts must issue orders ... always enforceable by contempt."

**Statutory Construction (Again):** *An ordinance creating a historic preservation district was different in kind from zoning ordinances that had to be approved in a referendum because the former imposed no direct land use limitations whereas the latter focused on the preservation of unique architectural details. Again, the court divides in approach to statutory interpretation because the concurring justices reject the majority's consideration of extra-statutory considerations such as the historical objectives of historic preservation ordinances.*

In [\*Powell v. City of Houston\*](#), the dispute resolved around whether a historic preservation ordinance was a zoning ordinance. If so, a binding referendum was required under Houston's charter. No referendum was held for the historic preservation ordinance. If classified as a zoning ordinance, it was unenforceable. The homeowners challenging the ordinance also insisted that it did not comply with Local Government Code chapter 211. Under an opinion authored by Justice Busby, a majority rejected both challenges.

At the outset, the majority carefully notes that its opinion does not consider whether historic preservation is within a municipality's police powers because the issue was raised only in briefs of *amici*, not the parties themselves. Grounds for reversal were deemed limited to the arguments of the parties themselves.

After that bit of housekeeping, the majority considered whether the historic preservation ordinance was "zoning" for which the city's charter required a referendum. Because "zoning" was not defined, the majority began by consulting the textualist's sacred texts – dictionaries – which referred to the feature of zoning that regulates land use in a municipality comprehensively according to geographic "districts." Houston's historic preservation ordinance created an historic "district" but the majority ruled that more than creation of a geographic district was necessary to create a zoning regulation.

The majority emphasized comprehensiveness as an essential feature of zoning, pointing to decisions that location restrictions on adult businesses or perimeter fencing requirements for auto salvage yards. It then looked to the distinction of zoning from historic preservation based on the former's regulation of structural uses, height and bulk as opposed to the latter's focus on architectural details that make a structure unique.

The majority deemed it noteworthy the historic preservation ordinance imposed "no direct limits on land use" and affirmatively disclaimed any intent to regulate use. Thus, the ordinance lacked "a defining feature" of zoning. Moreover, the ordinance was "so targeted that it lacks the geographic comprehensiveness associated with zoning regulations." This, the majority reasoned, is what distinguished a zoning scheme from other district-based regulations, like those in effect for flood zones or utility districts. The historic preservation ordinance only applied to less than one percent of the lots in Houston and merely provided a *mechanism* for residents to create historical districts without creating such districts itself.

Further, the ordinance did not impose a uniformity of regulation that is a common feature of zoning. Lastly, the majority noted that the ordinance provides remedies for violation that were explicitly distinct from those available for zoning violations. In sum, the majority refused to consider every ordinance that created a geographic regulatory district as a "zoning" ordinance because doing so would invalidate district-based land use restrictions required by programs like National Flood Insurance and would undermine its construction standards for structures in flood hazard areas. It would invalidate the City's subdivision plat requirements. None of these regulations were approved in a referendum necessary to implement zoning. For these reasons, the majority rejected the homeowners' efforts to broadly define "zoning" as any "regulation of size, area, density, and aesthetics, as well as use . . . based on geographic districting."

The majority was also unpersuaded that the historic preservation ordinance violated Local Government Code chapter 211, which imposes certain procedural and substantive requirements that traditional city zoning regulations must meet. After ruling chapter 211 applied, the majority rejected the City's argument the City could have enacted the preservation ordinance under its inherent powers as a home rule city. Somewhat incongruently, the majority considered the Houston Archaeological and Historical Commission a "zoning commission" for purposes of chapter 211 even though it did not consider the ordinance under which the commission was created "zoning" for purposes of

the City's charter. The difference, however, was based on the definitions and usage of "zoning" in the statute. Moreover, the ordinance was not deemed to run afoul of the "comprehensive" plan requirement in chapter 211 simply because such structures were not located in all parts of the city.

Justice Bland, joined by Justices Devine, Blacklock and Huddle, [concurred](#) in upholding the validity of the preservation ordinance. They agreed the ordinance is not common-law "zoning" because "the restrictions it imposes within its regulated districts are not uniform... [and] do[] not have the geographic reach of traditional zoning." But the concurring justices reject the majority's reach beyond these two factors when it "examines the [o]rdinance's historic-preservation goals and ... suggest[s] that the City may create uniform historic-preservation districts" notwithstanding the charter's restrictions on zoning. The concurrence was especially critical of the majority's holding that the preservation ordinance was not zoning in the traditional sense because of the declaration in the ordinance itself that it was not a "regulation of the use of any ... property." To the concurrence, the "purpose [of the ordinance] should not inform the inquiry." Instead, the only task before the court was "simply to determine the ordinary meaning of 'zoning.'" As in *Hogan v. Zoanni*, the court appears to fracture on the divide between textualism and purposivism.