Interventions

UNDERSTANDING BASIC AVENUES FOR STANDING IN CPS CASES.

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Goals of the presentation:

- Address standing requirements to intervene in CPS legal cases and in cases with other stages of CPS involvement
- Address recent statutory changes and review recent caselaw addressing standing
- Provide guidance on best practices when addressing an intervention in a CPS case

All in 30 minutes!!!

Standing Fundamentals

- Standing is a component of subject matter jurisdiction and is the threshold issue in a child custody proceeding.
- Standing in a SAPCR is conferred by statute
- Standing must exist at the time a suit is filed
- If a party fails to establish standing, the trial court must dismiss the suit
- There is no equitable component to standing

Two avenues for parties to establish standing in a SAPCR

- Standing to file an Original Suit
- Standing to Intervene in a Pending Suit

Standing to File an Original Suit

§ 102.003 General Standing to file Suit

(a) An original suit may be filed at any time by:

(1) a parent of the child;

(2) the child through a representative authorized by the court;

(3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;

(4) a guardian of the person or of the estate of the child;

(5) a governmental entity;

(6) an authorized agency;

(7) a licensed child placing agency;

§ 102.003 (continued)

(8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;

(9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;

(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;

(11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition;

(12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;

Actual Care, Control, & Possession § 102.003(a)(9)

Section 102.003(a)(9) provides standing to "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.

§ 102.003(a)(9) is very time-specific in its applicability

A person, other than a foster parent, must have actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.

- No standing when child in home for only 5 ½ months at time of filing

In the Interest of E.C., No. 02-13-00413-CV (Tex. App. – Fort Worth [2nd District] August 7, 2014)

- No standing when child in home for only 3 months at time of filing

In re C.M.J., No. 02-12-0036-CV (Tex App. – Fort Worth, December 2012, no pet.)

Actual Care, Control, and Possession under § 102.003(a)(9)

102.003(b)

In computing the time necessary for standing under Subsections (a) (9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

Elements of "actual care, control, and possession"

Generally the individual asserting standing under 102.003(a)(9) will have:

(1) Lived in a home where the child consistently and frequently stayed overnight;

(2) Financially supported the child;

(3) Participated in the child's education; and

(4) Fed, clothed, and provided health care to the child

Jasek v. Texas Department of Family & Protective Services, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)

Actual Care, Control, and Possession of the Child can't be shared possession with a fit parent

In the Interest of H.S., A Minor Child., No. 02-15-00303-CV(Tex. App. – Fort Worth [2nd District]July 28, 2016, pet. filed) (mem.op.)

Mother and Father were JMC of 1 year-old Heather and Mom and Heather lived with Grandparents since birth. Father had regular visitation. The parties agreed Heather would stay with grandparents while Mom attended rehab. Six months after Mom entered rehab, grandparents filed a Petition to Modify asking to be given the exclusive right to designate the residence of the child.

The Court found that during the six months in question, mother had returned to the grandparents' home in the evening to have dinner with Heather, bathe her and put her to bed. She had periodically picked her up from daycare and both mom and grandmother had made doctor's appointments for Heather. Father had also kept Heather every other weekend during this period and often Father would take Heather to see her mother. The trial court found the Grandparents failed to show they had actual control over Heather for the statutory 6 month period.

In the Interest of H.S., A Minor Child., No. 02-15-00303-CV(Tex. App. – Fort Worth [2nd District]July 28, 2016, pet. filed) (mem.op.) (Cont.)

Grandparents argued on appeal that shared custody could meet 102.003(a)(9)'s actual care and control requirements and that the trial court had "engrafted" a "not temporary" element to 102.003(a)(9) as well. The Fort Worth Appeals Court, relying heavily on Troxel v. Granville's expression of the fundamental interest of parents in the care of their children, affirmed the trial court and added that for a non-parent to exercise actual control under 102.003(a)(9), a parent would have to completely abdicate parental responsibilities and evidence would need to be presented that the parents are not fit.

This case is under review by the Texas Supreme Court and Oral Arguments are scheduled for 1/10/18.

§102.0035 Statement to Confer Standing

(a) A pregnant woman or a parent of a child may execute a statement to confer standing to a prospective adoptive parent as provided by this section to assert standing under Section 102.003(a)(14). ***A statement to confer standing under this section may not be executed in a suit brought by a governmental entity under Chapter 262 or 263.***

*You will see this attempted quite a bit!

§ 102.004
Standing for a Grandparent or Other Person

(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or other relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof that: (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

Limits of § 102.004(a)

Standing under 102.004(a) is limited to grandparents or another relative of the child within the third degree by consanguinity.

Relatives who are within the third degree of consanguinity are:

(1) A parent or child (relatives of the 1st degree)

(2) A brother, sister, grandparent, or grandchild (relatives in the 2nd degree)

(3) A great-grandparent, great-grandchild, aunt who is a sister of a parent of the child, an uncle who is a brother of a parent of the child, a nephew who is a child of a brother or sister of the child, or a niece who is a child of a brother or sister of the child (relatives of the third degree)

Texas Government Code Ann. § 573.023(c)

Applicability & Implications of § 102.004(a) in CPS cases

- Avenue for Grandparents and other relatives within the requisite degree of consanguinity to file for custody of a child in an Investigation or FBSS stage of a CPS case or at the time of Removal.
- An original action for conservatorship under 102.004(a) does not have the rehabilitative and service requirements of a CPS case or the same strict timelines.

§102.0045 Standing for Sibling

(a) The sibling of a child may file an original suit requesting access to the child as provided by Section 153.551 if the sibling is at least 18 years of age.

(a-1) The sibling of a child who is separated from the sibling as the result of an action by the Department of Family and Protective Services may file an original suit as provided by Section 153.551 requesting access to the child, regardless of the age of the sibling. A court shall expedite a suit filed under this subsection.

(b) Access to a child by a sibling of the child is governed by the standards established by Section 153.551.

Standing to Intervene in a Pending Suit

§ 102.004(b)

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that the appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

§ 102.004(b) applies only to Pending Suits

- A grandparent or other person can only utilize 102.004(b) in suits where managing conservatorship is already an issue in dispute.
- In the context of CPS cases, the suit is no longer pending once the Department is appointed PMC of the child.

§ 102.004(b) involves a 2-part Analysis

1. The Grandparent or other person must establish that they have had substantial past contact with the child

AND

2. The Grandparent or other person must present satisfactory proof to the court that the appointment of the parent or parents as sole or managing conservators would significantly impair the child's physical health and emotional development.

What is Substantial Past Contact?

- Fact-Intensive Inquiry
- Flexible Standard
- Not Statutorily Defined
- Case law does not establish a clear factual framework
- Deference given to trial court's assessment

What is satisfactory proof that the appointment of parent(s) as MC would significantly impair the child's physical health and emotional development?

- Evidentiary Standard is Preponderance of the Evidence
- The non-parent Intervenor must offer evidence of specific acts or omissions of the parent that demonstrate that an award of custody to the parents would cause physical or emotional harm to the child.
- Intervenor must do more than show he/she would be a better caretaker for the child
- It is not enough to focus on past acts

Practical Considerations:

- Even in CPS cases, specific facts should be alleged to support the finding of significant harm.
- Given the rehabilitative nature of CPS proceedings, an Intervenor's standing may be impacted by a parent's substantial progress with their service plan and the reunification process.
- Intervenors can't be allies with parents in CPS proceedings.

Foster Parent Interventions

Prior to September 1, 2017, there were two avenues available for Foster Parents seeking to intervene in CPS proceedings.

(1) General Standing provision § 102.003 (a)(12)

An original suit may be filed at any time by a person who is a foster parent of a child placed by the Department of Family and Protective Services in the persons home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition.

(2) Standing could also be established through § 102.004(b) and a showing of substantial past contact and satisfactory proof to the court that the appointment of a parent as Sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

As of September 1, 2017, §102.004(b-1) limits Foster Parent Standing under 102.004(b)

- 102.004(b-1) states that a foster parent may only be granted leave to intervene under Subsection (b) if the foster parent would have standing to file an original suit as provided by Section 102.003(a)(12).
- This requirement effectively prevents any foster parent from intervening in a pending CPS case unless that foster parent has had the child placed in their home for 12 months.

Limitations on Standing

§ 102.006 & Limitations on Standing

Section 102.006 of the Family Code provides:

(a) Except as provided by Subsections (b) and (c), if the parent-child relationship between the child and every living parent of the child has been terminated, an original suit may not be filed by:

(1) a former parent whose parent-child relationship has been terminated by court order;

(2) the father of the child; or

(3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.

(b) The limitations on filing suit imposed by this section do not apply to a person who: (1) has a continuing right to possession of or access to the child under an existing court order; or (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.

§ 102.006(c)

(c) The limitations on filing suit imposed by this section do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is the sister of a parent of the child, or an uncle who is the brother of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated.

Practical Effects of § 102.006 (c)

- Narrows the class of individuals who would otherwise have standing to file an original proceeding for modification or adoption
- Restricts the time period for filing
- Legal avenues of adoption and modification impose their own obstacles even to those who have standing and file within 90 days.
- If an incorrect pleading or petition is filed, there is not much time to file a correct one.

Recent Cases emphasize hard limits of §102.006(c)

In re R.B. and J.B. and J.B., No. 02-16-00387-CV (Tex. App. – Fort Worth Nov. 17, 2016, orig. proceeding)

Mother had relinquished rights to grandparents in 2006, who then allowed the child to live with mom for extended periods of time. Mother filed a SAPCR in 2016 seeking JMC, in response, grandparents filed a plea to the jurisdiction arguing mom lacked standing due to limitations imposed by TFC §102.006(c). The trial court ruled that §102.006(c) didn't apply because the grandparents had voluntarily relinquished the child to mother and her husband for 1 and 2 year periods. The grandparents sought mandamus relief arguing that §102.006(c) "expressly limited, and consequently divested" them of standing. Mother argued that TFC §153.002 and the consideration of the best interest of the child should be the paramount consideration and override §102.006(c). The Appellate Court disagreed and found that the unambiguous language of §102.006(c) meant the mother lacked standing and the trial court lacked subject matter jurisdiction over the suit.

Grandmother's Standing Limited by §102.006(c) 90 days after Verbal Order of Termination

P.R.M. v. Texas Dept. of Family and Protective Services, No. 03-16-00065-CV (Tex. App. – Austin Aug. 26, 2016, no pet.) (mem. op.)

The trial court held a termination hearing on March 20 2015 and at the end of the hearing, the court orally rendered an order terminating the rights of the parents. A termination order was signed on May 1, 2015. Grandmother filed a Petition requesting MC under §102.004(a)(1) and (a)(2) on July 15, 2015. The Department filed a Plea to the Jurisdiction arguing that Grandmother filed her petition more than 90 days from the date parental rights were terminated. After holding a hearing, the trial court granted the Department's plea to the jurisdiction and dismissed Grandmother's suit. She appealed and the Court of Appeals reviewed the record and took notice that at the conclusion of the hearing on May 1, 2015, the trial court's use of the present tense "is hereby terminated" implied an immediate termination of parental rights. The Appellate Court found the trial court rendered judgment at the March 20, 2015 hearing which meant that Grandmother's petition was untimely.

Practical Considerations for Addressing Interventions filed in your court

Timing is Everything

- Waiting to file an Intervention, even during a pending case, may be problematic if it is filed too close to the dismissal deadline.
- ***In re C.A.L. No. 02-05-308-CV (Tex. App. – Fort Worth Feb. 15, 2007 orig. proceeding) (mem. op.)***

  Grandmother filed petition in intervention 2 months before dismissal date when permanency plan changed from reunification to termination although she had been aware of the case for over a year. Motion to Strike granted and affirmed by Appellate Court as within the discretion of the Court.
- Waiting to file an intervention if you are out of state and ICPC study required also problematic
- **Anderson v. Texas Dep't of Family and Protective Services, No. 03-06-00327-CV (Tex. App. – Austin May 9, 2007, pet. denied (mem. op).**

Grandfather who lived in Kentucky filed an intervention 2 months before trial

Late interventions are not necessarily fatal.

Seale v. Texas Dept. of Family & Protective Services., No. 01-10-00440-CV (Tex. App. – Houston [1st Dist.] Mar. 3 2011, no pet.) (mem. op.)

The Seales had been placement for the child for 18 months. Maternal great aunt and uncle intervened 2 months before trial. Two weeks before trial the Seales intervened. Court denied intervention claiming no leave to intervene had been requested. Court of Appeals reversed and remanded finding that a trial court abuses its discretion if it strikes a petition in which (1) the intervener could bring the same action, or any part thereof, in their own names, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the interveners' interest. (Citing Harris County v. Luna-Prudencio, 294 S.W. 3d 690, 699 (Tex. App.-Houston [1st Dist.] 2009, no pet.)

Procedural Issues impacting interventions

Rule 60 of the Texas Rules of Civil Procedure provides that "any party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party."

Thus, intervening parties, absent a Motion to Strike, are immediately granted the status of a party and can participate in discovery, participate in hearings and mediations, and receive court reports, and other filings with the court.

§ 102.004 (b) requires leave of court to intervene.

102.004(b) provides "the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter…"

What is a Request for Leave and is it necessary?

In the Interest of A.T., No 14-14-00071-CV, (Tex. App. – Houston, July 15, 2014, (no pet.) (mem. op.)

Following the plain language of the statute, the court finds a request for leave to intervene is necessary under 102.004(b) and that the Intervenor's Amended Petition for Intervention which requested that the court "grant the relief requested in this intervention" be read as a request for leave to intervene.

L.J. v. Texas Department of Family & Protective Services, No. 03-11-00435-CV (Tex. App. – Austin Aug. 1, 2012, pet. denied) (mem.op.)

Court found that TRCP 60 does not apply to interventions filed under 102.004(b). Court noted that the legislature developed a separate provision governing interventions in family law cases and gave the trial court discretion to determine whether to allow an intervention even when the statutory requirements are met. Court then found that no written motion to strike was required.

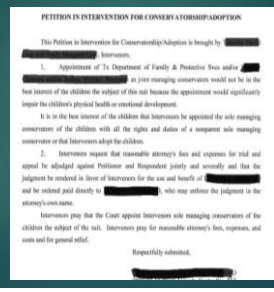
Imperfect pleadings can establish standing

- Appellate courts review standing issues by construing the pleadings in favor of the petitioner and by looking to the pleader's intent.
- Question is whether a party provides other parties and the Court fair notice of his or her claim

Examples:

- *Jasek v. TDFPS, 348 S.W.3d 523 (Tex App. – Austin 2011, no pet.)*
- *In the Interest of D.A., No. 02-14-00265-CV (Tex. App. – Fort Worth, February 5, 2015)(mem. op.)*
- *In the Interest of N.I.V.S, No. 04-14-00108-CV (Tex. App. – San Antonio, March 11, 2015) (mem. op.)*

Most intervention pleadings are far from perfect



PETITION IN INTERVENTION FOR CONSERVATORSHIP/ADOPTION

This Petition in Intervention for Conservatorship/Adoption is brought by [redacted], Intervenors.

1. Appointment of Tx Department of Family & Protective Svcs and/or [redacted] as joint managing conservators would not be in the best interest of the children the subject of this suit because the appointment would significantly impair the children's physical health or emotional development.

It is in the best interest of the children that Intervenors be appointed the sole managing conservators of the children with all the rights and duties of a nonparent sole managing conservator or that Intervenors adopt the children.

2. Intervenors request that reasonable attorney's fees and expenses for trial and appeal be adjudged against Petitioner and Respondent jointly and severally and that the judgment be rendered in favor of Intervenors for the use and benefit of [redacted] and be ordered paid directly to [redacted], who may enforce the judgment in the attorney's own name.

Intervenors pray that the Court appoint Intervenors sole managing conservators of the children the subject of the suit. Intervenors pray for reasonable attorney's fees, expenses, and costs and for general relief.

Respectfully submitted,

[redacted]

Best Practices and Final Thoughts

Hear Evidence

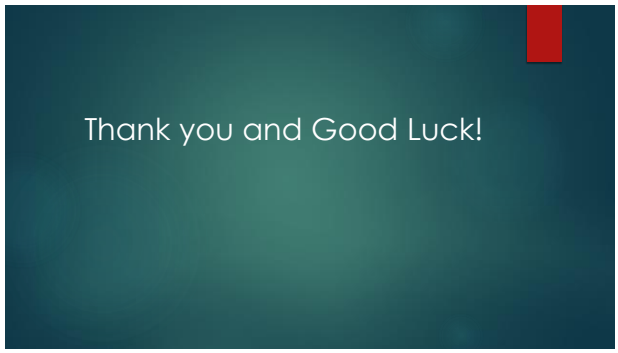
- Ordinarily Standing is based on the existence of certain facts
  - ***In re K.D.H., 426 S.W.3d 879, 884 (Tex. App. – Houston [14th Dist.] 2014, no pet.)***
- Facts need to come in through sworn affidavits and/or sworn testimony
- ***In Re Shifflet, No. 01-14-00929-CV, Court of Appeals, First District, March 3, 2015.***
  - Mandamus Proceeding found abuse of discretion "After hearing only the arguments of counsel on standing, and without receiving evidence other than to take judicial notice of the contents of the June 18th Temporary Order."

Ensure rights of Intervenors are clearly addressed in Final Order.

- Interventions that survive a standing challenge deserve a clear decision from the Court regarding the relief requested in the Intervention petition.
- Mother Hubbard Clauses can result in unintended outcomes.
- Rights of Intervenors need to be addressed simultaneously with the rights of parents in CPS cases.
- Don't allow CPS to Non-suit a case if an Intervention has been filed.

Remember that Standing is only one of many issues you must address with Interventions in CPS cases

- If an Intervenor establishes standing, that simply means they have a right to sit at the table & be a participant in the case in hearings, discovery, and at trial.
- A best interest analysis still applies to determine if the intervenor should be placement and/or managing conservator.
- The Court can also afford a party with no standing a homestudy and order placement above a party with standing if that placement is in the best interest of the child.


Thank you and Good Luck!