INTERVENTIONS IN DFPS CASES

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Houston Bar Association
Juvenile Law Section

6TH ANNUAL ADJUSTING THE BAR:
THE DEFINITIVE AD LITEM SEMINAR IN DFPS CASES

April 30, 2016
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Ronnie E. G. Harrison is an attorney Board Certified in Family Law and Criminal Law practicing with the firm Harrison Law Office, P.C. She received a B.A. degree in education from Queens College of the City University of New York and a law degree from Widener University School of Law.

Ronnie has served as past chair of the State Bar Women & the Law Section, has received the Ma’at Justice Award. She originated the popular Used Book Sale at the State Bar of Texas Annual Meetings under the auspices of the Women & the Law Section — with all net proceeds being donated to the Texas Advocacy Project.

She has served as a council member of the State Bar of Texas Individual Rights and Responsibilities Section and as a member of the Child Abuse and Neglect Committee. Ronnie has also been a member of the Women in the Profession Committee and has served on the Supreme Court of Texas Advisory Committee on Child Support and Visitation.

Ronnie is a member of the Houston Bar Association, where she has previously served as chair of the Criminal Law & Procedure Section and as a former council member of the Juvenile Law Section, and served as founding chair of the Special Olympics Committee. She has also been a past board member of the Gulf Coast Family Law Specialists.

As a member of the ABA Family Law Section, Ronnie was honored by being elected to the Executive Committee and served as Chair of the Specialization/Certification Committee. She was awarded the Family Law Section Certificate of Outstanding Service.

Ronnie has previously spoken on the CPS Track at the Advanced Family Law Course and at other State Bar & HBA seminars and workshops pertaining to Finding Missing Persons and resolving “Who’s My Daddy” issues.
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Nature of Intervention

A petition in intervention joins a lawsuit already in progress. Texas Rules of Civil Procedure, Chapter 5 J. Sec. 2. A requirement to intervene in any case, including CPS cases, is that the Intervenor have standing. There may be more than one intervenor in a case. Seale v. Texas Department of Family and Protective Services, Brown and Brown, 2011WL 765886 (Tex. App. - Houston {1st Dist.} 2011)-Appendix C. Interventions in Texas Department of Family and Protective Services (herein after referred to as “TDFPS”) cases have provisions for a variety of people/entities who may intervene, including but not limited to, relatives, people with significant contact with the child, foster parents and licensed adoption agencies. The Texas Family Code (herein after referred to as “TFC”) and the Texas Code of Civil Procedure (herein after referred to as “TRCP”) are the primary sources for statutes directly relating to Intervention. Intervention case law is the subject of numerous, diverse Appellate Court decisions making the topic somewhat confusing, yet interesting and relevant with room for creative inclusion.

Petition in Intervention

The intervenor does not need leave of court to file an Intervention, (TRCP Chapter 5 J. § 2.1 (2.2.), with the exception of TFC 102.004 (b), which will be discussed below. The intervenor should plead as many grounds as are applicable under the circumstances. The Petition in Intervention should be filed timely and served on all existing parties. The intervenor must have standing. Standing may not be waived; is provable by a preponderance of the evidence, see, Department of Family and Protective Services v. Alternatives in Motion, 210 S.W. 3rd 794 (Tex. App. - Houston {1st Dist.} 2007-Appendix D; and may be challenged at any time including for the first time on appeal. The grounds for standing must be met to sustain an Intervention. The fact that an Intervention is filed, neither means nor requires that the intervenor prevail on the merits at
the final hearing. An Intervention which has not been challenged, or that has survived a challenge, allows the intervenor to fully participate in the case to the same extent as the original parties to the suit, thus affording the intervenor an advantage over the intervenor's prior status as a non-party.

In TDFPS cases, there are usually numerous parties and attorneys already on the case at the time a petition for Intervention is filed. The addition of one or more parties and attorneys becomes incrementally less burdensome. Notwithstanding, the intervenor must persuade the court that the intervenor has a substantial interest in the ongoing case which will otherwise not be adequately protected by an existing party. There isn’t a set limit on the number of intervenors who can enter a case, nor is there a set limit on the number of petitions an intervenor may file in any given case. Depending on the relief sought by each existing party in a particular case, each such party may choose to support a petition in Intervention, oppose the petition in Intervention or have no position. In most circumstances, the court is amenable to hearing additional voices on behalf of the best interest of the child and is inclined to allow the Intervention.

All parties should be aware of the grounds to strike a petition in Intervention and, if opposed thereto, should file a written Motion to Strike Intervention stating all grounds and set a hearing on the motion. The intervenor then has the burden of proof to traverse the objections. The court may strike the Intervention upon another party’s motion, or strike the Intervention \textit{sua sponte}. Mandamus is the remedy for a party’s challenge to the court’s ruling on the Intervention. In \textit{In re Salverson}, 2012 WL 1454549-Appendix E the Appellate Court granted the intervenors’ Mandamus and remanded to the trial court to consider intervenors’ alternate ground. In \textit{In re David Arnold Northrop, Relator}, 305 S.W.3rd 172 (Tex. App. - Houston \{1st Dist.\} 2009-Appendix F, the Appellate Court denied intervenor’s Mandamus because intervenor filed his petitions in intervention too close to the extended dismissal date which would have caused the case to be dismissed if trial wasn’t held before the extended dismissal date. (Query: can a trial court grant an
Intervention, start the trial and recess the trial to give intervenor additional time to prepare for trial?

**Statutory Basis for Intervention**

Section 102 of the TFC and TRCP Chapter 5 J. § 2 are the primary statutes relating to Interventions. When planning an intervention strategy, it is recommended that reference be made to the statutes and case law to establish your bearings and to properly structure your case. The trial court has the advantage of personally observing the litigants, evidence, testimony and witnesses, while the appellate court only has a record of the proceeding. Importantly, while an intervention hearing may appear to be relatively informal, it is incumbent upon the engaging parties to assure that the record is complete as to the elements, law and facts presented. Don’t make the mistake to assume that the appellate court will help a party by filling any evidentiary gaps - the can’t and they wont! Evidentiary gaps or other deficiencies in the intervention case will remain as part of the record.

It is wise to review the provision of the relevant codes carefully, assuming that the legislature has chosen each word with the intention that each word is interpreted by its common definition. For example, TFC 102.004 is entitled: “Standing for **Grandparent** or **Other Person.**” (Emphasis supplied). Nevertheless, note that TFC 102.004(a) refers to “**grandparent** or **another relative of the child related within the third degree by consanguinity.**” (Emphasis supplied). Thus, TFC 102.004 gives Grandparents and other relatives of the children within the third degree of consanguinity an added means to intervene in a CPS case. It’s crucial to be aware that “consanguinity” means relation by blood, as opposed to “affinity” which means relation by marriage. Reference the chart prepared by the State of Nevada Commission of Ethics found in the Appendix A.

**Consanguinity & Leave of Court**

Relatives to the child by the first degree of consanguinity are the child's parents; the second degree of consanguinity includes the child's grandparents, and — for purpose of intervention, adult — brothers and sisters; the third degree of consanguinity includes the
child's great grandparents, and — for purposes of intervention, adult — uncles, aunts, nephews and nieces. TFC 102.004 (a) (1). Furthermore, TFC 102.004 (b) refers to “grandparent or other person” deemed by the court to have had substantial past contact with the child...). The general term “other person” in 102.004 (b) does not apply to 102.004 (a). That is, “Other person” is not necessarily included as “another relative...” but “another relative...” can be considered as “another person.”

It is important to note TFC 102.004(b) requires leave of court for a grandparent or other person to file an Intervention requesting possessory conservatorship. This crucial exception to the leave-of-court rule was in the initial “Nature of Intervention” portion hereof. Counsel should recognize that the Intervention statute means what it says; rigorous preparation of your pleadings that strictly comport with the statutory requirements is essential for preserving and prevailing in your Intervention petition.

Standing as an Intervenor

Whether you are planning to file a Petition in Intervention or preparing to file a Motion to Strike an Intervention that has already been filed, familiarize yourself with the standing requirements which are crucial to successfully lodging an Intervention. Below is a list of the TFC sections related to whom may have standing to intervene. Several approved intervenors appear in more than one code provision, so that, for example, if a potential intervenor were a foster parent, or Grandparent, these several TFC provisions that apply to that person are grouped in a single paragraph with the title of the potential intervenor highlighted in bold and underlined for easy recognition. As your Intervention practice develops, you may find more applicable provisions or find that the some of these entries are not applicable.

An Intervention is available to a person/entity who would have standing to bring an original suit in the person/entity’s own name. Standing may be conferred to an intervenor in writing by a pregnant woman or a parent of the child, TFC 102.0035; grandparent, other relatives, other person, TFC 102.004; sibling, TFC 102.0045; termination and
adoption, TFC 102.005; Title I-VD agency, TFC 102.007. There are limitations on standing to file an original suit. See, TFC 102.004 (neither grandparent nor other person can file an original suit for possessory conservatorship, but may intervene with leave of Court); TFC 102.006 (limitation and exceptions to limitation on standing), "... a grandparent or another relative of the child related within the third degree by consanguinity, may file on original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development..."

In TDFPS cases TFC 262.201 requires a similar finding:

"(b) ... At the conclusion of the full adversarial hearing, the court shall order the return of the child...unless the court finds sufficient evidence ...that:

(1) there was a danger to the physical health or safety of the child...and for the child to remain in the home is contrary to the welfare of the child:"

Both the sections of TFC 104.004 (1) and TFC 262.201 (b) (1) have a threshold requirement in common: the impairment or danger to the child's physical health. Therefore, if a CPS court has removed the child from the child's parent after an adversarial hearing, then by definition, there has been a finding that meets the minimal requirement for standing, for the relative within the third degree by consanguinity. This fact alone separates the non-TDFPS interventions from the TDFPS interventions. Query: If there has been an agreement reached by negotiation, mediation or otherwise, whereby the child's parent(s) agree(s) for TDFPS to take temporary managing conservatorship of the child, is the finding in TFC 262.201 a result of an adversarial hearing? Is such an agreement an admission which carries the same weight for purposes of conferring standing on the relatives in the third degree of consanguinity? Query: Are the foster parent TFC provisions applicable to Fostering Connections placements?
The list below may raise some questions. As each fact situation is different, counsel should be creative and inclusive within reasonable boundaries when preparing and presenting an Intervention petition or motion to strike, as well as during the contested hearing.

**POTENTIAL INTERVENORS BY TEXAS FAMILY CODE PROVISIONS**

1. **Grandparent** - TFC: 102.004 (a), 102.003(9), 102.003 (10), 102.003 (11), 102.00 (13), 102.003 (14), 102.0035(A), 102.005 (2), 102.005 (3), 102.005 (5), 102.006, 102.006 (b)

2. **Parent** - TFC 102.003(1)

3. **Child through representative of the court** - TFC 102.003(2)

4. **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** - TFC 102.003(3)

5. **Guardian of the person or estate of the child** - TFC 102.003 (4)

6. **Governmental agency** - TFC 102.003(5)

7. **Department of Family and Protective Services** - TFC 102.003 (6)

8. **Licensed child placing agency** - TFC 102.003(7)

9. **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 - TFC 102.003(8)

10. **Person, other than a foster parent, who has had actual care, custody, control and possession of the child for at least six months ending not more that 90 days preceding the date of the filing of the petition** - TFC 102.003 (9)

11. **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 - TFC 102.003 (10)

12. **Person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more that 90 days preceding the date of filing of the petition** if the child's guardian, managing conservator, or parent
is deceased at the time of the petition - TFC 102.003 (11)

13. 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 - TFC 102.003 (12); foster parent at any time after the person has been approved to adopt the child - TFC 102.003 ©; an adult who has adopted or is the foster parent of and has petitioned to adopt a sibling of the child TFC - 102.005 (4); TFC - 102.003(10); TFC- 102.003 (14); TFC- 102.0035(a); TFC - 102.005 (2),102.005(3), 102.005 (5)

14. Person who is a relative of the child within the third degree by consanguinity as determined by Chapter 573, Government Code, if the child's parents are deceased at the time the filing of the petition - TFC102.003 (13)

15. Person who has been named as a prospective adoptive parent of the child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section TFC -102.0035, regardless of whether the child has been born TFC - 102.003 (14)

16. Prospective adoptive person who has been conferred standing by a pregnant woman or a parent of a child. 102.0035 (a)

17. Standing to Request Termination & Adoption 102.005 a stepparent of the child TFC- 102.005 (1); an adult who, as the result of placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition TFC-102.005 (2); an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition TFC - 102.005 (3); an adult who has adopted or is the foster parent of and has petitioned to adopt a sibling of the child TFC - 102.005 (4); another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so TFC102.005 (5)

18. Chapter 231 Title-D agency or a political subdivision contracting with the attorney general to provide IV-D services 102.007

19. Limitations on Standing TFC 102.006 (a) (1) - (3) provides, in general, that a family
member may not file an original suit after the parents’ rights are terminated, those limitations are not imposed on a person who: (b) (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 representative to bring the suit; (c) the limitations ...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 a brother of a parent of the child, if {they} file an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the parent-child relationship between the parent and the child is terminated in a suit filed by the Department of Family and Protective Services requesting the termination of the parent-child relationship.

Issues raised by 102.006 relating to intervention include: whether there is a suit in which to intervene if there has already been termination? Is consent being unreasonably withheld in (b) (2)? Does the filing relative have standing? For what relief does the intervenor have standing to request?

Query: Would early, well prepared by the parent and quickly and diligently investigated by TDFPS Child Caregiver Resource Form reduce the need for contested interventions? See Form in Appendix B

When pleading for or opposing an Intervention petition always address the standing issue as if your case depended upon it, because it does! From the trial level through the appellate level, objection to standing may be brought at any time. Indeed, standing may exist to bring an original suit where the court denies the Intervention, if brought under TFC 102.003(a) (9). Jasek v. Texas Department of Family and Protective Services, 348 S.W. 3rd 523 (Tex. App. - Austin {3rd Dist.} 2011).

**Conclusion**

Interventions are a serious matter: counsel should plead comprehensively, carefully and
creatively. Interventions provide a way for adults who are relatives and/or have significant contact with the child, to request to remain in the child’s life in some capacity. While all parties may not welcome an Intervention into their ongoing case, purported intervenors — by offering invaluable additional perspective, insight, information and options — have the opportunity to assist not only the parties but also the court to reach a decision that is decidedly in the best interest of the child in the present and for the future.
Appendix A
State of Nevada Commission on Ethics

Consanguinity/Affinity Chart
(Degrees of family relationship by blood/marriage)

Instructions:

For Consanguinity (relationship by blood) calculations:
Place the public officer/employee for whom you need to establish relationship by consanguinity in the blank box. The labeled boxes will then list the relationships by title to the public officer/employee. Anyone in a box numbered 1, 2, or 3 is within the third degree of consanguinity. Nevada Ethics in Government Law addresses consanguinity within third degree by blood, adoption or marriage.

For Affinity (relationship by marriage) calculations:
Place the spouse of the public officer/employee for whom you need to establish relationship by affinity in the blank box. The labeled boxes will then list the relationships by title to the spouse and the degree of distance from the public officer/employee by affinity. A husband and wife are related in the first degree by marriage. For other relationships by marriage, the degree is the same as the degree of underlying relationship by blood.

Revised: MEL 02/16/2012
Appendix B
Child Caregiver Resource Form

Please fill out this form to give us names and locating information for relatives or close family friends who may want to take care of your children or support them until you get them back. Try to list the people you know your child would feel happiest with. Child Protective Services (CPS) will make contact with them and ask them how they want to help. We will decide if it is safe for your child to be with them. We will also decide if they can safely be with and support your child. CPS will tell them about your case. If we think they can provide a safe place for your child, CPS will do a background and criminal history check. We will do this check within 2 business days of getting this completed form back. If the check is OK, we will assess them and their home. Most of the time, children are not placed until CPS knows how the assessment turns out. The final decision about placing your children will be made by the judge for your child(ren)’s case. If the person tells us they do not want the children placed with them but instead wants to provide support and have unsupervised visits, CPS will have to do a background and criminal history check first.

On this page, you must provide the names of the first three persons you think may be able to care for your child. On the following attachment you can list their names and locating information in the boxes provided. The first three persons can be adult relatives (including grandparents) and/or close family friends.

On the second attachment, you must also list the names and locating information for ALL THE GRANDPARENTS, GREAT GRANDPARENTS, AND ANY ADULT AUNTS, UNCLEs, SIBLINGS OR NIECES/NEPHEWS for each of the children removed. This includes relatives for BOTH the mother and the father. You may also list contact information for any other relatives or close family friends. You can send this form to CPS:

In person at:
By e-mail at: @dfps.state.tx.us
By fax:

The selection of a placement (and other legal issues) may be impacted if the Indian Child Welfare Act applies. Please indicate whether you, another parent or any of your child(ren) is of American Indian or Alaskan Native descent/heritage.

☐ I have no information that this child(ren) has any American Indian or Alaskan Native descent/heritage.
☐ I believe this child(ren) may of be American Indian or Alaskan Native descent/heritage. The person with tribal affiliation is ______________________________________ and the tribe is ____________________________________________.

Your signature below indicates that you were provided the opportunity to list possible caregivers for your child(ren).

SIGNATURE OF PARENT OR GUARDIAN DATE

CASEWORKER NAME PHONE NUMBER

Here are the names of three relatives or close family friends who may be able to care for my child(ren). I will provide their contact information on the following page(s).

1. ___________________________________________________________

2. ___________________________________________________________

3. ___________________________________________________________

Information provided in this form is in response to the following Legal Requirements:
State: Designation of relatives or close family friends to care for the child
Texas Family Code: Chapter 261.307(a)(2)
Federal: Department's efforts to obtain information about maternal and paternal relatives and other adult relatives
Public Law (P.L.) 110-351 (Sec. 103)

Date Information Received by CPS: _____________________________
# Caregiver Contact Information--Attachment 1

Please list contact information for the three people listed on the first page of this form, who you wish to designate as possible caregivers for your child.

<table>
<thead>
<tr>
<th>1. Name of Caregiver (including all names used)</th>
<th>Placement Resource</th>
<th>Support Resource</th>
<th>Maternal Grandparent</th>
<th>Paternal Grandparent</th>
<th>Other</th>
<th>Age/Date of Birth</th>
<th>Ethnicity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Street Address</td>
<td>City/State</td>
<td>Zip Code</td>
<td>Phone number with Area code</td>
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<tr>
<td>What is this person’s relationship to your child?</td>
<td>Have they lived out-of-state during the past 3 years? Where?</td>
<td>Please provide any other information to help us locate this person</td>
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<tr>
<th>2. Name of Caregiver (including all names used)</th>
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</table>
Other Contact Information--Attachment 2

Please list all of the child's grandparents, great grandparents and adult aunts, uncles, siblings, nieces and nephews. In addition, please list any other relatives of close family friends who may be able to help while your child is in care.

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Please use the back of this form or additional pieces of paper to provide the names and contact information of any other relatives or close friends who may wish to be involved in the case.

**Date Information Received by CPS: _________________________**
Appendix C
HARVEY BROWN, Justice.

*1 Theresa and Leonard Seale appeal the trial court’s designation of Robert and Donna Brown as joint managing conservators of the minor child M.M. Both the Browns and the Seales petitioned to intervene as parties to a suit brought by the Department of Family and Protective Services (DFPS) to terminate parental rights and designate a conservator for the child. The Seales argue on appeal that the trial court erred in denying DFPS’s motion to strike the Browns’ petition because the Browns lacked standing to intervene under the Family Code. The Seales also argue the trial court erred in denying their own petition because they had standing and none of the parties filed a motion to strike their intervention. Finally, the Seales challenge the Browns’ appointment as M.M.’s joint managing conservators.

We reverse and remand for a new trial on the merits.

Background
DFPS took custody of M.M. at her birth in October 2008 when she tested positive for marijuana and her mother tested positive for marijuana and Valium. DFPS initiated a suit affecting the parent child relationship (“SAPCR”) within days of M.M.’s birth and filed a petition for the protection of the child, conservatorship, and the termination of parental rights. DFPS placed M.M. with the Seales who the agency believed to be M.M.’s paternal grandparents. A paternity test later showed that the Seales had no blood relationship to M.M. The Seales continued to raise M.M., even after the discovery, with Theresa Seale staying home to care for her and Leonard Seale supporting the family.

M.M.’s maternal great-aunt, Donna Brown, discovered in July 2009 that the child was being raised by people who had no blood relationship to M.M. She attempted to contact DFPS regarding M.M., but did not receive a response from the agency until December 2009. DFPS told Donna that the agency would conduct a home study, but it did not initiate a home study until shortly before trial.

In February 2010, the Browns filed a petition to intervene in the DFPS suit and asked to be designated as M.M.’s joint managing conservators. A month later, they filed a motion asking the trial court for leave to file their petition to intervene.\(^2\) DFPS filed a motion to strike the Browns’ petition. After a hearing on March 30, 2010, the trial court denied DFPS’s motion to strike and allowed the Browns to intervene as parties to the suit one month before trial.

The Seales filed their own petition to intervene on April 13, 2010, within two weeks of the hearing on DFPS’s motion to strike the Browns’ intervention. Trial began two weeks later at which time the Browns alleged that the Seales only served them on the day of trial and had failed to file a motion for leave to file their petition. The Seales explained that they had not intervened earlier because they did not consider themselves to be adversaries to any parties to the proceeding until the trial court allowed the Browns to intervene. The trial court ruled, “I’m going to deny your request for intervention as no motion for leave has been made,” but would allow the Seales to testify if called. The Browns then invoked the Rule and excluded all witnesses from the courtroom, including the Seales. See Tex.R. Evid. 614.

\(^2\) At trial, the court terminated all parental rights to M.M. after her mother signed a voluntary relinquishment of her rights. The trial court then heard testimony as to conservatorship. DFPS argued that M.M. should remain with the Seales. One of M.M.’s case workers testified that M.M. had been with the Seales for her entire life—18 months at the time of trial—and that the child had bonded with her foster parents. She testified that M.M.’s only contacts with the Browns were two visits in the month before trial at the DFPS office.

Theresa Seale testified to M.M.’s daily routine, her family’s financial and living situation, and that she had two grown sons with drug problems—one of whom lived with M.M.’s mother at the time. Leonard Seale testified that he had not smoked marijuana in the last two to three years, but that in the past he had smoked marijuana with his stepson who everyone believed to be M.M.’s father. He testified that he had never smoked marijuana with M.M.’s mother and that she had not lived on his property after she became pregnant with M.M. M.M.’s mother testified that she had lived on the Seale’s property for several months and had smoked marijuana before, during, and after her pregnancy with Leonard Seale and his stepson. She stated that she preferred that DFPS place M.M. with the Browns.

Donna Brown testified as to her family’s financial and living situation and that she wanted conservatorship of M.M. because of her family connection. She stated they were in the final stages of adopting a three-year-old girl who was the child of a distant cousin and had lived with them since infancy. She also testified that her 26-year-old physically disabled son lived with them as well and that he was doing well despite past instances of depression and suicidal thoughts as a teenager. Robert Brown testified that he had a robbery and a DWI conviction and had used marijuana and cocaine, but that none of these behaviors continued past the early 1980s.

The trial court appointed the Browns as joint managing conservators with DFPS. The Seales timely filed a notice of appellate points under Texas Family Code section 263.405(b) and a motion for new trial challenging the denial of DFPS motion to strike the Browns’ petition to intervene, the trial court’s denial of their own petition, and the trial court’s appointment of the Browns as conservators even though they lacked standing to participate. The trial court denied the motion for new trial and the Seales appealed.

**Petition to Intervene in SAPCR Proceedings**

The Seales contend that the trial court erred in denying DFPS’s motion to strike the Browns’ petition to intervene and in dismissing their petition to intervene. All parties agreed that Texas Rule of Civil Procedure Rule 60 governs the intervention procedure in this case. Rule 60...
permits any party to intervene in an action “subject to being stricken out by the court for sufficient cause on the motion of any party.” TEX. CIV. P. 60; see McCord v. Watts, 777 S.W.2d 809, 811–12 (Tex.App.-Austin 1989, no pet.) (applying Rule 60 to petitions to intervene in SAPCR proceeding). The rule authorizes a party with a justiciable interest in a pending suit to intervene as a matter of right. In re Union Carbide Corp., 273 S.W.3d 152, 154 (Tex.2008).

*3 Ordinarily, to have a justiciable interest the intervenor must show standing to have brought the original suit, or that he would be able to defeat recovery, or some part thereof, if the action had been brought against him. Whitworth v. Whitworth, 222 S.W.3d 616, 621 (Tex.App.-Houston [1st Dist.] 2007, no pet.). “However, an intervenor in a suit affecting the parent-child relationship does not need to plead or prove the standing required to institute an original suit because managing conservatorship is already in issue.” Id. Section 102.004(b) of the Family Code provides that the trial court may grant a grandparent or “other person deemed by the court to be in a proper position to represent the child’s interest” leave to intervene in a pending suit filed by a person authorized to do so under this subchapter,” if the court has proof that appointing either parent as a managing conservator would impair the child’s health and emotional development. TEX. FAM. CODE ANN. § 102.004(b) (West 2008).

Under Rule 60 of the Texas Rules of Civil Procedure, an intervenor is not required to secure the trial court’s permission to intervene; the party who opposed the intervention has the burden to challenge it by a motion to strike. See Guaranty Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 657 (Tex.1990); see also Harris Cnty. v. Luna–Prudencio, 294 S.W.3d 690, 699 (Tex. App.-Houston [1st Dist.] 2009, no pet.). We examine the trial court’s ruling on a motion to strike for abuse of discretion. Guaranty Fed. Sav. Bank, 793 S.W.2d at 657; In re N.L.G., 238 S.W.3d 828, 829 (Tex.App.-Fort Worth 2007, no pet.). In reviewing matters committed to a trial court’s discretion, we are not to substitute our own judgment for that of the trial court but to determine whether the trial court acted in an arbitrary or unreasonable manner without reference to any guiding rules or principles. See Walker v. Gutierrez, 111 S.W.3d 56, 62 (Tex.2003).

I. Motion to Strike the Seales’ Petition
The Seales contend that no party raised a motion to strike their petition and therefore the trial court abused its discretion by striking the petition sua sponte. Guaranty Fed. Sav. Bank, 793 S.W.2d at 657 (holding trial court cannot strike a petition to intervene without a party’s motion to strike). The Browns objected on the first day of trial that the Seale’s petition for intervention had not been filed until two weeks before trial, that they had only received service on the day of trial, and that the Seales had not filed a motion for leave to file their petition. The Seales responded that they had filed the petition within two weeks of the trial court’s order allowing the Browns to intervene, before which they believed they were the only family seeking conservatorship of M.M.

We must determine whether the Browns’ objection constituted a motion to strike. An intervenor does not need the trial court’s permission to intervene, therefore, the burden rests on the objecting party to raise a motion to strike to challenge a petition to intervene. Guaranty Fed. Sav. Bank, 793 S.W.2d at 657. The Browns did not use the words “motion to strike,” but their objection challenged the Seales’ right to intervene as a full party to the suit and sought the same relief as a motion to strike—namely that the trial court prevent the Seales from intervening. The name of the motion does not matter as long as the relief sought and effect are made clear to the trial court. See C/S Solutions, Inc. v. Energy Mgmt. Servs. Group, L.L.C., 274 S.W.3d 299, 307 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (stating trial court should consider substance of plea for relief, not merely title given). The Browns therefore effectively raised a motion to strike the Seales’ petition to intervene.

II. Abuse of Discretion
*4 We examine the trial court’s ruling on a motion to strike for abuse of discretion. In re N.L.G., 238 S.W.3d at 829. The trial court ruled on the Seales’ petition by stating, “I’m going to deny your request for intervention as no motion for leave has been made.” The intervenor does not need the trial court’s permission to intervene. Harris Cnty., 294 S.W.3d at 699. Even though the trial court gave an incorrect basis for its ruling, however, we consider whether a legitimate basis exists. Drilex Sys., Inc. v. Flores, 1 S.W.3d 112, 119 (Tex.1999).

With a petition to intervene, a trial court abuses its discretion if it strikes a petition in which (1) the intervenor 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 intervenors’ interest. See Harris Cnty., 294 S.W.3d at 699 (citing Guaranty Fed. Sav. Bank, 793 S.W.2d at 657).
First, the Seales satisfied the first prong because they had standing to intervene in DFPS suit based on their substantial past contact with M. M—they had raised her for the entirety of her 18 month life—and the undisputed allegation in DFPS’s and their own petitions that placement with M.M.’s mother would significantly impair the child’s health and emotional wellbeing. See TEX. FAM.CODE ANN. § 102.004(b).³

Second, the inclusion of the Seales would not have further complicated the case. The Seales did not bring any new issues or claims to the trial because M.M.’s conservatorship was already before the court and DFPS was advocating for the Seales to be granted custody of M.M. The Seales testified at trial regardless of their status as full parties to the case. While allowing their attorney to call and cross-examine witnesses would have added another attorney to the proceeding, and thus lengthened the trial to some degree, seven attorneys were already participating. The addition of a single attorney when so many were already participating is not sufficient to outweigh the Seales’ justiciable interest.

The Seales’ petition also did not complicate the case because, under these unusual and narrow facts, the timing of their petition to intervene would not have adversely affected the trial or the other parties to the case. The Browns—who lacked standing to intervene under the Family Code⁴—first participated in the case less than one month before trial when the court denied DFPS’s motion to strike the Browns’ petition to intervene. The Seales, who had standing to intervene, filed their petition only two weeks later. The Seale’s involvement and interest in the suit could hardly have been surprising to either the trial court or the parties. The Seales had possession of M.M., had raised her for her entire life, and DFPS petitioned for and argued that M.M. remain in their care. The Seales, without counsel, had attended all the hearings in the case. They had had no reason to intervene before the Browns became parties when the matter was uncontested. The Browns’ intervention changed the dynamics of the case, so it should not have surprised anyone that the Seales would now want to participate in protecting their conservator status.

*⁵ The only substantive reason offered by the Browns for striking the Seales’ petition was that they were not served until the day of trial. The Seales did not refute or offer any excuse for their failure. But that failure did not prejudice the Browns under these narrow circumstances given the Seales’ clear interest in the suit and the proximity of the two interventions.

Third, the inclusion of the Seales as parties was essential to the protection of their interest. The Seales were unable to call their own witnesses or cross-examine the witnesses brought at trial. By preventing the Seales from presenting any evidence at trial, other than their own testimony, the trial court eviscerated their ability to present their position effectively. See Taylor v. Taylor, 254 S.W.3d 527, 535 (Tex.App.-Houston [1st Dist.] 2008, no pet.) (holding trial court abused its discretion by forbidding party from calling or cross-examining witnesses as sanction for not producing witness and exhibit list before trial). The Browns also invoked the Rule excluding witnesses from the courtroom immediately after the trial court dismissed the petition to intervene. The Seales, therefore, were not allowed to be present during trial and their attorney was prohibited from informing them of the substance of the trial testimony. TEX.R. CIV. P. 267(d) (“Witnesses ... shall be instructed by the court that they are not to converse with each other or with any other person about the case other than the attorneys in the case ”) (emphasis added); Bishop v. Wollyung, 705 S.W.2d 312, 314 (Tex.App.-San Antonio 1986, writ ref’d n.r.e.) (holding trial court may not exclude party in interest, whether named party or not). Indeed, the court ordered them and the other witnesses “not to discuss anything” about the case until the trial was concluded. That limitation on their ability to communicate interfered with their ability to protect their interest.

Given the Seales’ standing, the Browns’ lack of standing, the lack of surprise or inconvenience to the parties or trial court, and the harm to the Seales’ interest, we hold the trial court abused its discretion by granting the Browns’ motion to strike the Seales’ petition to intervene.

III. Harmful Error
We may not reverse the judgment of the trial court unless we conclude the error probably caused the rendition of an improper judgment or probably prevented the petitioner from properly presenting the case to the appellate courts. See TEX.R.APP. P. 44.1(a); Quick v. City of Austin, 7 S.W.3d 109, 126 (Tex.1998). The Browns contend that any error by the trial court in striking the Seales’ intervention or allowing their own is harmless because the trial court may award conservatorship to any suitable, competent adult. They assert the trial court heard sufficient evidence regarding the suitability of both the Browns and Seales to justify its decision.

The trial court may designate a suitable, competent adult as conservator regardless of whether the adult intervened as a party to the suit. See TEX. FAM.CODE ANN. §§ 153.002, 161.207 (West 2008). Here, ironically, the trial court allowed the Browns to intervene without standing...
under the Family Code and excluded the Seales who had standing and a justiciable interest. The Browns’ attorney played a major role at the trial eliciting some of the most substantial direct and cross-examination testimony of any party except DFPS. The Browns also remained in the courtroom and heard all the evidence presented to the trial court while the Seales waited in the hall to be called as witnesses. The Seales were, therefore, unable to call their own witnesses, cross-examine and refute the evidence against them, present attorney argument at the open and close, or make any objections to preserve error on appeal. Their lack of participation prevented the Seales from properly preserving, advocating, and presenting their case on appeal. Admittedly, DFPS’s interests aligned with the Seales’ desire to be named M.M.’s conservator, at least at the start of the hearing. The Seales were forced to rely, however, on another party to the proceeding rather than use their own counsel to advocate their interest. DFPS switched its position on appeal so that they now support placement with the Browns and counsel for DFPS indicated that DFPS changed its position during the hearing based on the testimony of M.M.’s mother that she had smoked marijuana with Leonard Seale while pregnant with M.M. We hold that the trial court’s error in excluding the Seales was harmful because it prevented them from participating as a full party to the suit despite their clear justiciable interest.

*6 We sustain the Seales’ second issue.

**Conclusion**

We hold the trial court abused its discretion in dismissing the Seales’ petition to intervene and that such error was harmful. We reverse the judgment of the trial court and remand the case for a new trial on the merits.

**All Citations**

Not Reported in S.W.3d, 2011 WL 765886

**Footnotes**

1. As discussed below, a motion for leave to intervene is not required by Texas Rule of Civil Procedure 60.

2. The trial court also terminated parental rights as to any unknown father of M.M.

3. Although the Seales’ petition did not allege facts to establish their substantial contact with M.M., they told the trial court after the Browns’ objection, “They have been the foster parents since this child came home from the hospital.” Also, no party contested the Seales’ standing to intervene either at the trial court or to this court.

4. At oral argument, DFPS conceded, and the Browns’ counsel did not disagree, that the Browns did not have standing to intervene at the time they filed their petition if they were not within the third degree of consanguinity. Sections 102.003 and 102.004 of the Family Code list who is entitled to bring an original suit and who has standing to intervene. See TEX. FAM.CODE ANN. § 102.003, 102.004 (West 2008). Persons within the third degree of consanguinity may be entitled to bring an original suit—and thereby intervene—if certain other conditions are met, but the Browns do not fall within the definition of third degree consanguinity given in section 102.003. Admittedly, the Browns may now be able to satisfy standing to intervene requirements in section 102.004(b) at a new trial given their substantial contact with M.M. since the trial court’s judgment named them joint managing conservators.
Appendix D

Synopsis
Background: Licensed child-placing agency, that had intervened in termination and conservatorship proceedings, moved for summary judgment, seeking termination of parent-child relationship as to parents and seeking to be appointed managing conservator of children. The 300th District Court, Brazoria County, Jerri Lee Mills, J., granted summary judgment in favor of agency. Department of Family and Protective Services (DFPS) appealed.

Holdings: The Court of Appeals, Evelyn V. Keyes, J., held that:

[1] child-placing agency established its right to intervene, but

[2] child-placing agency was required to present evidence that its appointment as managing conservator was in children’s best interest.

Reversed and remanded.

West Headnotes (20)
A party’s standing to pursue a cause of action is a question of law.

To maintain a suit affecting the parent-child relationship (SAPCR), a party must show not only that it has general standing but that it has a justiciable interest in the matter before the court. V.T.C.A., Family Code § 102.003.

An appellate court’s primary goal is to ascertain and effectuate the legislature’s intent; in doing so, the court begins with the statute’s plain language because it assumes that the legislature tried to say what it meant and, thus, that its words are the surest guide to its intent.
statutory words, phrases, or clauses, but the court instead examines the entire act.

Cases that cite this headnote

[13] Statutes
Giving effect to entire statute and its parts; harmony and superfluousness

For purposes of statutory construction, every word of a statute must be presumed to have been used for a purpose.

Cases that cite this headnote

[14] Statutes
Absent terms; silence; omissions

For purposes of statutory construction, every word excluded from a statute must also be presumed to have been excluded for a purpose.

Cases that cite this headnote

[15] Statutes
Absent terms; silence; omissions

For purposes of statutory construction, courts should not insert words into a statute except to give effect to clear legislative intent.

Cases that cite this headnote

[16] Statutes
Presumptions, inferences, and burden of proof

A court of appeals should presume the legislature intended a just and reasonable result in enacting a statute.

Cases that cite this headnote

[17] Statutes
Unintended or unreasonable results; absurdity

An appellate court should not construe a statute in a manner that will lead to a foolish or absurd result when another alternative is available.

Cases that cite this headnote

[18] Infants
Other particular persons

Licensed child-placing agency established its right to intervene, in suit affecting the parent-child relationship (SAPCR) brought by Department of Family and Protective Services (DFPS), seeking to terminate parental rights and to be named sole managing conservator of children, to likewise seek termination of parent’s rights and appointment as managing conservator of children by virtue of affidavits of relinquishment; upon execution of parents’ affidavits that designated licensed child-placing agency as managing conservator of children, agency assumed rights and duties of possessory conservator of children with rights superior to rights of parents until such time as agency’s rights and duties were modified by court order. V.T.C.A., Family Code § 102.003(a)(10).

3 Cases that cite this headnote

[19] Infants
Disposition and placement of child

Licensed child-placing agency, to which parents relinquished children, was required to present evidence that its appointment as managing conservator was in children’s best interest, in suit affecting parent-child relationship (SAPCR) in which trial court terminated parental rights
In this termination of parental rights appeal and original proceeding, appellant, the Department of Family and Protective Services (DFPS), challenges an order granting summary judgment in favor of *797 appellee, Alternatives in Motion (AIM). In the appeal, appellate cause number 01–06–00092–CV, DFPS raises the following issues: (1) whether parents have a right to designate a party other than DFPS as the managing conservator of minor children by an affidavit of voluntary relinquishment, without the consent of DFPS, following DFPS’s removal of the parents’ children; (2) whether AIM, the licensed child-placing agency to which the parents relinquished the children, has standing to intervene in a suit filed by DFPS pursuant to chapters 262 and 263 of the Texas Family Code; (3) whether a child’s best interest overrides a conservatorship designation in a relinquishment affidavit; (4) whether AIM established its right to summary judgment; and (5) whether section 161.207 of the Family Code overrides the right of the parties to a jury trial on conservatorship. DFPS also raises issues one and five in its original proceeding, appellate cause number 01–06–00052–CV.

In the original proceeding, we deny the relief requested in the petition for writ of mandamus.

In the appeal, we reverse and remand the cause.

**Background**

On October 24, 2004, following a week-long psychotic episode, Dawn Rachille Mock (Mock) was found lying in a ditch expressing her desire to sacrifice herself and her male child to God. On October 25, 2004, DFPS took possession of Mock’s and Robert Lee Brown’s (Brown) children, B.L.B. and J.M.B. (the children), because of neglect at home and Mock’s hearing voices telling her to kill the children. The following day, DFPS filed an original petition for conservatorship in a suit affecting the parent-child relationship (SAPCR), seeking to terminate the parental rights of Mock and Brown and to be named the sole managing conservator of the children. The trial court ordered that the children be placed in the temporary managing conservatorship of DFPS and that the parents “are temporarily restrained and enjoined from disturbing, removing, or taking possession of the children....” On October 26, 2004, Mock was involuntarily committed for psychiatric treatment at Austin State Hospital. The court appointed a guardian ad litem and an attorney for Mock at some point before November 2, 2004.

On November 2, 2004, the trial court made additional temporary orders. It appointed Brazoria County Children’s Protective Services (hereinafter referred to as DFPS) as temporary managing conservator and appointed Mock and Brown as temporary possessory conservators...
of the children. Mock was discharged from Austin State Hospital in late December 2004.

On January 5, 2005, both parents signed “Affidavit[s] for Voluntary Relinquishment of Parental Rights” in favor of AIM, a licensed child-placing agency. On January 7, 2005, AIM intervened in the SAPCR filed by DFPS by filing a petition in intervention for conservatorship and termination of the parent-child relationship. As a basis for its request for conservatorship over the children, AIM attached the voluntary relinquishment affidavits from both Mock and Brown, both of which designated AIM as managing conservator. On January 18, 2005, Mock filed a revocation of her affidavit relinquishing the children to AIM on the ground that she was “not capable of knowingly and willingly executing” it, as she had “recently been under psychiatric care and treatment.” Mock also averred that she was “misled by the Intervenor and was coerced into signing the affidavit as the result of misrepresentations by the Intervenor, i.e., AIM.” Three days later, the trial court granted AIM’s motion to dismiss its suit for conservatorship and termination of Mock’s and Brown’s parental rights.

On July 21, 2005, AIM again intervened in the termination and conservatorship proceedings, on the basis of a second set of affidavits of voluntary relinquishment executed by Mock and Brown on July 18. It filed a SAPCR against the State of Texas alleging the same grounds as in its previous intervention. On August 2, 2005, DFPS filed a motion to strike AIM’s petition in intervention on the ground that AIM did not have standing to proceed against the State. On September 7, 2005, the trial court denied DFPS’s motion. DFPS requested a jury trial on October 25, 2005.

On November 21, 2005, AIM moved for summary judgment, seeking termination of the parent-child relationship as to Mock and Brown and seeking to be appointed managing conservator of the children. After a hearing, the trial court entered a final summary judgment on January 3, 2006, terminating the parent’s rights and naming AIM as the permanent managing conservator of the children. DFPS appealed from this judgment. In addition to the appeal, DFPS filed a petition for writ of mandamus, a writ of prohibition, and an emergency motion for temporary relief, asking this Court to suspend enforcement of the trial court’s judgment giving AIM possession of the children. On January 19, 2006, we granted DFPS’s motion for temporary relief.

**Summary Judgment**

Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that judgment should be granted as a matter of law. TEX.R. CIV. P. 166a(c); KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex.1999). To the extent the issue presented in this appeal involves statutory construction and the application of a statute to undisputed facts, we determine the issues as a matter of law. Gramercy Ins. Co. v. Auction Fin. Program, Inc., 52 S.W.3d 360, 363 (Tex.App.-Dallas 2001, pet. denied) (citing McCreight v. City of Cleburne, 940 S.W.2d 285, 288 (Tex.App.-Waco 1997), writ denied).

**Standing of Party Designated in Affidavit of Relinquishment of Parental Rights to Intervene in Termination and Conservatorship Proceedings**

In its first issue on appeal, DFPS argues that after the trial court appointed it as the temporary managing conservator of the children the parents could not appoint a managing conservator via an affidavit of relinquishment. DFPS relies on the trial court’s temporary orders that restricted the rights of the parents. Specifically, the parents no longer had the right to “represent the children in legal action and to *make other decisions of substantial legal significance concerning the children.*” TEX. FAM.CODE ANN. § 153.371(8) (Vernon Supp.2006). In its second issue, DFPS challenges AIM’s standing to intervene on the basis of the parents’ affidavits of relinquishment in DFPS’s suit for termination of parental rights and SAPCR. Because these issues both go to AIM’s standing to intervene in the lawsuit, we consider them together.

Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law. Tex. Ass’n of Bus. v. Texas Air Control Bd., 852 S.W.2d 440, 443–44 (Tex.1993); In the Interest of SSJ–J, 153 S.W.3d 132, 134 (Tex.App.-San Antonio 2004, no pet.) (standing is necessary prerequisite to trial court’s exercise of subject matter jurisdiction in SAPCR seeking managing conservatorship). Thus, AIM’s standing to maintain its claims is a threshold issue. See In the Interest of Pringle, 862 S.W.2d 722, 724 (Tex.App.-Tyler 1993, no writ); In the Interest of SSJ–J, 153 S.W.3d at 134. The burden of proof on the issue of standing to initiate a SAPCR seeking managing conservatorship is on the petitioner. Pringle, 862 S.W.2d at 725. The petitioner must prove its standing by a preponderance of the evidence. Id. The standard of
review applicable to subject matter jurisdiction also applies to standing. Texas Ass’n of Bus., 852 S.W.2d at 446. Under this standard, the pleader must allege facts affirmatively demonstrating the court’s jurisdiction to hear the case. Id. On appellate review, we construe the pleadings in favor of the plaintiff and look to the pleader’s intent. Id. A party’s standing to pursue a cause of action is a question of law. Coons-Andersen v. Andersen, 104 S.W.3d 630, 634 (Tex.App.-Dallas 2003, no pet.).

Section 102.003 of the Family Code sets out the general standing requirements for filing a SAPCR. See TEX. FAM.CODE ANN. § 102.003. Section 102.003(a)(7) states that an original suit may be filed at any time “a licensed child placing agency.” TEX. FAM.CODE ANN. § 102.003(a)(7) (Vernon Supp.2006). Subsection (a)(10) states that an original suit may be filed at any time by “a person designated as the managing conservator in a standing requirements for filing a SAPCR.

The right to relinquish parental rights voluntarily and to designate a managing conservator is given exclusively to parents pursuant to sections 153.374 and 161.103 of the Family Code. See TEX. FAM.CODE ANN. § 153.374 (Vernon 2002), § 161.103 (Vernon Supp.2006). Section 153.374 states that:

(a) A parent may designate a competent person, authorized agency, or licensed child-placing agency to serve as managing conservator of the child in an unrevealed or irrevocable affidavit of relinquishment of parental rights executed as provided by Chapter 161.

(b) The person or agency designated to serve as managing conservator shall be appointed managing conservator unless the court finds that the appointment would not be in the best interest of the child.

TEX. FAM.CODE ANN. § 153.374(a), (b) (Vernon 2002). Section 161.103 states that an affidavit of voluntary relinquishment of parental rights must contain, among other things:

(12) the designation of a prospective adoptive parent, the Department of Protective and Regulatory Services, if the department has consented in writing to the designation, or a licensed child-placing agency to serve as managing conservator of the child and the address of the person or agency.

TEX. FAM.CODE ANN. § 161.103(b)(12) (Vernon Supp.2006). Section 161.104 provides that “a person, licensed child-placing agency, or authorized agency designated managing conservator of a child in an irrevocable or unrevealed affidavit of relinquishment has a right to possession of the child superior to the right of the person executing the affidavit” and the rights and duties of a possessory conservator “until such time as those rights and duties are modified or terminated by court order.” TEX. FAM.CODE ANN. § 161.104 (Vernon 2002).

Independently, section 105.001 of the Family Code allows a trial court to make a temporary order for the conservatorship of children for their safety and welfare. TEX. FAM.CODE ANN. § 105.001 (Vernon Supp.2006).

It is undisputed that AIM is a licensed child-placing agency. However, to maintain a SAPCR, a party must show not only that it has general standing but that it has a justiciable interest in the matter before the court. Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex.1982). Once a motion to strike has been filed, the burden shifts to the intervenor to show a justiciable interest in the lawsuit. Jabri v. Alsayed, 145 S.W.3d 660, 671–72 (Tex.App.-Houston [14th Dist.] 2004, no pet.); Mendez, 626 S.W.2d at 499. A party has a justiciable interest in a suit, and thus a right to intervene, when its interests will be affected by the litigation. Jabri, 145 S.W.3d at 671–72; Law Offices of Windle Turley, P.C. v. Ghiasinejad, 109 S.W.3d 68, 71 (Tex.App.-Fort Worth 2003, no pet.).

AIM relies upon the affidavits of relinquishment filed by Mock and Brown to establish its justiciable interest in the instant litigation. DFPS contends that neither parent had the legal right to sign an affidavit of relinquishment designating AIM as the managing conservator of the children on July 18, 2005, because DFPS had already been named managing conservator by the trial court with the right to represent the children in legal actions and *800 to make other decisions of substantial legal significance concerning the children. Thus, DFPS argues that the affidavits of relinquishment are invalid and will not support the trial court’s implied finding in support of its judgment that AIM has a justiciable interest in this suit.4

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children until further orders of the court. The order also
provided that “[DFPS] is authorized to consent to such
medical, surgical, or psychological care as may be
required by the children.” The court’s order further stated
that the parents were “temporarily restrained and enjoined
from disturbing, removing, or taking possession of the
children.”

On November 2, 2004, the trial court entered additional
orders that DFPS has the “rights, privileges, duties and
powers as set forth in Section 153.371 of the Texas
Family Code...” The court gave DFPS “the right to
represent the children in legal action and to make other
decisions of substantial legal significance concerning
ordered that the parents were to be temporary possessory
conservators with the rights, privileges, duties and powers
of possessory conservators set forth in section 153.074 of
the Code. See TEX. FAM.CODE ANN. § 153.074
(Vernon Supp.2006). Such temporary orders are valid
and enforceable until properly superseded by a court with
jurisdiction to do so. TEX. FAM.CODE ANN. § 262.204
(Vernon 2002). Thus, this case requires us to determine
whether a trial court’s temporary orders can preclude a
parent from voluntarily relinquishing parental rights and
designating a managing conservator pursuant to section
153.374 when DFPS has brought suit to terminate the
parents’ parental rights. Because the Family Code does
not address this situation, we analyze the issue under the
proper rules of statutory interpretation.

Statutory interpretation is a question of law. In re Canales, 52 S.W.3d 698, 701 (Tex.2001). Our
primary goal is to ascertain and effectuate the legislature’s intent. Albertson’s, Inc. v. Sinclair, 984 S.W.2d 958, 960
(Tex.1999). In doing so, we begin with the statute’s plain
language because we assume that the legislature tried to
say what it meant and, thus, that its words are the surest
guide to its intent. Fitzgerald v. Advanced Spine Fixation
Sys., Inc., 996 S.W.2d 864, 865–66 (Tex.1999). To
ascertain legislative intent, however, we must look to the
statute as a whole and not to its isolated provisions.

In light of the Family Code’s clear intent to give parents
the right to designate a managing conservator for their
children upon voluntarily relinquishing their parental
rights and the absence of any temporal restriction on this
right, we conclude that the right survives a trial court’s
temporary orders naming DFPS managing conservator in
a suit brought by the State to terminate parental rights.
Here, however, the parents had been removed as
managing conservators pending a hearing on involuntary
termination of their parental rights. Thus, their affidavits
that designated AIM as managing conservator served only
to transfer those rights the parents still possessed—in this
instance, only possessory rights. When a valid affidavit of
We overrule DFPS’s first and second issues on appeal.

ANN. § 102.003(a)(10).

affidavits of relinquishment.

conservator of B.L.B. and J.M.B. by virtue of the

and Brown’s parental rights and appointment as managing

intervene in the SAPCR to seek termination of Mock’s

id.

AIM’s rights and duties were modified by court order.

rights superior to Mock’s and Brown’s until such time as

of B.L.B. and J.M.B., AIM assumed the rights and duties

automatically has a statutory right of possession superior

agency as managing conservator of a child, the agency

[19]

affidavits that designated AIM as managing conservators

we hold that upon the execution of Brown’s and Mock’s

designated AIM as managing conservators of B.L.B. and J.M.B., AIM assumed the rights and duties of a possessory conservator of B.L.B. and J.M.B. with rights superior to Mock’s and Brown’s until such time as AIM’s rights and duties were modified by court order. See id. We further hold that AIM established its right to intervene in the SAPCR to seek termination of Mock’s and Brown’s parental rights and appointment as managing conservator of B.L.B. and J.M.B. by virtue of the affidavits of relinquishment. See TEX. FAM.CODE ANN. § 102.003(a)(10).

We overrule DFPS’s first and second issues on appeal.

Apportion of Managing Conservator in Suit for
Conservatorship of a Child

[19] In its third issue on appeal, DFPS contends that, in the court’s appointment of a managing conservator, the children’s best interest controls over a conservatorship designation in a relinquishment affidavit, and, in its fourth issue on appeal, DFPS argues that AIM was not entitled to summary judgment because “[AIM] did not present any evidence that its appointment as managing conservator was in the children’s best interest.”

DFPS relies on section 153.374(b) of the Family Code, which provides that a parent may designate a competent person, authorized agency or licensed child-placing agency to serve as managing conservator of a child in an unrevoked or irrevocable affidavit of relinquishment and that “[t]he person or agency designated to serve as managing conservator shall be appointed managing conservator unless the court finds that the appointment would not be in the best interest of the child.” TEX. FAM.CODE ANN. § 153.374. DFPS also relies on section 153.002 of the Family Code, which states, “The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.” TEX. FAM.CODE ANN. § 153.002; see also In re K.R.P., 80 S.W.3d 669, 674 (Tex.App.-Houston [1st Dist.] 2002, pet. denied); In the Interest of D.R.L.M., 84 S.W.3d 281, 300 (Tex.App.-Fort Worth 2002, pet. denied). Chapter 153 of the Family Code governs SAPCR’s affecting conservatorship, possession, and access to a child.

AIM relies on Section 161.207 of the Family Code as authority for its position that the court must automatically appoint it managing conservator in order to carry out the wishes of the parents whose rights were voluntarily terminated. Section 161.207 provides in pertinent part,

(a) If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult, the Department of Protective and Regulatory Services, a licensed child-placing agency, or an authorized agency as managing conservator of the child. An agency designated managing conservator in an unrevoked or irrevocable affidavit of relinquishment shall be appointed managing conservator.

TEX. FAM.CODE ANN. § 161.207(a) (Vernon 2002) (emphasis added). Section 161.207 makes no reference to the best interest of the child or children for whom the managing conservator is appointed. See id. However, section 161.207 does not govern conservatorship, possession, or access to a child, but termination proceedings.

We disagree with AIM’s argument that because the parents designated it as managing conservator in their affidavits of relinquishment of parental rights under Chapter 161 of the Family Code, the trial court was required automatically to name AIM as managing conservator in the SAPCR under Chapter 153 of the Family Code without inquiry into the best interest of the children. Section 153.374 governs appointment of a managing conservator in matters of “conservatorship, possession, and access,” which is the title and subject matter of Chapter 153. Section 153.374 clearly provides that in appointing a managing conservator in such cases, the trial court need not comply with the parent’s designation of a managing conservator if the designation is not in the children’s best interest. See TEX. FAM.CODE ANN. § 153.374(b).

[20] The overriding policy of Chapter 153 is the best interest of the child. See TEX. FAM.CODE ANN. § 153.002; Meritor Auto., Inc. v. Ruan Leasing Co., 44 S.W.3d 86, 90 (Tex.2001); TEX. GOV’T CODE ANN. § 311.023(1)-(7) (Vernon 1998); Canales, 52 S.W.3d at
702. Two statutes express this policy; first, section 153.002 expressly states that the best interest of the child is the overriding concern for the courts. See TEX. FAM.CODE ANN. § 153.002. Second, section 153.374 states that “the trial court shall appoint the designated person or licensed child placing agency in an affidavit of relinquishment unless the appointment of such person is not in the best interest of the child.” See TEX. FAM.CODE ANN. § 153.374 (emphasis added). Because the best interest of the child must be considered, we conclude that while appointment of a party designated in an affidavit of relinquishment in place of the parent whose rights are voluntarily terminated is automatic for the purpose of termination proceedings, appointment of that party as managing conservator in a suit to determine conservatorship of the child is subject to proof that the appointment is in the child’s best interest. See In the Interest of D.R.L.M., 84 S.W.3d at 300 (“The statute nowhere requires the trial court to abide by the parent’s choice of a managing conservator expressed in the relinquishment affidavit.”).

In determining that the appointment of a party as managing conservator is in the best interest of a child in a termination of parental rights case where, as here, the children are in the custody of DFPS, the court must consider not only the factors set out by the supreme court in Holley v. Adams, 544 S.W.2d 367 (Tex.1976), but also the factors set out in section 263.307 of the Family Code. See TEX. FAM.CODE ANN. § 263.307 (Vernon 2002) (listing “factors in determining best interest of child in review of placement of children under care of DFPS); Corrales v. DFPS, 155 S.W.3d 478, 489–90 (Tex.App.-El Paso 2004, no pet.) (listing Holley factors and observing that “[i]n 1993 the Legislature codified Holley, in section 263.307] incorporating additional factors for the court to consider when reviewing placement of children under care of [DFPS]”); In the Interest of J.R.P., M.C., and R.P., Jr., 55 S.W.3d 147, 151–52 (Tex.App.-Corpus Christi 2001, pet. denied).

At the summary judgment hearing, Mock’s guardian ad litem expressed the viewpoint that Mock’s parental rights should be terminated and stated, “I have never seen one bit of proof that there’s a problem with this agency.” Likewise, Mock’s attorney reported that Mock knew the people at AIM and “would like the children to be placed with them.” However, the trial court heard no evidence regarding the best interest of the children, under any of the Holley factors or the factors listed in section 263.307. Accordingly, we conclude that the trial court improperly granted AIM’s motion for summary judgment.

We sustain DFPS’s fourth issue on appeal.7

Because we resolve DFPS’s fourth issue on appeal in its favor, it is not necessary for us to reach the merits of its fifth issue on appeal, whether section 161.207 of the Family Code overrides the right of the parties to a jury trial on conservatorship. See TEX.R.APP. P. 47.1.

Conclusion

We reverse the judgment of the trial court and remand the cause for further proceedings in accordance with this opinion. We withdraw our January 19, 2006 *805 order that suspended enforcement of the judgment of the trial court.

All Citations

210 S.W.3d 794

Footnotes

1 Chapter 262 of the Family Code governs "Procedures in Suit by Governmental Entity to Protect Health and Safety of Child." Chapter 263 of the Family Code governs "Review of Placement of Children Under Care of Department of Protective and Regulatory Services."


3 Neither of the parties complains about the part of the trial court's judgment that terminated the rights of the parents.

4 DFPS contended in its motion to strike, in its response to AIM’s motion for summary judgment, and in its subsequent plea to the jurisdiction that Mock’s affidavit was obtained by coercion and without notice either to the ad litem or to the attorney appointed by the court to represent Mock’s interests and that it was, therefore, invalid and did not support AIM’s intervention. DFPS does not make these arguments on appeal.
The parents were given the following rights:

1. the duty of care, control, protection, and reasonable discipline of the children during periods of possession.
2. the duty to support the children including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure during periods of possession;
3. the right to consent for the children to medical and dental care not involving an invasive procedure during periods of possession;
4. the right to consent for the children to medical, dental, and surgical treatment during an emergency involving immediate danger to the health and safety of the children during periods of possession; and
5. the right to direct the moral and religious training of the children during periods of possession.

Although the issue is not dispositive, we sustain DFPS's third issue on appeal—that an affidavit of voluntary relinquishment and designation of managing conservator can be overridden by the best interest of the children. See TEX. FAM.CODE ANN. § 153.374(b); In the Interest of D.R.L.M., 84 S.W.3d 281, 300 (Tex.App.-Fort Worth 2002, pet. denied).

In its original proceeding, DFPS raises two issues that are substantially similar to the issues raised in its appeal. Because DFPS has an adequate remedy by appeal, we conclude that DFPS is not entitled to proceed with its petition for writ of mandamus. Accordingly, we deny DFPS's petition for writ of mandamus. See TEX.R.APP. P. 52.8(a). DFPS's writ of prohibition is likewise denied. See id.
Appendix E
In re Salverson, Not Reported in S.W.3d (2012)

2012 WL 1454549
Only the Westlaw citation is currently available.
SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas, Houston (1st Dist.).

In re Tina and Greg SALVERSON.
No. 01–12–00343–CV.
| April 23, 2012.

On Appeal from the 246th District Court, Harris County, Texas, Trial Court Case No.2010–31668.

Attorneys and Law Firms
Gary M. Polland, for Tina and Greg Salverson.
John M. Gascoigne, for Assistant County Attorney for the Department of Family and Protective Services.
Robert Clark Johnson, for Rozell Randall.
Jerry R. Bonney, for Michelle Ruch.
Panel consists of Justices KEYES, BLAND, and SHARP.

MEMORANDUM OPINION

JANE BLAND, Justice.

*1 Tina and Greg Salverson request mandamus relief, contending that the trial court erred in striking their petition to intervene in a SAPCR suit. The trial court’s order relies on Texas Family Code section 102.003(12), which addresses standing to file an original SAPCR petition. The relators contend that the trial court should have considered their petition to intervene under Texas Family Code section 102.004(b) permits “other persons,” such as the Salversons, to intervene in SAPCR proceedings once such proceedings have begun, if sufficient proof demonstrates that the intervenors have had substantial contact with the child and the trial court concludes that placement with the parents would significantly impair the child’s physical health or emotional development. We conditionally grant the writ, and direct the trial court to vacate its March 1, 2012 order and reconsider the Salverson’s petition to intervene under the intervention rule set forth in section 102.004(b).

Background

The Department of Family and Protective Services filed a petition seeking the emergency protection of D.K.R. and D.R.R., for conservatorship and for termination of parental rights. In December 2010, the trial court appointed DFPS temporary sole managing conservator of D.K.R. One month later, the trial court also appointed DFPS temporary managing conservator of D.K.R.’s brother, D.R.R., and consolidated the suits. In the petition, DFPS alleges that there is immediate danger to the children and continued placement with the children’s parents would be contrary to the children’s welfare.

In February 2012, Tina and Greg Salverson petitioned to intervene in the suit under section 102.004(b) of the Family Code and sought conservatorship of the children. See TEX. FAM.CODE ANN. § 102.004(b) (West 2008). Their petition maintained that the children had been in their care since October 2011, that their intervention is necessary to protect their interests, and that it would not complicate the issues of the case.

The respondents (D.R.R. and D.K.R.’s mother and father) moved to strike the Salverson’s petition to intervene. At a hearing on the motion, the trial court heard testimony from Tina Salverson about her contact with the children. She testified that she and her husband are “foster-to-adopt parents” and the children were placed in their care on October 14, 2011. Since the children moved into their home, the Salversons have enrolled them in school, speech therapy and physical therapy. After the hearing, the trial court granted the respondent’s motion to strike. The trial court based its order striking the petition to intervene on Texas Family Code section 102.003(12). See id. § 102.003(12) (West Supp.2011). The Salversons moved to reconsider and, after a second hearing, the trial court denied the motion. The trial date for this case is April 26, 2012.

Discussion

The trial court’s order relies on Texas Family Code section 102.003(12), which addresses standing to file an original SAPCR petition. According to the relators, the trial court erred in striking their petition to intervene under Texas Family Code section 102.004(b) permits “other persons,” such as the Salversons, to intervene in SAPCR proceedings once such proceedings have begun, if sufficient proof demonstrates that the intervenors have had substantial contact with the child and the trial court concludes that placement with the parents would significantly impair the child’s physical health or emotional development. We conditionally grant the writ, and direct the trial court to vacate its March 1, 2012 order and reconsider the Salverson’s petition to intervene under the intervention rule set forth in section 102.004(b).


Standard of review
A writ of mandamus issues to correct a clear abuse of discretion when no adequate remedy at law exists. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135 (Tex.2004) (orig.proceeding); Walker v. Packer, 827 S.W.2d 833, 839 (Tex.1992) (orig.proceeding). A trial court has no discretion to apply the law incorrectly. Walker, 827 S.W.2d. at 840.

1. Abuse of Discretion

*2 The Salversons contend that the trial court abused its discretion in striking their petition to intervene. They contend that the trial court erred in relying on section 102.003(12), because the trial court should have considered their petition to intervene under section 102.004(b), which governs interventions in a pending case.

At the trial court hearing, the parents did not dispute that section 102.004(b) governs intervention in a pending case. Section 102.003 defines the group of persons with standing to file an original suit affecting the parent child relationship (SAPCR). See TEX. FAM.CODE ANN. § 102.003. Section 102.003(12) confers standing to “foster parent[s] 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.” Id. § 102.003(12).

Section 102.004, however, provides an avenue for foster parents to participate in a SAPCR apart from filing an original petition. Under section 102.004, “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 if there is satisfactory proof to the court that 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.” TEX. FAM.CODE ANN. § 102.004(b) (emphasis added).

Therefore, foster parents who do not have standing to file an original SAPCR requesting possessory conservatorship may nonetheless intervene in a SAPCR proceeding under section 102.004(b) upon sufficient proof. In re A.M., 60 S.W.3d 166, 169 (Tex.App.-Houston [1st Dist.] 2001, no pet.) (recognizing that intervening in existing suit and filing original suit are distinct legal actions and applying section 102.004(b) to foster parent’s motion to intervene in suit originally filed by DFPS). The legislature created this distinction because it “decided the overriding concern for the best interest of the child when a termination suit is already pending is greater than the concern for the privacy of the parties.” Id. at 169. In so doing, the legislature recognized a “relaxed standing rule for intervention.” Id.

In this case, the trial court did not consider the Salverson’s petition to intervene under the proper statute. The trial court based its ruling on section 102.003(12), which addresses standing to file an original SAPCR petition. See TEX. FAM.CODE ANN. § 102.003(12). The trial court should have considered their motion to intervene under section 102.004(b), which governs standing to intervene in existing proceedings. See id. § 102.004(b); see also In re A.M., 60 S.W.3d at 169. The trial court’s failure to apply the law correctly satisfies the first requirement for mandamus relief. See In re Columbia Med. Ctr. of Las Colinas, 306 S.W.3d 246, 248 (Tex.2010) (orig.proceeding) (“A trial court abuses its discretion when it fails to analyze or apply the law correctly.”); see also In re Mabray, 355 S.W.3d 16, 22 (Tex.App.-Houston [1st Dist.] 2010, orig. proceeding) (trial court abuses its discretion occurs when it reaches decision amounting to a clear and prejudicial error of law).

2. Adequate Remedy

*3 Having concluded that the trial court erred in striking the petition to intervene based on lack of standing under section 102.003(12), we now turn to whether the Salversons lack an adequate appellate remedy.

Mandamus review may be essential to: (1) preserve a relator’s substantive or procedural rights from impairment or loss; (2) allow appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in an appeal from a final judgment; and (3) prevent the waste of public and private resources invested into proceedings that would eventually be reversed. In re Prudential, 148 S.W.3d at 136. Thus, the Texas Supreme Court has applied a balancing test to determine whether there an adequate remedy on appeal exists. See id. “An appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments.” Id.

Three reasons counsel in favor of concluding that mandamus is appropriate in this context. First, the Texas Supreme Court has granted mandamus relief when a trial court abused its discretion by erroneously denying a motion to strike a petition in intervention. See In re Union Carbide Corp., 273 S.W.3d 152, 156–57 (Tex.2008) (orig.proceeding) (per curiam); see also In re O’Quinn, 355 S.W.3d 857, 861–62 (Tex.App.-Houston [1st Dist.] 2011, orig. proceeding). Second, although this Court has not directly addressed the matter, other courts of appeals
have held that a party lacks an adequate appellate remedy when a trial court abuses its discretion in ruling on a motion to intervene in a SAPCR. See e.g. In re Chester, No. 04–11–00758–CV, 2011 WL 6793696, at *2—S.W.3d—(Tex.App.-San Antonio, Dec. 28, 2011, orig. proceeding) (granting mandamus where trial court struck grandmother’s petition to intervene); In re Lewis, 357 S.W.3d 396, 402–03 (Tex.App.-Fort Worth 2011, orig. proceeding) (holding mother lacked adequate remedy by appeal from trial court’s order granting maternal grandparents’ petition to intervene); In re S.B., No. 02–11–00081–CV, 2011 WL 856963, at * 3 (Tex.App.-Fort Worth, Mar. 11, 2011, orig. proceeding) (relators lacked an adequate remedy by appeal from trial court’s order striking intervention). Third, the Texas Supreme Court has recognized that, in the context of custody disputes, “[j]ustice demands a speedy resolution,” and appeal is frequently inadequate to protect the rights of parents and children. In re Tex. Dep’t of Family & Protective Servs., 210 S .W.3d 609, 613 (Tex.2006) (orig.proceeding) (quoting Proffer v. Yates, 734 S.W.2d 671, 673(Tex.1987)).

Apart from these reasons, mandamus relief is appropriate in this case to preserve the Salverson’s substantive rights. In the absence of mandamus relief, the Salveron’s must rely on DFPS to preserve their interests as “foster to adopt” parents. While DFPS and the Salveron’s interests may align now, there is no guarantee that the parties will continue to assert the same positions at trial. Further, issuing the writ in this case will prevent the waste of public and private resources invested into proceedings that would eventually be subject to certain reversal on the basis that the trial court did not consider the Salverson’s petition under the correct section of the Family Code.

Conclusion

*4 We grant mandamus relief and direct the trial court to vacate its March 1, 2012 order, and to consider the Salverson’s motion to intervene under the Family Code’s relaxed standard for intervention set forth under section 102.004(b). We lift the stay of the trial court proceedings and deny all pending motions as moot.

All Citations

Not Reported in S.W.3d, 2012 WL 1454549
Appendix F
In re Northrop, 305 S.W.3d 172 (2009)

305 S.W.3d 172
Court of Appeals of Texas,
Houston (1st Dist.).

In re David Arnold NORTHROP, Relator.
Nos. 01–09–00814–CV, 01–09–00815–CV.

Synopsis
Background: After Department of Family and Protective Services (DFPS) brought suit affecting parent-child relationship (SAPCR) regarding two children, and the 257th Judicial District Court, Harris County, Judy Warne, J., denied petition to intervene filed by children’s great uncle, great uncle brought mandamus action seeking to compel trial court to vacate order denying petition.

[ Holding: ] The Court of Appeals, George C. Hanks, Jr., J., held that mandamus relief was not warranted.

Writ denied.

West Headnotes (10)

[1] Mandamus
Remedy by Appeal or Writ of Error
Mandamus
Matters of discretion

Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and there is no adequate remedy by appeal.

Cases that cite this headnote

[2] Appeal and Error
Abuse of discretion

A trial court commits a clear abuse of discretion when its action is so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.

Cases that cite this headnote

Power to Review

With respect to factual issues, matters are committed to the trial court’s discretion, and the reviewing court may not substitute its judgment for that of the trial court.

Cases that cite this headnote

Matters of discretion

A relator seeking mandamus relief on the grounds that trial court abused its discretion with respect to factual issues must establish that the trial court reasonably could have reached only one decision.

Cases that cite this headnote

Remedy by Appeal or Writ of Error

An appellate remedy is adequate when any benefits to mandamus review are outweighed by the detriments.

Cases that cite this headnote

[6] Equity
Equity aids the vigilant, not those who sleep
In re Northrop, 305 S.W.3d 172 (2009)

on their rights

**Mandamus**

*Nature and scope of remedy in general*

Although mandamus is not an equitable remedy, its issuance is largely controlled by principles of equity, one such principle being that equity aids the diligent and not those who slumber on their rights.

2 Cases that cite this headnote

[7] **Mandamus**

*Laches*

Mandamus relief may be denied when a party delays asserting its rights without justifiable explanation.

1 Cases that cite this headnote

[8] **Infants**

*Intervention and joinder in general*

A trial court has discretion in deciding whether to strike an intervention in a suit affecting the parent-child relationship (SAPCR), under the rule allowing a third party to intervene in a suit by filing a pleading. Vernon’s Ann.Texas Rules Civ.Proc., Rule 60.

1 Cases that cite this headnote

[9] **Mandamus**

*Laches*

Great uncle was not entitled to mandamus relief compelling trial court to vacate its order denying his intervention petition, in suit by Department of Family and Protective Services (DFPS) affecting parent-child relationship (SAPCR) of two children, even though great uncle provided affidavits of relinquishment signed by children’s parents, as great uncle delayed seeking writ of

mandamus until one day before trial deadline without offering explanation for delay, great uncle’s intervention would have placed case in serious risk of dismissal if trial was not commenced by statutory deadline, which would have forced children to be returned to parents, and parents had ample opportunity to name great uncle as potential caregiver earlier in proceedings, which would have given DFPS sufficient time before trial to conduct its obligatory evaluation of named caregivers. V.T.C.A., Family Code §§ 262.114(a), 263.401(a).

2 Cases that cite this headnote

[10] **Infants**

*Inter-jurisdictional placement*

*States*

*Compacts between states*

To evaluate a proposed placement living out of state in a suit affecting the parent-child relationship (SAPCR), the Department of Family and Protective Services (DFPS) must comply with the Interstate Compact on the Placement of Children. V.T.C.A., Family Code § 162.102.

1 Cases that cite this headnote

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*Sandra D. Hachem*, Senior Assistant County Attorney, Terry Lea Elizondo, Richard Hipp, Houston, TX, for appellee.

Panel consists of Justices KEYES, ALCALA, and HANKS.

**OPINION**
GEORGE C. HANKS, JR., Justice.

Relator, David Arnold Northrop, filed a petition for writ of mandamus on September 21, 2009, seeking mandamus relief compelling the trial court to vacate its orders from August 11, 2009 and August 25, 2009, striking Northrop’s petition in intervention. Northrop also requested a stay of the trial set for September 22, 2009 *174 on the ground that he should have been allowed to intervene to participate at the trial. We granted a stay on September 21, 2009 so that we could consider Northrop’s arguments. On October 7, 2009, having reviewed the record and the briefs, we concluded that the trial court did not abuse its discretion in denying Northrop’s petition to intervene, lifted the emergency stay, and denied mandamus relief. We withdraw our opinion of October 7, 2009, and issue the following in its stead.2

BACKGROUND

Northrop is the maternal great uncle of the two children who are the subjects of the underlying suits affecting the parent-child relationship (SAPCR). Northrop resides in Indiana, and has no substantial contacts with the children. The Texas Department of Family & Protective Services (“Department”) initiated the SAPCR against the biological parents of the children, seeking emergency protection on April 29, 2008. TEX. FAM.CODE ANN. § 262.104 (Vernon 2008). The trial court entered emergency orders giving the Department temporary managing conservatorship of the children on April 29, 2008. The emergency orders set a one year dismissal date of May 4, 2009. An adversarial hearing was held pursuant to Texas Family Code Section 262.201 on May 13, 2008. At that hearing, the court found the emergency protection of the children was appropriate and the Department should continue to serve as temporary managing conservator of the children. See TEX. FAM.CODE ANN. § 262.201 (Vernon Supp. 2009).

Before the one-year deadline expired, the court granted extensions in both cases to the latest possible date for trial on the merits before the suits were subject to dismissal: October 31, 2009. See TEX. FAM.CODE ANN. § 262.104 (Vernon 2008) (allowing for a one-time stay of 180 days). To accommodate this deadline, the court set the cases for trial on September 22, 2009.

Just over two months before the trial date, on July 17, 2009, Northrop filed his first set of petitions to intervene, seeking termination of parental rights, appointment as sole managing conservator, and adoption of the children. Attached to the petitions were affidavits of relinquishment of parental rights, signed by the children’s parents on July 2, 2009, naming Northrop as managing conservator of the two children. The Department filed a motion to strike the petition in intervention on August 5, 2009. After a hearing on August 11, 2009, the court granted the motion to strike.


A month later and on the day before this case was set for trial on the merits, Northrop filed this action seeking mandamus *175 relief compelling the trial court to vacate its orders striking his petitions in intervention. Additionally, Northrop requested emergency relief to stay the trial, scheduled to begin on September 22, 2009. We granted an emergency stay on September 21, 2009.

Northrop argues that the trial court abused its discretion by striking his petitions in intervention. The Department responds that the trial court did not abuse its discretion because Northrop sought to intervene too near the dismissal deadline and that such an untimely intervention would jeopardize the trial with dismissal under the statutory deadlines.

STANDARD OF REVIEW

[1] [2] [3] [4] [5] Mandamus is an extraordinary remedy, available only when a trial court clearly abuses its discretion and there is no adequate remedy by appeal. In re Dep’t of Fam. & Prot. Servs., 273 S.W.3d 637, 643 (Tex.2009); In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 135–36 (Tex.2004). A trial court commits a clear abuse of discretion when its action is “so arbitrary and unreasonable as to amount to a clear and prejudicial error of law.” In re CSX Corp., 124 S.W.3d 149, 151 (Tex.2003) (quoting CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex.1996)). With respect to factual issues, matters are committed to the trial court’s discretion, and the reviewing court may not substitute its judgment for that of the trial court. In re Parnham, 263 S.W.3d 97, 101 (Tex.App.-Houston [1st Dist.] 2006, orig. proceeding) (citing Walker v. Packer, 827 S.W.2d 833, 839 (Tex.1992)). The relator must establish that the trial court reasonably could have reached only one decision. Id. “An
appellate remedy is ‘adequate’ when any benefits to mandamus review are outweighed by the detriments.” In re Prudential, 148 S.W.3d at 136.

[6] [7] Although mandamus is not an equitable remedy, its issuance is largely controlled by principles of equity. In re Roxsane R., 249 S.W.3d 764, 771 (Tex.App.-Fort Worth 2008, orig. proceeding) (citing In re Users Sys. Servs., Inc., 22 S.W.3d 331, 337 (Tex.1999); Rivercenter Assocs. v. Rivera, 858 S.W.2d 366, 367 (Tex.1993)). One of these equitable principles is that “equity aids the diligent and not those who slumber on their rights.” Id. (citing Rivercenter Assocs., 858 S.W.2d at 367). Thus, mandamus relief may be denied when a party delays asserting its rights without justifiable explanation. Id. (citing Rivercenter Assocs., 858 S.W.2d at 367).

THE LAW

[8] A trial court has discretion in deciding whether to strike an intervention in a SAPCR. TEXT.R. CIV. P. 60. Texas Rule of Civil Procedure 60 provides that “[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.” Id.


In In re C.A.L., a grandmother, who was designated as a conservator in an affidavit of relinquishment, petitioned to intervene fourteen months after the Department was appointed temporary managing conservator and just two months before the case was set for dismissal under the extended deadline. In re C.A.L., 2007 WL 495195, at *8. In support of its motion to strike, the Department argued that because of the dismissal deadline approaching in six weeks, the Department had inadequate time and opportunity to investigate the appropriateness of the grandmother who was seeking to intervene. Id. On appeal, the court held it was not an abuse of discretion to strike the grandmother’s petition in intervention filed two months before the dismissal date. Id. at *9.

Similarly, in Oehlerich, a grandmother petitioned to intervene eight months after the Department initiated the SAPCR and just two months before the case was set for trial. Oehlerich, 1999 WL 546970, at *1–2. The trial court granted the motion to strike, explaining that “intervention must be timely and should not be allowed when it would delay the cause, unless the intervenor demonstrates facts which justify tardiness in coming forward.” Id. at *2. The Austin Court of Appeals held that it was not an abuse of discretion to strike the petition to intervene because the petition was untimely and the grandmother offered no evidence to justify her late intervention. Id. at *2. The Oehlerich court notes, In the absence of a prescribed time, the issue of timeliness is governed by equitable principles and determined by the facts and circumstances of the particular case. Relevant factors may be the purpose for which intervention is requested; the point to which the suit has progressed and the time elapsed from its initiation; the length of time the applicant knew of his interest in the litigation; possible prejudice occasioned to existing parties by the delay; the applicant’s interest and potential harm to that interest if intervention is denied; the reason for the applicant’s delay; interference resulting to orderly trial processes if intervention is allowed.... Some of these factors are determinable without evidence; others, such as the length of time the applicant knew of his interest and his reason for delay, require evidence before they may be considered by the trial court in deciding whether to grant the application to intervene. The latter have particular relevance in the present case.

Id. at *2 n. 4 (citing 59 Am.Jur.2d Parties § 157, at 632–36 (1987)).
ANALYSIS

[9] In this case, the trial court did not abuse its discretion by striking Northrop’s intervention because it was untimely. Just over two months before the trial date, on July 17, 2009, Northrop filed his first set of petitions to intervene in the SAPCR, based on affidavits of relinquishment signed by the parents of the children on July 2, 2009. The Department filed a motion to strike the petitions on August 5, 2009, and the trial court granted the motion to strike after a hearing on August 11, 2009. Rather than seeking mandamus relief at this time, Northrop filed a second set of petitions to intervene with the trial court on August 14, 2009, accompanied by affidavits of relinquishment signed by the parents on August 13, 2009. Again, a motion to strike these petitions was filed, which was granted by the trial court on August 25, 2009. Aware of the September 22, 2009 trial date and the October 31, 2009 absolute deadline, Northrop waited until the day before trial, twenty-seven days later, to seek a *177 writ of mandamus from this Court. Northrop never offered an explanation for his delay.

The October 31, 2009 deadline for trial of the case is absolute. The deadline is not tolled by a stay by our Court, a mistrial, or an agreement between the parties to extend the dismissal date. TEX. FAM.CODE ANN. § 263.401 (Vernon 2008); In re Dep’t of Fam. & Prot. Servs., 273 S.W.3d 637, 644 (Tex.2009) (holding grant of new trial after deadline required dismissal). Because the trial court has a duty to dismiss the case if trial on the merits is not commenced by October 31, 2009, allowing Northrop to intervene in this late stage of the case would put the case at serious risk of being dismissed. In the event that the case is dismissed, the children must be returned to their biological parents without a trial being held to determine the merits of the termination. In re Dep’t of Fam. & Prot. Servs., 273 S.W.3d at 644.

[10] Because the Texas Family Code creates a presumption that the prompt and permanent placement of the child in a safe environment is in the child’s best interest, we cannot conclude that the trial court abused its discretion because it could have found that the petition in intervention would jeopardize the prompt resolution of the termination hearing.

We also note that there was ample opportunity for the parents to suggest Northrop as a potential caregiver earlier in the case. The Texas Family Code requires parents to provide the Department with a list of names of relatives or family friends who could serve as caregivers for the children. TEX. FAM.CODE ANN. §§ 261.307(a)(2)(A)(ii), 262.114, 264.751(1) (Vernon 2008). The Department is required by law to evaluate the named individuals before the full adversary hearing. Id. § 262.114. The full adversary hearing in this case was May 13, 2008. The appropriate procedure for designating a relative caregiver would have been for the parents to provide the Department with Northrop’s name and information at the inception of the case, so that the Department could have evaluated Northrop prior to the May 13, 2008 hearing. Despite the many opportunities to suggest Northrop for consideration, the parents waited fifteen months to designate him. We cannot say it was an abuse of discretion for the trial court to determine that it would be against the children’s best interest to delay the *178 suit to evaluate Northrop at this late date, risking dismissal of the case.

Finally, Northrop contends that it is the desire of the parents (defendants in the underlying suit) that he be able to intervene into the case. In other words, he seems to be arguing that a party to the case seeks to bring him into the suit. However, Texas Rule of Civil Procedure 37 provides that, “[b]efore a case is called for trial, additional parties, necessary or proper parties to the suit, may be brought in, either by the plaintiff or the defendant upon such terms as the court may prescribe; but not at a time nor in a manner to unreasonably delay the trial of the case.” (Emphasis added.) Thus, this argument fails because as discussed above, the late intervention of Northrop would not be reasonable.

The trial court did not abuse its discretion in finding sufficient cause to grant the motions to strike Northrop’s petitions to intervene.

CONCLUSION

We deny the petition for writ of mandamus.
All Citations

305 S.W.3d 172

Footnotes

1 The underlying cases are Cause No. 2004–66050, in the 257th Judicial District Court of Harris County, Texas, the Hon. Judy Warne, presiding, and Cause No. 2008–24499, in the 257th Judicial District Court of Harris County, Texas, the Hon. Judy Warne, presiding.

2 Our order lifting the stay on October 7, 2009 and overruling all outstanding motions remains in effect.

3 In all cases in which the court enters temporary orders appointing the Department as temporary managing conservator, the court must dismiss the SAPCR filed by the Department on the first Monday after the first anniversary of the temporary order unless trial is commenced on the merits. TEX. FAM.CODE ANN. § 263.401(a) (Vernon 2008). Pursuant to Section 263.401(a), when the trial judge granted this first emergency order, the one year deadline for dismissal began to run. In re Tex. Dep't of Fam. & Prot. Servs., 210 S.W.3d 609, 612 (Tex.2006).

4 “Before placing a child with a proposed relative or other designated caregiver, the department must conduct an investigation to determine whether the proposed placement is in the child's best interest.” TEX. FAM.CODE § 264.754 (Vernon 2008). Texas Family Code Section 262.114 sets out the procedure for evaluating an identified relative, requiring a background and criminal history check on all individuals and a homestudy on the most qualified individual. TEX. FAM.CODE ANN. § 262.114(a) (Vernon Supp. 2009). To evaluate a proposed placement living out of state, the Department must also comply with the Interstate Compact on the Placement of Children. TEX. FAM.CODE ANN. § 162.102 (Vernon 2008). Before the placement can be made, the agency in the “receiving state” (the state of the proposed placement) must certify that the “placement does not appear to be contrary to the interests of the child.” Id. (Art. III).
Appendix G

Synopsis
Background: Married couple, with whom children had been placed during proceeding to terminate biological parents’ rights, filed suit affecting the parent-child relationship (SAPCR) against the Department of Family and Protective Services (DFPS), after children were removed based on husband’s positive drug test. The District Court of Comal County, 207th Judicial District, Dib Waldrip, J., found that the couple lacked standing and granted motion by DFPS to dismiss. Married couple appealed.

Holdings: The Court of Appeals, Bob Pemberton, J., held that:

[1] couple lacked standing to intervene in proceeding to terminate biological parents’ rights, as there was no pending suit in which to intervene; but

[2] couple provided fair notice of their intent to bring an original SAPCR;

[3] couple’s SAPCR was properly filed with the district court that had presided over proceeding to terminate biological parents’ rights; and

[4] couple had actual control over the children, as required in order to have standing to bring an original SAPCR.

Reversed and remanded.

West Headnotes (31)

[1] Action
Persons entitled to sue
Standing is a component of subject-matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit.

I Cases that cite this headnote

[2] Action
Persons entitled to sue
Analysis of whether a party has standing begins with the plaintiff’s live pleadings.

I Cases that cite this headnote

[3] Courts
Allegations, pleadings, and affidavits
A plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court’s jurisdiction to hear the cause.

I Cases that cite this headnote

Matters or Evidence Considered in Determining Question
In an appeal of dismissal of an action for lack of standing, an appellate court must consider evidence the parties presented below that is relevant to the jurisdictional issues, including any evidence that a party has presented to negate the existence of facts alleged in the plaintiff’s pleading.
Courts

Determination of questions of jurisdiction in general

If the facts relevant to jurisdiction are undisputed, a jurisdictional determination is a matter of law.

Action

Persons entitled to sue

When standing to bring a particular type of lawsuit has been conferred by statute, courts use that statutory framework to analyze whether the petition has been filed by a proper party.

Statutes

Intent

A court’s primary objective in statutory construction is to give effect to the Legislature’s intent.

Action

Persons entitled to sue

A party seeking relief must allege and establish standing within the parameters of the language of the relevant statute.

Statutes

Language and intent, will, purpose, or policy

Courts seek legislative intent first and foremost in the statutory text.

Statutes

Purpose and intent; unambiguously expressed intent

Where text of a statute is clear, text is determinative of Legislative intent.

Statutes

Context

Courts consider the words of a statute in context, not in isolation.
Meaning

Statutes
• Defined terms; definitional provisions

Statutes
• Relation to plain, literal, or clear meaning; ambiguity

Courts rely on the plain meaning of the text of a statute, unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results.

Cases that cite this headnote

[14] Statutes
• Prior or existing law in general

When construing a statute, courts presume that the Legislature was aware of the background law and acted with reference to it.

Cases that cite this headnote

[15] Statutes
• Language

When construing a statute, courts presume that the Legislature selected statutory words, phrases, and expressions deliberately and purposefully.

1 Cases that cite this headnote

[16] Statutes
• In general; factors considered

Statutes
• Extrinsic Aids to Construction

Only when the statutory text is ambiguous do courts resort to rules of construction or extrinsic aids.

Cases that cite this headnote

[17] Child Custody
• Decisions reviewable

A final order in a suit affecting the parent-child relationship (SAPCR) that purports to dispose of all issues and all parties is a final appealable order.

Cases that cite this headnote

[18] Infants
• Foster and de facto parents

Infants
• Construction, operation, and effect in general

Married couple, with whom children had been placed, lacked standing to intervene in proceeding to terminate biological parents’ rights when they filed suit affecting the parent-child relationship (SAPCR) against the Department of Family and Protective Services (DFPS) after DFPS removed the children based on husband’s positive drug test, as there was no pending suit in which to intervene; though DFPS had been named managing conservator of the children and thus the court was required by statute to conduct periodic placement-review hearings until the children were adopted, a final and appealable order terminating the biological parents’ rights had been issued, and the review hearings supervised the results of a proceeding that had already been terminated by the final order. V.T.C.A., Family Code §§ 102.004(b), 105.006, 263.501(b).

Cases that cite this headnote

[19] Pleading
• Sufficiency of allegations in general

Texas follows a fair notice standard for pleading, which looks to whether the opposing
party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.

A pleading that gives adequate notice will not fail merely because the draftsman named it improperly.

Cases that cite this headnote

Cases that cite this headnote

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Cases that cite this headnote

Married couple, with whom children had been placed during proceeding to terminate biological parents’ rights, provided Department of Family and Protective Services (DFPS) and the district court with adequate and fair notice of their intent to bring an original suit affecting the parent-child relationship (SAPCR), in SAPCR petition filed after children were removed following husband’s positive drug test, by requesting in the petition appointment as the children’s managing conservators, referencing an original SAPCR as opposed to an intervention in a pending matter, and invoking a statutory provision governing standing to bring an original SAPCR. V.T.C.A., Family Code § 102.003(a)(9).

Married couple, with whom children had been placed during proceeding to terminate biological parents’ rights, properly filed an original suit affecting the parent-child relationship (SAPCR) in the district court that had terminated biological parents’ rights, after Department of Family and Protective Services (DFPS) removed the children due to husband’s positive drug test, as such district court had acquired continuing exclusive jurisdiction over the children as a result of the final order of termination. V.T.C.A., Family Code §§ 102.003(a)(9), 155.001.

Married couple, with whom children had been placed during proceeding to terminate biological parents’ rights, sufficiently pleaded that they had care, custody and possession of the children, as required to establish standing to bring an original suit affecting the parent-child relationship (SAPCR) against the Department of Family and Protective Services (DFPS) after DFPS removed the children following husband’s positive drug test; though the couple did not quote the text of the statute conferring standing, they cited the statute and alleged that the children had lived with them for more than two years, and, if the DFPS had filed a special exception to couple’s petition, the couple could
conferring standing to bring an original suit affecting the parent-child relationship (SAPCR), means the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child, and reflects the Legislature’s intent to create standing for those who have, over time, developed and maintained a relationship with a child entailing the actual exercise of guidance, governance and direction similar to that typically exercised by parents with their children.

9 Cases that cite this headnote

[31] Constitutional Law
- Judicial rewriting or revision
- Statutes
  - Absent terms; silence; omissions

Courts cannot add words to a statute; that is solely the Legislature’s prerogative.

Cases that cite this headnote

Attorneys and Law Firms

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Before Justices PURYEAR, PEMBERTON, and ROSE.

OPINION

BOB PEMBERTON, Justice.

The principal issue presented in this appeal is what constitutes the “actual control” of a child that is required to establish standing to bring a suit affecting the parent-child relationship (SAPCR) under family code section 102.003(a)(9). See Tex. Fam.Code Ann. § 102.003(a)(9) (West 2008). Appellants Philip and Lorine Jasek assert that they had “actual control” of the two children affected by this case where appellee, the Texas Department of Family and Protective Services (DFPS), placed the children with the Jaseks and the children lived with the Jaseks for more than two years thereafter. DFPS argues that “actual control” turns on whether one has the legal right of control over the children, and the district court was persuaded to render an order predicated on that conclusion. We disagree with that conclusion, hold that the Jaseks satisfied the “actual control” requirement as a matter of law, and will reverse and remand.

BACKGROUND

The material facts are undisputed. In February 2007, DFPS filed a SAPCR against the biological parents of two children, K.E. and T.E., seeking to terminate the parent-child relationship. The district court issued an order of termination in *527 January 2008 and named DFPS as K.E. and T.E.’s sole managing conservator.

In April 2007, two months after filing the termination proceeding, DFPS had placed K.E. and T.E. with the Jaseks, who were friends of the children’s family according to the record. The placement was made pursuant to a DFPS “Placement Authorization” agreement that required the Jaseks to “provide for the child [ren’s] daily care, protection, control, and reasonable discipline,” “enroll them in public school,” and “provide routine transportation.” The placement authorization did not allow the Jaseks to travel with the children outside of Texas or for longer than seventy-two hours without first notifying DFPS, and it required the Jaseks to “give DFPS access to information about the child [ren] at all times.” It also advised that “DFPS, at its sole discretion, may remove the child[ren] from the care giver at any time, subject to applicable court orders.”

In October 2009, Philip Jasek tested positive for marijuana. Not long thereafter, DFPS removed the children from the Jaseks’ home. Before that positive drug test, both the DFPS and the Jaseks had intended to have K.E. and T.E. stay with the Jaseks permanently.

Two months later, the Jaseks filed what they styled as a “Petition in Intervention in Suit Affecting the
have easily amended the petition to cure any defects. V.T.C.A., Family Code § 102.003(a)(9).

Cases that cite this headnote

[25] Pleading
- Construction in General
- Pleading
- Presumptions and inferences in aid of pleading

When a party fails to specially except to pleadings, a court must construe the pleadings liberally in favor of the pleader.

Cases that cite this headnote

[26] Pleading
- Special exceptions

An opposing party should use special exceptions to identify defects in a pleading so that they may be cured, if possible, by amendment.

Cases that cite this headnote

[27] Infants
- Private individuals
- Parties, intervention, and standing

Married couple, with whom children had been placed during proceeding to terminate biological parents’ rights, had “actual control” over the children, as required to have standing to bring an original suit affecting the parent-child relationship (SAPCR) against the Department of Family and Protective Services (DFPS) after DFPS removed the children based on husband’s positive drug test; though DFPS had been named the managing conservator of the children and was vested with the ultimate legal authority to make decisions for the children, the children had resided with married couple for over two years, the couple provided for the children’s daily care, protection, control and reasonable discipline, the couple provided the children’s basic needs for food, shelter and medical care, and the children were very bonded with the couple. V.T.C.A., Family Code § 102.003(a)(9).

Cases that cite this headnote

[28] Negligence
- Conditions created or known by defendant
- Knowledge or Notice in General
- Negligence
- Constructive notice

In the context of premises-liability cases, the law distinguishes between actual knowledge of a dangerous condition, i.e., when a person directly knows of the dangerous condition, and constructive or imputed knowledge, i.e., what a person does not actually know, but objectively should know or has reason to know, so as to be charged with the same duties that arise from actually knowing it.

Cases that cite this headnote

[29] Notice
- Knowledge or express notice
- Notice
- Constructive Notice

Actual notice rests on personal information or knowledge, while constructive notice is notice that the law imputes to a person not having personal information or knowledge.

Cases that cite this headnote

[30] Child Custody
- Parties; intervention

“Actual control” of the child, as used in statute
Parent–Child Relationship” in the same cause number as the termination proceedings that had concluded in January 2008. DFPS filed a motion to strike, asserting that the Jaseks lacked standing to intervene in the termination proceeding or to file an original SAPCR regarding K.E. and T.E. After a hearing on the motion to strike, at which evidence was introduced, the district court found that—

- K.E. and T.E. had lived with the Jaseks between April 2007 and October 13, 2009;
- the Jaseks were “Fictive Kin, not a parent, foster parent, or otherwise” to the children;
- the “[p]arental rights to K.E. and T.E. were terminated on January 10, 2008”;
- DFPS had removed K.E. and T.E. from the Jaseks’ home on October 13, 2009 as a result of Philip Jasek’s positive marijuana test; and
- the Jaseks had filed a “Petition for Intervention in a Suit Affecting Parent–Child Relationship” on December 17, 2009, asserting standing under family code sections 102.004(b), 102.003(a)(9), and 102.005.

However, concluding that the Jaseks lacked standing under section 102.004(b) because their petition was not filed during a pending suit and that they lacked standing under section 102.003(a)(9) because they did not have “control” of the children, the district court granted DFPS’s motion and struck the Jaseks’ petition. The Jaseks appeal from this judgment.

**DISCUSSION**

In two issues, the Jaseks assert that the district court erred in granting DFPS’s motion to strike because (1) they had standing to bring an original SAPCR under family code section 102.003(a)(9) and (2) they had standing to intervene in the termination case under family code section 102.004(b).

**Standard of review**

Standing is a component of subject-matter jurisdiction and is a constitutional prerequisite to maintaining a lawsuit under Texas law. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443–44 (Tex.1993). As with other issues implicating subject-matter jurisdiction, analysis of whether a party has standing begins with the plaintiff’s live pleadings. See *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 831 (Tex.App.-Austin 2010, no pet.) (citing *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex.2004)). The plaintiff has the initial burden of alleging facts that affirmatively demonstrate the trial court’s jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 225–26 (citing *Texas Ass’n of Bus.*, 852 S.W.2d at 446). We must also consider evidence the parties presented below that is relevant to the jurisdictional issues, *Bland Independent School District v. Blue*, 34 S.W.3d 547, 555 (Tex.2000), including any evidence that a party has presented to negate the existence of facts alleged in the plaintiff’s pleading. See *Miranda*, 133 S.W.3d at 227; see also *Combs v. Entertainment Publ’ns, Inc.*, 292 S.W.3d 712, 719 (Tex.App.-Austin 2009, no pet.) (summarizing different standards governing evidentiary challenges to the existence of pleaded jurisdictional facts where such facts implicate both jurisdiction and the merits versus where they implicate only jurisdiction). If the facts relevant to jurisdiction are undisputed, as they are here, the jurisdictional determination is a matter of law. See *Miranda*, 133 S.W.3d at 228; *Combs*, 292 S.W.3d at 719.

“[t]he Texas Legislature has provided a comprehensive statutory framework for standing in the context of suits involving the parent-child relationship.” *In re H.G.*, 267 S.W.3d 120, 124 (Tex.App.-San Antonio 2008, no pet.) (citing Tex. Fam.Code Ann. §§ 102.003, .004, .0045, .005, .006 (West 2008)). When standing to bring a particular type of lawsuit has been conferred by statute, we use that statutory framework to analyze whether the petition has been filed by a proper party. See *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex.1984). The party seeking relief must allege and establish standing within the parameters of the statutory language. *In re H.G.*, 267 S.W.3d at 123.

To the extent that the parties’ issues turn on the construction of a statute, we review these questions de novo. *State v. Shumake*, 199 S.W.3d 279, 284 (Tex.2006). Our primary objective in statutory construction is to give effect to the Legislature’s intent. See *id*. We seek that intent “first and foremost” in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex.2006). “Where text is clear, text is determinative of that intent.” *Energy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex.2009) (op. on reh’g) (citing *Shumake*, 199 S.W.3d at 284; *Alex Sheshunoff Mgmt. Servs. v. Johnson*, 209 S.W.3d 644, 651–52 (Tex.2006)). We consider the words in context, not in isolation. *State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex.2002). We rely on the plain meaning of the text,
unless a different meaning is supplied by legislative definition or is apparent from context, or unless such a construction leads to absurd results. See City of Rockwall v. Hughes, 246 S.W.3d 621, 625–26 (Tex.2008) (citing Texas Dep’t of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 642 (Tex.2004)); see also Tex. Gov’t Code Ann. § 311.011 (West 2005) (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage,” but “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted construed accordingly.”). We also presume that the Legislature was aware of the background law and acted.

Standing to intervene under family code section 102.004(b)

We begin by addressing the Jaseks’ second issue, which concerns whether they have standing to intervene in the termination proceeding under family code section 102.004(b). The Jaseks’ pleading, which they titled “Petition in Intervention in Suit Affecting the Parent–Child Relationship,” asked the district court to name them K.E. and T.E.’s managing conservators. The pleading invokes section 102.004(b) of the family code, which provides as follows:

102.004(b) The court may grant ... a 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 if there is satisfactory proof to the court that 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.

Tex. Fam.Code Ann. § 102.004(b) (emphasis added). Regardless of whether they are persons who “have had substantial past contact” with K.E. and T.E., the Jaseks cannot establish standing under this provision because there is no “pending suit” in which to intervene.

The district court issued a final order in January 2008 that terminated the biological parents’ parental rights and named DFPS as sole managing conservator. See Tex. Fam.Code Ann. § 105.006 (West 2008) (establishing requirements for contents of final order). A final order in a SAPCR that purports to dispose of all issues and all parties is a final appealable order. See State ex. rel. Latty v. Owens, 907 S.W.2d 484, 485–86 (Tex.1995) (holding that associate judge’s order terminating father’s parental rights became final and appealable when father failed to timely appeal to the district court); Brines v. McIlhaney, 596 S.W.2d 519, 523–24 (Tex.1980) (holding that final divorce decree appointing party “temporary” managing conservator “until further order of the court” was a final order). Thus, the termination proceeding, in which a final and appealable order has issued, is no longer “pending.”

The Jaseks argue that in a proceeding such as this, where parental rights have been terminated and DFPS was named managing conservator, the case remains “pending” until the subject children have been adopted or become adults. They reason that family code section 263.501(b) requires courts in such cases to conduct periodic placement-review hearings after the entry of the final order of termination:

17 [18] The district court issued a final order in January 2008 that terminated the biological parents’ parental rights and named DFPS as sole managing conservator. See Tex. Fam.Code Ann. § 105.006 (West 2008) (establishing requirements for contents of final order). A final order in a SAPCR that purports to dispose of all issues and all parties is a final appealable order. See State ex. rel. Latty v. Owens, 907 S.W.2d 484, 485–86 (Tex.1995) (holding that associate judge’s order terminating father’s parental rights became final and appealable when father failed to timely appeal to the district court); Brines v. McIlhaney, 596 S.W.2d 519, 523–24 (Tex.1980) (holding that final divorce decree appointing party “temporary” managing conservator “until further order of the court” was a final order). Thus, the termination proceeding, in which a final and appealable order has issued, is no longer “pending.”

If [DFPS] has been named as a child’s managing conservator in a final order that terminates a parent’s parental rights, the court shall conduct a placement review hearing not later than the *530 90th day after the date the court renders the final order. The court shall conduct additional placement review hearings at least once every six months until the date the child
is adopted or the child becomes an adult.

Tex. Fam.Code Ann. § 263.501(b) (West Supp. 2010). We disagree that the existence of this statutory duty means that the SAPCR remains “pending” in the sense that term is used in family code section 102.004(b). Section 263.501(b)’s reference to “a final order” indicates that the court has already decided the termination suit. The proceeding, therefore, is not “pending” by any ordinary definition of that term. This conclusion is further confirmed by the characterization of the subsequent activities as “review hearings,” denoting supervision with regard to the results of a proceeding that has already been concluded by the “final order.” Cf. Brines, 596 S.W.2d at 523–24 (holding that final divorce decree appointing party “temporary” managing conservator “until further order of the court” was final, and noting that “until further order of the court” referred to court’s continuing exclusive jurisdiction over the child subject of the divorce). Accordingly, we hold that section 102.004(b) was not available to the Jaseks here because there was no “pending suit” in which to intervene.

We overrule the Jaseks’ second issue.

Standing to bring original SAPCR under family code section 102.003(a)(9)

Although the Jaseks have styled their pleading as a “Petition in Intervention” in the SAPCR that was concluded by the 2008 final order, this inaccurate nomenclature is not singularly fatal. Texas follows a “fair notice” standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. See Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex.1999). The Jaseks’ petition asked the court to appoint them as K.E. and T.E.’s conservators and, in addition to seeking to “intervene,” asserted that the Jaseks had “general standing under section 102.003(a)(9) to file an original SAPCR.” Section 102.003(a)(9) confers standing to bring an original SAPCR to “person[s], other than a foster parent, who [have] had actual care, control, and possession of the child[ren] for at least six months ending not more than 90 days preceding the date of the filing of the petition.” See Tex. Fam.Code Ann. § 102.003(a)(9). Thus, by requesting appointment as the children’s managing conservators, referencing an original SAPCR—as opposed to an intervention in a pending matter—and invoking a provision governing standing to bring an original SAPCR (and section 102.003(a)(9) specifically), the Jaseks provided DFPS and the district court adequate and fair notice of their intent to bring an original SAPCR under section 102.003(a)(9) to modify K.E. and T.E.’s conservatorship. See Horizon/CMS Healthcare Corp., 34 S.W.3d at 897. “A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim” such that “the opposing party has information sufficient to enable him to prepare a defense.” Roark v. Allen, 633 S.W.2d 804, 810 (Tex.1982). “A pleading that gives adequate notice will not fail merely because the draftsman named it improperly.” CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc., 809 S.W.2d 577, 586 (Tex.App.-Dallas 1991, writ denied) (citing Tex.R. Civ. P. 71). Further, because the district court had acquired continuing exclusive jurisdiction over K.E. and T.E. as a result of the final order of termination, it would have been proper for the Jaseks to file an original proceeding there. See *531 Tex. Fam.Code Ann. § 155.001 (West 2008) (providing that a court who has issued a final order in an earlier SAPCR proceeding has jurisdiction over future SAPCR proceedings involving the same child).

The district court found, and it is undisputed, that the two children lived with the Jaseks for more than two years. Consequently, they would satisfy section 102.003(a)(9)’s requirements if such care and possession constituted “actual care, control, and possession of the child[ren],” as the district court found they were “person[s], other than a foster parent,” the period of care and possession was “at least six months,” and the period ended “not more than 90 days preceding the date of the filing of the petition.” See id. § 102.003(a)(9). DFPS, while acknowledging that the Jaseks cared for and possessed K.E. and T.E. for more than two years within the relevant time period, argues that the Jaseks failed nonetheless to establish standing under section 102.003(a)(9) because they (1) did not properly plead that they had “care, control, and possession” of K.E. and T.E. and (2) could not establish that they had “actual control” over the children because, at all relevant times, DFPS had sole legal control over the children.

Pleadings

As to DFPS’s challenge to the Jaseks’ pleadings, we note that the Jaseks’ petition asserted that “the Jaseks have general standing under section 102.003(a)(9) to file an original SAPCR.... Therefore, as a matter of law, the Jaseks satisfy the legal requirements to intervene in this case.” As facts in support of their standing, the Jaseks alleged that “[o]n ... April 10, 2007, [K.E. and T.E.] were removed them on ... October 13, 2009.” Although the Jaseks’ petition did not quote the text of section
“Actual control”

DFPS contends that regardless of whether the Jaseks properly pleaded standing under section 102.003(a)(9), they could not establish that they had the requisite “actual control” over K.E. and T.E. DFPS does not dispute that the Jaseks had “actual care” and “actual possession” of the children for the requisite time period. However, it argues that the Jaseks could not have had “actual control” during that time because that requires having the “authority to make legal decisions, decisions of legal significance and including the responsibilities of a legal parent.” DFPS insists that only DFPS had “actual control” over the children because, as the district court found, DFPS was vested with the ultimate legal authority to make decisions for the children, including the discretion to remove them from the Jaseks’ home at any time. We disagree that “actual control” under section 102.003(a)(9) hinges on whether a care giver possesses this sort of legal authority.

Our analysis begins with the statutory text, which requires that the person asserting standing have had “actual care, control, and possession of the child.” We observe that the adjective “actual” in the phrase “actual care, control, and possession” modifies each of the three nouns that follows. Thus, a person asserting standing under section 102.003(a)(9) must show actual care, actual control, and actual possession. Here, because DFPS does not contest care and possession, we are concerned only with “actual control,” which the family code does not define.

Further, DFPS did not file special exceptions to the Jaseks’ petition. When a party fails to specially except to pleadings, we must construe the pleadings literally in favor of the pleader. Horizon/CMS Healthcare, 34 S.W.3d at 897; Roark, 633 S.W.2d at 810 (“A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim” such that “the opposing party has information sufficient to enable him to prepare a defense.”).
“possession, custody, or control of an item” as “physical possession of the item”—i.e., actual possession—or the “right to possession of the item that is equal or superior to the person who has physical possession of the item”—i.e., constructive possession. See Tex.R. Civ. P. 192.7(b); see also GTE Commc’ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 729 (Tex.1993) (distinguishing between constructive and actual possession); cf. Tex. Fam.Code Ann. § 34.003 (discussing “actual physical possession”).

We need not further belabor the point—the law uses the term “actual” to indicate something that exists in fact, as opposed to something that is a function of legal duties or imputation. And we are to presume that the Legislature was aware of such usage and connotation, and deliberately intended that meaning, when it made “actual” care, control, and possession the basis for standing under family code section 102.003(a)(9). See State v. Young, 265 S.W.3d 697, 707 (Tex.App.-Austin 2008, pet. denied); see also Tex. Gov’t Code Ann. § 311.011(b); Acker, 790 S.W.2d at 301; USA Waste Servs. of Houston, Inc. v. Strayhorn, 150 S.W.3d 491, 494 (Tex.App.-Austin 2004, pet. denied).

[30] As for “control”—a word which the Legislature included in seventy-three provisions of the family code but did not specifically define—it means the “power or authority to guide or manage: directing or restraining domination.” Webster’s Third New Int’l Dictionary 496 (2002); see Black’s Law Dictionary 378 (9th ed. 2009) (defining control as the “power to govern the management and policies of a person”); see also American Fid. & Cas. Co. v. Traders & Gen. Ins. Co., 160 Tex. 554, 334 S.W.2d 772, 775 (1960) (defining control as “[p]ower or authority to manage, direct, govern, administer, or oversee”). Accordingly, “actual ... control ... of the child,” as used in section 102.003(a)(9), means the actual power or authority to guide or manage or the actual directing or restricting of the child, as opposed to legal or constructive power or authority to guide or manage the child. In sum, these words reflect the Legislature’s intent to create standing for those who have, over time, developed and maintained a relationship with a child entailing the actual exercise of guidance, governance and direction similar to that typically exercised by parents with their children. See Coons–Andersen v. Andersen, 104 S.W.3d 630, 636 (Tex.App.-Dallas 2003, no pet.).

Several courts, including this Court, have previously addressed section 102.003(a)(9)’s requirement that a person have “actual care, control, and possession” of the child to have standing to bring an original SAPCR. But in doing so, most of these courts considered all three elements—care, control, and possession—collectively, without distinguishing them. Some of these cases define or identify the elements only in terms of what they do not mean. See, e.g., id. at 634 (holding that “[o]ccasional visitation with or possession of a child ... is not ‘actual care, control, and possession’ under the statute”); *534 In re J.J.J., No. 14–08–01015–CV, 2009 WL 4613715, at *2 (Tex.App.-Houston [14th Dist.] Dec. 8, 2009, no pet.) (noting that assertion that the child had lived with one person “during a particular time period is not necessarily mutually exclusive of the assertion that [another person] had care, control, and possession of the child during that same period”). Others relied on certain specific facts—e.g., living arrangements, financial contributions, nurturing, home modifications, and educational involvement—to determine whether there was “actual care, control, and possession.” See, e.g., In re M.K.S.-V., 301 S.W.3d 460, 463–65 (Tex.App.-Dallas 2010, pet. denied); In re M.P.B., 257 S.W.3d 804, 809 (Tex.App.-Dallas 2008, no pet.); Smith v. Hawkins, No. 01–09–00060–CV, 2010 WL 3718546, at *3 (Tex.App.-Houston [1st Dist.] Sept. 23, 2010, pet. filed) (mem. op.). The common threads running through the cases in which the court found actual care, control, and possession collectively to be established, however, were that the person asserting standing (1) lived in the same home as the child or lived in a home where the child stayed overnight on a regular and frequent basis, (2) made financial contributions benefitting the child, (3) was involved with the child’s education, and (4) was involved in matters involving the child’s general upbringing, like health care, feeding, and clothing. See, e.g., In re M.K.S.-V., 301 S.W.3d at 463–65; In re M.P.B., 257 S.W.3d at 809; Smith, 2010 WL 3718546, at *3.

In contrast, we found only two cases that have addressed “actual control” separately in this context. See In re K.K.C., 292 S.W.3d 788, 792–93 (Tex.App.-Beaumont 2009, no pet.); In re Kelso, 266 S.W.3d 586, 590 (Tex.App.-Fort Worth 2008, no pet.). Both held that the parties lacked standing because they did not have “actual control” over the children at issue in the cases.

In In re Kelso, the court held that a child’s maternal grandmother and step-grandfather lacked standing under section 102.003(a)(9) on the basis that the evidence failed to show that the mother had “voluntarily relinquished permanent care, control, and possession of [the child] to the [grandparents] for the six months preceding the filing of the suit.” See In re Kelso, 266 S.W.3d at 590. The court further held that the evidence showed that the child’s mother “controlled where [the child] would stay and for how long and that the [grandparents] did not have such control,” and that there was no evidence that the mother had “intended for [the child] to stay with the
[grandparents] for any extended periods of time—i.e., “there was no evidence that [the child’s] abode in [the grandparents’ county of residence] was fixed or permanent; rather, the evidence was that it was temporary, sometimes up to several months at a time, but always depending on [the mother’s] consent.”

In In re K.K.C., on which DFPS relies heavily in its brief to this Court, the court of appeals held that an ex-boyfriend of the child’s mother, who had previously lived with the mother and child for approximately seven years, lacked standing under section 102.003(a)(9) to seek appointment as a joint managing conservator of the child. The evidence in the case showed that the ex-boyfriend, in addition to residing in the same home as the child, had attended the child’s school functions, been responsible for picking up the child from day care, disciplined the child, generally served as caretaker for the child, provided financial support, and was called “daddy” by the child. The court held that the ex-boyfriend lacked standing because the ex-boyfriend “had no legal right of control over the child and no authority to make decisions on behalf of the child,” and because the child’s mother had also “lived with the *535 child, adequately cared for the child, and did not relinquish to petitioner or abdicate her parental rights, duties, and responsibilities.” In re K.K.C., 292 S.W.3d at 793 (citing In re Kelso, 266 S.W.3d at 590–91; In re M.J.G., 248 S.W.3d 753, 757–58 (Tex.App.-Fort Worth 2008, no pet.)). In denying the ex-boyfriend’s standing, the court also relied on the “constitutional liberty interests retained by a fit parent adequately caring for her child” and “the statutory scheme for standing set forth in the family code.” With regard to the latter, the court specifically referenced family code section 102.003(a)(11) (frequently referred to as the “step-parent” standing provision), 102.004(a) (providing standing for close relatives of a child under certain circumstances), and 102.004(b) (providing standing to intervene in pending suit to grandparent or “person with substantial past contact with the child”). The court concluded that allowing standing under 102.003(a)(9), when the requirements of the other cited standing provisions had not been met, would “permit an ‘end run’ around specific restrictions in the [family code].” Id. at 795 (citing In re Derzapf, 219 S.W.3d 327, 332 (Tex.2007)); see Tex. Fam.Code Ann. §§ 102.003(a)(11), 102.004 (West 2008).

[31] To the extent that these two cases construe section 102.003(a)(9) to require that either (1) a parent or conservator have relinquished rights over a child or (2) that the person seeking standing have ultimate legal authority to control a child, we respectfully disagree. First, nothing in section 102.003(a) requires that a parent or other conservator have “voluntarily relinquished permanent care, control, and possession” or that the person seeking standing have legal control over the child. See Tex. Fam.Code Ann. § 102.003(a)(9); see also Smith, 2010 WL 3718546, at *3 (“Nothing in section 102.003(a)(9) requires that care, custody [sic], control and possession be exclusive.”). We cannot add words to a statute; that is solely the Legislature’s prerogative. See Lee v. City of Houston, 807 S.W.2d 290, 295 (Tex.1991) (“A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.”).

Second, requiring that the person seeking standing under section 102.003(a)(9) have the ultimate legal right to control a child, in addition to reading words into the text that are not there, would render the word “actual” superfluous at best and meaningless at worst. As discussed, “actual” is used in legal contexts to distinguish between something that exists in fact rather than as a function of legal implication. If the Legislature wanted to tie standing to persons with the legal right to control a child, it would have either omitted the word “actual” or included the word “legal.” But by using “actual” to modify “care, control, and possession,” the Legislature manifested its intent to confer standing on a person who had developed and maintained a relationship, of at least six months duration, with the child by virtue of that person’s actual care, control, and possession, as distinguished from a bare legal right of care, control, and possession.

In holding that standing under section 102.003(a)(9) turns on a legal right to make decisions of legal significance for the child and that the child’s parent have abdicated parental rights, duties, and responsibilities, the In re K.K.C. court relied on In re M.J.G., 248 S.W.3d at 757. See In re K.K.C., 292 S.W.3d at 793. In re M.J.G., however, addressed a challenge to the trial court’s finding that the person seeking standing did not have possession of the children in that case for any significant period of time and that the children were not left with that person for a six-month period of time. Although the court “declined to hold that the [person seeking standing] had ‘actual care, custody [sic], and control of the children,’” its holding was based on possession, not control. See In re M.J.G., 248 S.W.3d at 758–59. Accordingly, it does not support In re K.K.C.’s holding, nor does it inform our decision here.

As for In re K.K.C.’s reliance on Troxel and a parent’s constitutional “liberty interest in the care, custody, and control of their children,” see In re K.K.C., 292 S.W.3d at 792 (quoting Troxel v. Granville, 530 U.S. 57, 120 S.Ct.
We also differ with *Coons–Andersen,* (citing *West* 2008 & *Supp.* 2010); .006 (limitations on standing), .007 (standing for Title 20054, 147 L.Ed.2d 49 (2000)), we note initially that we are not presented here with a situation in which a parent’s constitutional rights are being challenged. Rather, we are faced with a situation where DFPS, a governmental entity that was named the children’s sole managing conservator because their biological parents’ parental rights were terminated, is attempting to deny standing to the people who performed a parent-like role while the children had lived with them for the past two years. Given these facts, we cannot say that a parent’s constitutional interest in the “care, custody, and control” of their child is implicated. *See Troxel,* 530 U.S. at 65, 120 S.Ct. 2054.

Regardless, however, *Troxel* involved a standing statute that the Supreme Court determined was “breathtakingly broad” because it allowed “[a]ny person [to] petition the court for visitation rights at any time” and “failed to provide any protection for the parent’s fundamental constitutional right to make decisions concerning the rearing of her own [children].” *Id.* at 67–70, 120 S.Ct. 2054 (quoting challenged statute) (emphases in original). In contrast to the statute in *Troxel,* section 102.003(a)(9) is narrowly tailored to give standing to only those persons who have exercised “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.” Presumably, a person would only be able to meet these requirements, absent violating some other law, with some type of parental or conservator consent, actual or constructive, such as where a parent leaves a child in the care of other people for more than six months. Thus, unlike the statute in *Troxel,* section 102.003(a)(9) does not violate a parent’s right to make decisions regarding their children; rather, it imposes potential legal consequences for certain types of parental decisions. *See In re Fountain,* No. 01–11–00198–CV, 2011 WL 1755550, at *5 (Tex.App.-Houston [1st Dist.] May 2, 2011, no pet. h.) (discussing section 102.003(a)(9) in view of Supreme Court’s decision in *Troxel*) (mem. op.).

We also differ with *In re K.K.C.*’s reasoning that construing section 102.003(a)(9) to apply to someone who lacks a legal right to control a child would create an “end-run” around the other standing provisions of the family code. *See In re K.K.C.*, 292 S.W.3d at 793–94 (citing *In re Derzapf*, 219 S.W.3d at 332). This contention implies that the family code’s standing provisions are mutually exclusive when they are not. *See Tex. Fam.Code Ann. §§ 102.003 (general standing), .004 (standing for grandparent or certain other relatives), .0045 (sibling standing), .005 (standing for termination and adoption), .006 (limitations on standing), .007 (standing for Title IV–D agency) (West 2008 & Supp. 2010); see also *Coons–Andersen,* 104 S.W.3d at 636 (“The purpose of section 102.003(a)(9) is to create standing for those who have developed and maintained a relationship with a child over time.”); *T.W.E. v. K.M.E.,* 828 S.W.2d 806, 808 (Tex.App.-San Antonio 1992, no writ)). Further, the supreme court in *In re Derzapf,* to which the *In re K.K.C.* cites for support for this proposition, specifically did not address whether *537* standing existed under section 102.003(a)(9). *See In re Derzapf,* 219 S.W.3d at 332. Instead, the supreme court held that because the trial court had granted access under the family code’s grandparent-access provision, *see Tex. Fam.Code Ann. § 153.433,* the grandparent’s standing had to be determined under the family code’s grandparent-standing provisions, *see id. § 102.004:*

Regardless of whether [the step-grandparent] satisfied section 102.003(a)(9)’s general standing requirements for filing a SAPCR—an issue we do not reach—the trial court awarded access based on the standards set forth in section 153.433, the grandparent access statute. As set forth above, [the step-grandparent] does not meet the more specific standing requirements to pursue a claim under that section. Concluding that [the step-grandparent seeking standing] had standing under section 102.003(a)(9) when access was granted based on chapter 153 would permit an end run around the requirements of section 153.432(a), a result the Legislature cannot have intended.

*In re Derzapf,* 219 S.W.3d at 332. Accordingly, *In re Derzapf* does not inform our decision here.

Based on the statutory text and the foregoing analysis, we hold that to establish standing under section 102.003(a)(9), the Jaseks had to show that they had actual control over K.E. and T.E.—meaning the actual power or authority to guide or manage K.E. and T.E. without regard to whether they had the legal or constructive power or authority to guide or manage K.E. and T.E.—for at least six months ending not more than 90 days preceding the date of the filing of their petition. *See Tex. Fam.Code Ann. § 102.003(a)(9).* The Jaseks’ pleadings and the evidence introduced at the hearing on DFPS’s motion to dismiss established that they did. Among other facts, the unchallenged pleadings and the undisputed evidence
showed:

- The Jaseks filed their petition on December 17, 2009.
- The Jaseks were obligated, under the terms of the Placement Authorization, to provide for K.E. and T.E.’s “daily care, protection, control, and reasonable discipline,” and to enroll them in school.
- DFPS does not contend that the Jaseks violated the terms of the Placement Authorization.
- The Jaseks provided K.E. and T.E.’s “basic needs for food, shelter, medical care, and therapeutic needs” and “structure, nurturing and therapeutic interventions,” as well as offering the girls time for recreational activities.
- The Jaseks provided “the structure, love and support necessary for [K.E. and T.E.] to be successful.”
- K.E. and T.E. “are very bonded with Mr. and Mrs. Jasek” and “happy in their home.”
- The Jaseks complied with the children’s doctors’ plan of medical treatment.
- The Jaseks enrolled K.E. and T.E. in school.
- The Jaseks were not the foster parents of K.E. and T.E.

We hold that, as a matter of law, the Jaseks had standing under family code section 102.003(a)(9) to file a suit affecting the parent-child relationship.

Finally, in its brief to this Court, DFPS emphasizes various unflattering facts and accusations regarding the Jaseks, including Philip Jasek’s positive marijuana test and alleged instances where the Jaseks subjected K.E. and T.E. to “extreme forms of punishment.” While these allegations may prove to be relevant to the district court’s ultimate decision on the merits of their petition to modify managing conservatorship, they are not relevant to whether the Legislature has given the Jaseks standing to bring their petition in the first place. Likewise, our holding that the Jaseks have standing to bring a case does not mean or imply that they will ultimately prevail.

We sustain the Jaseks’ first issue.

CONCLUSION

We reverse the district court’s judgment striking the Jaseks’ petition and remand the case to the district court for further proceedings consistent with this opinion.

All Citations

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