COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00234-CV

IN RE R.M. RELATOR

ORIGINAL PROCEEDING
TRIAL COURT NOS. D2010203, D2017021

MEMORANDUM OPINION[1]

Relator R.M. (Mother) seeks mandamus relief directing Respondent, the Honorable Ralph H. Walton, to vacate multiple orders signed in two cases—No. D2010203 and No. D2017021—from the 355th District Court of Hood County. In five issues, she contends that Respondent abused his discretion by signing the orders because (1) the real parties in interest, D.D.M. and D.B.M., lack standing to pursue relief in those cases; and (2) the trial court should have disqualified Richard Hattox, who represents D.D.M. and D.B.M., because he previously

[1]*See* Tex. R. App. P. 47.4, 52.8(d).

represented Mother and has a conflict of interest. We hold that in No. D2010203, D.D.M. and D.B.M. do not have standing; that in No. D2017021, D.D.M. does not have standing but D.B.M. does have standing; and that the trial court did not abuse its discretion by refusing to disqualify Hattox. We thus grant Mother's petition for writ of mandamus in part and deny the petition in part.

Background Facts

Mother has three children: B.A. (Braxton), E.A. (Emily), and D.B. (Daisy).[2] D.B.M. (Grandmother) is Daisy's paternal grandmother; she does not have a consanguineous relationship with Braxton or Emily. D.D.M. (Grandfather) does not have a consanguineous relationship with any of the children.[3]

In 2010, the Department of Family and Protective Services filed a lawsuit—No. D2010203—concerning Mother's relationship with Braxton and Emily. Hattox represented Mother in that case (the "2010 Case"). In February 2012, the Department nonsuited its petition, and at the end of February 2012 the trial court signed a dismissal order.

Five years later, in February 2017, Mother signed a "Family Team Plan" that recited the Department's concerns of Mother's "ongoing drug use" and stated that she had tested positive for opiates, that she had agreed to the

[2]To protect their anonymity, we identify the children through aliases. *See* Tex. Fam. Code Ann. § 109.002(d) (West Supp. 2017).

[3]For simplicity, we will refer to Grandmother and Grandfather collectively as "the grandparents" even though Grandfather does not have a blood relationship with the children.

grandparents' taking "custody of the children until [she could] receive needed services to address . . . drug use and become stable," and that she had agreed with the grandparents' hiring of "attorney Richard Hattox to complete the custody orders." That same month, Mother went to Hattox's office, where she signed a waiver in which she consented to Hattox's representing the grandparents:

> It is the desire of [Mother and Daisy's father] that the children be placed with [Grandmother] and that [Grandmother] has the right to discuss with and retain Richard L. Hattox to represent her and the children *without conflict to the fact that he has represented [Mother]* in a case regarding her children. [Emphasis added.]

In March 2017, the grandparents—represented by Hattox—filed two petitions. In the 2010 Case, the grandparents filed a "Petition to Modify Parent-Child Relationship" concerning Braxton and Emily. The grandparents also filed an original petition in No. D2017021 (the "New Case") concerning Daisy.

In both cases, the grandparents requested managing conservatorship of the children and pleaded that they had standing because the children had been placed with them by an agreement between the Department and Mother and that the children's circumstances with Mother significantly impaired their physical health or emotional development.

Mother hired a new attorney and in each case moved to strike the grandparents' petition for lack of standing and also moved to disqualify Hattox as the grandparents' counsel. With respect to the latter, Mother argued that Hattox's representation of the grandparents against her was a "violation of the conflict rules and [an] unwaivable conflict." Concerning the motions to strike, she argued

that no family-code provision gave the grandparents statutory standing and asserted that the grandparents had "made up their own standing requirement as claiming that the children were place[d] with them by the [Department]."

The trial court conducted an evidentiary hearing on all motions. At the hearing, the parties disagreed about what had happened during Mother's meeting with Hattox at his office, including the purpose and extent of Mother's conflicts waiver.

Mother's testimony

Mother testified that in signing the waiver, she had believed that she was merely consenting to the grandparents taking temporary guardianship of the children to avoid a foster-care placement and was consenting simply to Hattox's discussing the children with the grandparents. She believed that Hattox and the grandparents were "all on one team" with her. Mother referred to Hattox as her "trusted lawyer" and testified that Hattox had never explained his conflict of interest to her. Although she admitted having signed a document waiving Hattox's conflict of interest, she testified that Hattox had "deceived" her and had never asked her to waive confidentiality requirements. Mother further explained that she had never understood that the grandparents would be suing her to change her legal rights to the children. Mother characterized her arrangement with the grandparents as a "friendly agreement that turned disastrous and nightmarish."

Mary Hattox's testimony

Hattox's wife, Mary—who works in her husband's law office—testified that she had met with Mother in the office in February 2017 and that Mother had sought Hattox's help because she did not want the children placed in foster care. According to Mary, Mother wanted Hattox to "prepare the documents that would allow [the grandparents] to take the children out of state," and when Hattox explained his conflict of interest, she "begged" him to represent the grandparents and signed a document allowing him to do so. Mary testified that she had explained Hattox's conflict to Mother "over and over" and that Hattox had agreed to represent the grandparents only at Mother's insistence.

Grandmother's testimony

Grandmother testified that Mother had asked her to become involved in the children's lives, to legally seek the children's placement with her (Grandmother), and to hire Hattox to do so. She explained that Mother had understood that Hattox would be representing the grandparents in a legal action.

Richard Hattox's testimony

Hattox testified that he had "previously . . . represented" Mother "years ago." He also stated that when he had met with Mother most recently in February 2017, she had been "adamant and clear" that she wanted the children to get into "the custody, legal possession" of the grandparents. Although, according to Hattox, he had explained to Mother that a conflict of interest could prohibit him

from representing the grandparents, she had insisted and "begged" him to do so and had said that she "just didn't care." Hattox explained to Mother that he would "have to represent [the grandparents] and file legal paperwork to do it . . . and that's exactly what she asked [him] to do."

In addition, Hattox testified that he had told Mother that he would be representing the grandparents and that she ought to get her own attorney in that suit; in Hattox's recollection, Mother had replied that she "didn't intend to." Hattox then "filed the paperwork [he] had told everyone involved in the case that [he] would file." Hattox testified, "I believe [Mother's] decision to waive the conflict of interest . . . [was] voluntary on [her] part, especially with my urging [her] to reconsider [her] decision and [her] reluctance to do that."

Trial court's rulings

At the end of the hearing and after considering counsel's arguments, the trial court denied the motions to disqualify and the motions to strike, and granted primary, temporary custody of the children to the grandparents.

The Propriety of Mandamus Relief

In Mother's first issue, she contends that Respondent abused his discretion by denying her motions to disqualify Hattox from representing the grandparents. In her second through fifth issues, she argues that Respondent abused his discretion by denying her motions to strike because the grandparents do not have standing. We will discuss these two global issues in reverse order.

Mandamus standards

Mandamus relief is available to correct a clear abuse of discretion for which a relator has no adequate appellate remedy. *In re Meeker*, 497 S.W.3d 551, 555 (Tex. App.—Fort Worth 2016, orig. proceeding [mand. dism'd]). A trial court clearly abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *In re E.C.*, 444 S.W.3d 760, 763 (Tex. App.—Fort Worth 2014, orig. proceeding). "The relator has the burden to establish an abuse of discretion as well as the inadequacy of appeal as a remedy." *In re Fort Worth Star Telegram*, 441 S.W.3d 847, 853 (Tex. App.—Fort Worth 2014, orig. proceeding). A party's lack of standing to file a suit affecting the parent–child relationship affects the trial court's jurisdiction and may be addressed by mandamus relief. *See In re L.F.*, No. 02-17-00310-CV, 2017 WL 4684025, at *3 (Tex. App.—Fort Worth Oct. 19, 2017, orig. proceeding) (mem. op.) ("[M]andamus review is appropriate when the trial court's jurisdiction is challenged in a proceeding involving child custody issues. This is due to the unique and compelling circumstances presented when the trial court decides issues pertaining to child custody." (citations omitted)); *see also In re Bernhard*, No. 13-17-00251-CV, 2017 WL 2562682, at *1 (Tex. App.—Corpus Christi June 12, 2017, orig. proceeding) (mem. op.) ("Mandamus may be appropriate to review issues pertaining to standing in matters arising from temporary orders issued under the Texas Family Code.")

The grandparents' standing

Mother contends that the grandparents lacked standing to file a modification petition in the 2010 Case or to file the New Case involving Daisy. She argues that any such standing must be conferred by statute and that no section of the Texas Family Code confers standing on the grandparents under these facts.

Standing is a component of subject-matter jurisdiction that focuses on who may properly bring a claim. *Revell v. Morrison Supply Co.*, 501 S.W.3d 255, 259 (Tex. App.—Fort Worth 2016, no pet.). A court must have subject-matter jurisdiction to adjudicate a dispute; without it, the court may not reach the case's merits. *Id.* We determine standing based on circumstances that exist at the beginning of a case. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 78 (Tex. 2015).

As we have recently explained,

> When standing has been conferred by statute, the statute itself should serve as the proper framework for the standing analysis. If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. In Texas, standing in the context of a suit affecting the parent-child relationship (SAPCR) is governed by the family code; a party seeking relief in such a suit must plead and establish standing within the parameters of the language used in the code.

L.F., 2017 WL 4684025, at *2 (citations omitted).

In this court the grandparents rely only on family code section 102.004 to support their standing in both underlying cases. *See* Tex. Fam. Code Ann. § 102.004 (West Supp. 2017). Section 102.004(a) states that a

> grandparent, or another relative of the child related within the third degree by consanguinity, may file an 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; or
> >
> > (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

Id. § 102.004(a)(1)–(2).

We have previously determined that a "grandparent" under this section includes only someone who has a consanguineous relationship with the child. *In re E.C.*, No. 02-13-00413-CV, 2014 WL 3891641, at *3 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.) (mem. op.) ("W.F., E.C.'s step-grandfather, lacks standing under section 102.004(a) because he is not related to E.C. by consanguinity."); *In re Russell*, 321 S.W.3d 846, 859 (Tex. App.—Fort Worth 2010, orig. proceeding [mand. denied]); *see In re A.M.S.*, 277 S.W.3d 92, 99 (Tex. App.—Texarkana 2009, no pet.) ("Since there is no evidence that Larry was related to the child within three degrees of consanguinity, he lacked standing under Section 102.004.").

The grandparents here do not have such a relationship with either Braxton or Emily, and Grandfather does not have such a relationship with Daisy. We therefore hold that the grandparents do not have standing under section 102.004(a) to pursue relief in No. D2010203 (the 2010 Case regarding Braxton and Emily) and that Grandfather does not have standing to pursue relief in No. D2017021 (the New Case regarding Daisy). *See* Tex. Fam. Code Ann. § 102.004(a); *E.C.*, 2014 WL 3891641, at *3. We also hold, however, that the trial court did not err by concluding that based on Daisy's parents' consent to the suit in the New Case (as established in part by Hattox's and Grandmother's testimony),[4] Grandmother has standing to pursue relief in that case because she is Daisy's blood relative. *See* Tex. Fam. Code Ann. § 102.004(a)(2); *see also A.M.S.*, 277 S.W.3d at 98 ("Oral consent, given by the proper party and established in the record, is sufficient to grant standing under Section 102.004 . . . .").

The grandparents also appear to rely on section 102.004(b) to support their standing in both cases. Section 102.004(b) states that a court may grant a grandparent or other person having substantial past contact with the child "*leave to intervene in a pending suit*" if the court is satisfied 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

[4]This evidence shows that Daisy's father, along with Mother, consented to the grandparents' suit.

development." Tex. Fam. Code Ann. § 102.004(b) (emphasis added). Here, neither underlying case was "pending" at the time of the grandparents' petitions. In the New Case, the grandparents filed the original and an amended petition. There was also no "pending" suit in the 2010 Case, as it had been dismissed years earlier based on the Department's nonsuit in 2012. Indeed, although the grandparents filed a modification petition under the cause number of the 2010 Case, the mandamus record does not contain any order that could have been modified in the first place. *See* Tex. Fam. Code Ann. § 155.001(a) (West Supp. 2017) (stating that a court acquires continuing, exclusive jurisdiction over a child "on the rendition of a final order"), § 156.001 (West 2014) ("A court *with continuing, exclusive jurisdiction* may modify an order that provides for the conservatorship, support, or possession of and access to a child." (emphasis added)). The 2012 dismissal arising from the Department's nonsuit extinguished the 2010 Case and rendered it as if it had never been brought. *Christus Santa Rosa Health Care Corp. v. Botello*, 424 S.W.3d 117, 124 (Tex. App.—San Antonio 2013, pet. denied); *In re Damm*, No. 05-05-00432-CV, 2005 WL 737322, at *1 (Tex. App.—Dallas Apr. 1, 2005, orig. proceeding [mand. denied]) (mem. op.).

Finally, although the grandparents do not rely in this court on section 102.003, which sets out a number of situations giving rise to standing generally, we have reviewed the potential grounds for their standing under that section and

conclude that none support standing under these circumstances or for either case. *See* Tex. Fam. Code Ann. § 102.003(a) (West Supp. 2017).

For all these reasons, we conclude that the trial court clearly abused its discretion by denying Mother's motion to strike based on the grandparents' lack of standing in the 2010 Case and that mandamus relief is appropriate to correct that decision. *See L.F.*, 2017 WL 4684025, at *3; *Meeker*, 497 S.W.3d at 555. We also conclude that the trial court clearly abused its discretion and that mandamus relief is appropriate in the New Case to the extent that the trial court denied Mother's motion to strike on the basis that Grandfather lacked standing. *See L.F.*, 2017 WL 4684025, at *3; *Meeker*, 497 S.W.3d at 555. But we conclude that the trial court did not clearly abuse its discretion by denying Mother's motion to strike based on her assertion of Grandmother's lack of standing in No. D2017021, the New Case.

Based on these conclusions, we sustain Mother's second and third issues in her mandamus petition, sustain Mother's fourth and fifth issues in part, and overrule Mother's fourth and fifth issues in part.

Mother's motion to disqualify Hattox

The remaining issue, then, is whether the trial court abused its discretion by denying Mother's motion to disqualify Hattox in the New Case. *See In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding) (recognizing that an

appellate court reviews a trial court's decision on a motion to disqualify counsel for an abuse of discretion).

In her mandamus petition, Mother relies on disciplinary rule of professional conduct 1.06 to contend that Hattox had a conflict of interest that prevented his representing the grandparents. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013). Rule 1.06 concerns the simultaneous representation of two parties when the attorney has a conflict between them. *See id.* The decisional authority that Mother relies on also concerns simultaneous and conflicting representation of multiple parties. *See In re Posadas USA, Inc.*, 100 S.W.3d 254, 256 (Tex. App.—San Antonio 2001, orig. proceeding). But Hattox is not presently purporting to represent the interests of both Mother and the grandparents; in fact, he testified that he "previously . . . represented" Mother "years ago," that he advised Mother to seek her own counsel in deciding whether to waive his conflict of interest, and that he told Mother to seek separate counsel in the present cases. The waiver that Mother signed stated that Hattox had represented Mother in the past but that he was presently representing Grandmother. We thus conclude that rule 1.06 does not apply here.

Rule 1.09, relating to an attorney's conflict of interest between current representation of a client and prior representation of a former client, more appropriately fits this case. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a)

cmt. 2, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013) (stating that rule 1.09 "concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client"); *In re N.P.H.*, No. 09-15-00010-CV, 2016 WL 5234599, at *9 (Tex. App.—Beaumont Sept. 22, 2016, no pet.) (mem. op.) (explaining that rule 1.06 "applies to conflicts that may be incurred by attorneys attempting to represent opposing parties in the same litigation" while rule 1.09 concerns "conflicts that may arise between an attorney and the attorney's *former* clients").

Rule 1.09(a) states:

> (a) *Without prior consent*, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> > (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
> >
> > (2) if the representation in reasonable probability will involve a violation of Rule 1.05;[5] or
> >
> > (3) if it is the same or a substantially related matter.

Tex. Disciplinary Rules Prof'l Conduct R. 1.09(a) (emphasis added). Rule 1.09 is "primarily for the protection of clients[,] and its protections can be waived by them." *Id.* cmt. 10. A waiver is effective "only if there is consent after disclosure of

[5]Rule 1.05 protects against disclosure of confidential information. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.05, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013).

the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate." *Id.*

The testimony of Richard Hattox and Mary Hattox, viewed in the light most favorable to the trial court's decision to deny Mother's disqualification motion, establishes that they each repeatedly advised Mother about Hattox's conflict of interest in representing the grandparents and, despite this advice, that Mother was "adamant and clear" about waiving the conflict and allowing the representation. Hattox testified that Mother was "clear" about getting the children into the grandparents' legal custody. He also testified that he told Mother that conservatorship of the children by the grandparents would need to occur "legally through the courts . . . and that's exactly what [Mother] asked [him] to do." Hattox believed that "[he] did all [he] could do to dissuade" Mother, but she insisted. According to Hattox, he then "filed the paperwork [he] had told everyone involved in the case that [he] would file." The trial court was entitled to reject Mother's contrary testimony.

Based on the Hattoxes' testimony and the remaining evidence in the mandamus record, we hold that the trial court did not abuse its discretion by implicitly finding that Mother consented to the conflict under rule 1.09 and by denying Mother's motion to disqualify. *See Sanders*, 153 S.W.3d at 56; *see also In re Cerberus Capital Mgmt.*, 164 S.W.3d 379, 380–82 (Tex. 2005) (granting mandamus relief from a trial court's disqualification of counsel because the prior

client gave effective consent under rule 1.09). We overrule the first issue in Mother's mandamus petition.

Conclusion

Having sustained Mother's second and third issues and having sustained parts of her fourth and fifth issues, we hold that she is entitled to mandamus relief. We conditionally grant her mandamus petition in part. In No. D2010203 (the 2010 Case), we direct Respondent to set aside his May 11, 2017 "Order on Motion to Strike for Lack of Standing," in which he found that the grandparents had standing. Because the grandparents lack standing in that case, we also direct Respondent to set aside his June 23, 2017 "Temporary Orders in Suit Affecting the Parent-Child Relationship." We direct Respondent to dismiss the grandparents' petition in that cause for want of jurisdiction. *See* Tex. R. App. P. 52.8(c); *L.F.*, 2017 WL 4684025, at *3; *In re Kelso*, 266 S.W.3d 586, 591 (Tex. App.—Fort Worth 2008, orig. proceeding).

In No. D2017021 (the New Case), we direct Respondent to set aside his May 11, 2017 "Order on Motion to Strike for Lack of Standing" to the extent that the order rests on the trial court's finding that Grandfather has standing. Accordingly, in that cause, we also direct Respondent to set aside his September 21, 2017 "Temporary Orders in Suit Affecting the Parent-Child Relationship" to the extent that the order grants relief to Grandfather concerning Daisy's care and conservatorship. We direct Respondent to dismiss Grandfather's pleading in the

New Case. *See* Tex. R. App. P. 52.8(c); *L.F.*, 2017 WL 4684025, at *3; *Kelso*, 266 S.W.3d at 591.

Having overruled Mother's first issue and parts of her fourth and fifth issues, we deny all other relief requested within Mother's mandamus petition. *See* Tex. R. App. P. 52.8(a).

We are confident that Respondent will promptly comply with the relief ordered in this opinion. Our writ will issue only if he does not.

ELIZABETH KERR
JUSTICE

PANEL: WALKER, KERR, and PITTMAN, JJ.

DELIVERED: November 16, 2017