

AFFIRMED; Opinion Filed August 21, 2017.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-16-00524-CV

IN THE INTEREST OF P.W., A CHILD

**On Appeal from the 255th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-15-17767**

MEMORANDUM OPINION

Before Justices Evans, Stoddart, and Boatright
Opinion by Justice Evans

Appellant C.L. appeals from the trial court's order dismissing her suit affecting parent-child relationship (SAPCR) concluding she lacked standing to bring the action. In three issues, C.L. contends (1) she presented sufficient evidence to support her claim for standing pursuant to section 102.003(a)(9) of the family code, (2) the trial court erred in prematurely granting a motion for judgment against her, and (3) the jurisdictional facts should have been determined by the trier of fact at the trial on the merits. We affirm the trial court's dismissal order.

BACKGROUND

C.L. testified that she and M.W. began their relationship in July 2007. In October 2010, M.W. gave birth to P.W.¹ after which the three lived together in the same home until December

¹ C.L.'s original petition and notice of appeal identifies the child as P.L-W. However, her second amended petition is styled *In re P.W.* C.L. testified that M.W. changed the child's name in September 2015 to delete C.L.'s last name from the child's name.

2013 when the couple ended their relationship.² About two months later, C.L. established her own residence. But she continued to have visitation with and provide financial assistance for the child until her last visit on November 1, 2015. C.L. filed this lawsuit on September 17, 2015 seeking to be named as a joint managing conservator of the child with possession and access to the child. C.L. alleged she had standing to bring her suit pursuant to section 102.003(a)(9) of the family code because she “has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition.” M.W. filed a plea to the jurisdiction challenging C.L.’s standing. After an associate judge denied the plea, M.W. requested a de novo hearing on the jurisdictional issue.³ Following a hearing at which only C.L. testified, the trial court granted M.W.’s plea to the jurisdiction and dismissed C.L.’s lawsuit. This appeal followed.

ANALYSIS

A. Plea to the Jurisdiction

In her first issue, C.L. challenges the trial court’s granting of M.W.’s plea to the jurisdiction. Specifically, C.L. argues the trial court erred in concluding she lacked standing under section 102.003(a)(9) because the record contains evidence that she has had actual care, control and possession of P.W. for the statutorily required period. A plea to the jurisdiction challenges the trial court’s authority to determine the subject matter of the action and if successful, will defeat a claim without regard to its merits. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). Standing is a prerequisite to a trial court’s subject matter jurisdiction. *Id.* at 553. Where, as here, the plea to the jurisdiction challenges the existence of jurisdictional facts, but the jurisdictional facts do not implicate the merits of the plaintiff’s case,

² C.L. is not biologically related to P.W. which C.L. and M.W. knew at all times.

³ C.L. requested a de novo hearing on the associate judge’s ruling denying her request for temporary orders.

the trial court considers evidence only to the extent necessary to resolve the jurisdictional issues presented. *See Tex. Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004). Whether a determination of subject matter jurisdiction can be made in a preliminary hearing or should await fuller development of the merits of the case must be left largely to the trial court’s sound exercise of discretion. *Id.* at 227. When the jurisdictional facts are undisputed, the trial court rules on the plea to the jurisdiction as a matter of law and we review that ruling de novo. *See Lopez v. Tex. State Univ.*, 368 S.W.3d 695, 700 (Tex. App.—Austin 2012, pet. denied). When the jurisdictional facts that do not implicate the merits are disputed, however, the trial court makes the necessary fact findings to resolve the jurisdictional issue, which, when challenged, we review for legal and factual sufficiency. *See id.* at 700–01. Where, as here, the trial court does not make findings of fact and conclusions of law, we draw every reasonable inference supported by the record in favor of the trial court’s judgment, review the implied findings for legal and factual sufficiency, and review implied legal conclusions de novo. *See In re I.I.G.T.*, 412 S.W.3d 803, 806 (Tex. App.—Dallas 2013, no pet.). Under both standards, the trial court is the sole judge of witness credibility and the weight to be given their testimony and we do not disturb the trial court’s resolution of evidentiary conflicts that turn on credibility determinations or the weight of the evidence. *Id.*

A petitioner seeking conservatorship over a child must plead and establish she has standing to file a SAPCR under the family code provisions. *See In re M.K.S-V.*, 301 S.W.3d 460, 464 (Tex. App.—Dallas 2009, pet. denied). Among the statutorily authorized categories of persons authorized to file a SAPCR are those persons, other than foster parents, who have had “actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition” *See* TEX. FAM. CODE ANN. § 102.003(a)(9) (West Supp. 2016). The purpose of subsection (a)(9) is to give standing to a person who has

developed and maintained a relationship with a child over time. *See In re E.G.L.*, 378 S.W.3d 542, 547 (Tex. App.—Dallas 2012, pet. denied).

When computing the time necessary for standing under subsection(a)(9), the court “may not require that the time be continuous and uninterrupted, but shall consider the child’s principle residence during the relevant time preceding the date of commencement of the suit.” TEX. FAM. CODE ANN. § 102.003(b) (West Supp. 2016). A principle residence is (1) a fixed place of abode; (2) occupied consistently over a substantial period of time; (3) which is permanent rather than temporary.” *See In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.) (citing *Doncer v. Dickerson*, 81 S.W.3d 349, 362 (Tex. App.—El Paso 2002, no pet.)). A determination of standing under this section is necessarily fact specific and resolved on an ad hoc basis. *Id.* Accordingly, such determinations are situations where the trial court is the sole judge of witness credibility and the weight to be given their testimony and we do not disturb the trial court’s resolution of evidentiary conflicts that turn on credibility determinations or the weight of the evidence. *See In re I.I.G.T.*, 412 S.W.3d at 806 (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005) and *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003)).

C.L. filed her SAPCR on September 17, 2015. Accordingly, we examine the record for evidence that C.L. had actual care, control, and possession of the child for at least six months not ending prior to June 17, 2015 (90 days before C.L. sued). At the hearing on February 4, 2016, C.L. testified that after her relationship with M.W. ended, the two verbally agreed the child would spend an equal amount of time with each of them and that C.L. would continue to make decisions for her as a mother. C.L. further indicated that since December 2013, the child had consistently stayed with her three or four nights per week. According to C.L., the child had her own bedroom at her residence since February of 2014 and has her own clothes and toys at C.L.’s home. C.L. also indicated she provided financial support for the child’s medical and school

expenses including doctor bills, and one-half of the child's uncovered heart surgery expenses. C.L. indicated she last gave money to M.W. for the child's expenses in October 2015. During her periods of possession, C.L. dropped off and picked up the child from school and could pick up the child from school if she was sick. C.L. indicated the school knew C.L. as the child's mother, although she did not explain the basis for this statement. C.L. stated she also administered medication to the child if she was sick as documented in July 2015 exchange of texts admitted into evidence where C.L. and M.W. discussed the child's fever on an overnight visit with C.L. resulting in C.L. administering Tylenol to the child. Also admitted into evidence was a "Happy Mother's Day" collage C.L. testified was given to her by M.W. in 2013, pictures taken in September 2015 of the child's room at C.L.'s home, and an online calendar C.L. testified showed C.L.'s visitation and possession of the child from June 2014 through September 2015. According to C.L., she filed this lawsuit after M.W. sent her a text in September 2015 stating she would not be able to see the child. C.L. stated after that text, M.W. informed her she was unhappy with the current visitation schedule and wanted C.L. to have visitation alternating weekends and one night a week.

On cross-examination, C.L.'s credibility was questioned regarding a representation she had previously made to the court about whether she had posted anything on the internet about the child being taken away from her. She denied she had testified falsely, did not testify clearly whether at the time she testified she had deleted information posted to the internet with M.W.'s name, admitted posting a link to the dispute with facts about the child which she claimed was in the child's best interest. She also admitted there was no written custody agreement between her and M.W. C.L. admitted the calendar indicated she had the child on at least some dates when she did not have the child, but she could not identify which dates. C.L. was also questioned about a text she wrote to M.W. complaining M.W.'s mother sees the child more than C.L. C.L.

testified she made decisions for the child but provided only specific examples where she consulted with M.W. about decisions M.W. made for her child.

On appeal, M.W. argues that C.L.'s testimony was too vague and contradictory to be considered probative evidence. We agree. Although pictures of the child's room showed a bed, C.L. admitted the room had no bed through July 2015. C.L. also admitted the online calendar wasn't necessarily updated if possession was not exercised or changed. Likewise, C.L. testified that after she and M.W. separated, they agreed the child would spend an equal amount of time with each of them, but it is unclear from the evidence whether this was intended as a permanent or temporary arrangement. C.L. testified having the bed in the child's room indicated to her the visitation periods being set up were intended to be a permanent arrangement, suggesting that C.L. did not view the arrangement permanent before July 2015. Based on the evidence before it, and giving due deference to the trial court's determinations on credibility and the weight to be given the evidence, we conclude the evidence was legally and factually sufficient to support the trial court's implied finding that for the relevant time period before suit was filed, the parties did not intend C.L.'s home or her possession of the child to be a permanent arrangement. *See In re I.I.G.T.*, 412 S.W.3d at 809 (affirming dismissal when evidence showed child's residing with appellant was not intended to be permanent arrangement). We therefore conclude the trial court did not err by granting the plea to the jurisdiction and dismissing C.L.'s lawsuit. We resolve C.L.'s first issue against her.

B. Motion for Judgment

In her second issue, C.L. complains the trial court erred in prematurely granting a motion for judgment against her before she had been given a full opportunity to present all her evidence and rest her case. At the beginning of the hearing, the trial court informed each side was limited to thirty minutes. Although C.L.'s attorney requested additional time, the trial court denied the

request. C.L. then took the stand to testify. At the conclusion of C.L.'s cross-examination by M.W.'s attorney, the following exchange occurred: "Pass the witness. Although I'm not sure who I'm passing to because I don't know what time is left." C.L.'s attorney informed the court she had "two quick questions" which the court allowed her to ask. After C.L. answered the questions, her attorney said "thank you." M.W.'s attorney then stated, "At this time before I call my witnesses, I'd like to move for a directed verdict." C.L.'s attorney did not object to the motion for judgment, inform the court that she had additional evidence to present or otherwise indicate that she had not yet rested her case. Because C.L. did not present the complaint she now raises on appeal to the trial court, it has not been preserved for our review. *See* TEX. R. APP. P. 33.1. We resolve C.L.'s second issue against her.

C. Deferral of Jurisdictional Issue to Trial on Merits

In her third issue, C.L. contends the trial court erred in failing to defer the standing issue until the trial on the merits. C.L. argues that "the very nature of standing in this case and its fact specific requirements creates a fact issue regarding the jurisdictional issue" that should have been resolved by the factfinder at trial. We do not agree. Only when disputed jurisdictional facts implicate the underlying merits of a case should the jurisdictional issue be deferred to trial. *See Miranda*, 133 S.W.3d at 226. When the issue of subject matter jurisdiction requires the examination of evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, "mindful that this determination must be made as soon as practicable." *Id.* at 227. C.L. has not shown the trial court abused its discretion in addressing the standing issue in a preliminary hearing and has provided no argument or authority to support her contention that a factual dispute relating to C.L.'s standing implicates the underlying merits of

her cause of action. Accordingly, C.L. has failed to show the trial court erred in failing to defer the standing issue until a trial on the merits. We resolve C.L.'s third issue against her.

CONCLUSION

We affirm the trial court's dismissal order.

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/David W. Evans/
DAVID EVANS
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

IN THE INTEREST OF P.W., A CHILD,
No. 05-16-00524-CV

On Appeal from the 255th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DF-15-17767
Opinion delivered by Justice Evans, Justices
Stoddart and Boatright participating.

In accordance with this Court's opinion of this date, the trial court's order of dismissal is **AFFIRMED**.

It is **ORDERED** that appellee Mary Wall recover her costs of this appeal from appellant Connie Lewis.

Judgment entered this 21st day of August, 2017.