**Opinion issued September 9, 2021**

**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-20-00003-CV**

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**IN THE INTEREST OF M.B., a child**

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**On Appeal from the 315th District Court**
**Harris County, Texas**
**Trial Court Case No. 2018-00243J**

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## MEMORANDUM OPINION

After the parental rights of M.B.'s parents were terminated, M.B.'s maternal great-grandmother, Jeane Gardiner, petitioned to modify conservatorship to appoint her, instead of the Texas Department of Family and Protective Services, as M.B.'s conservator. M.B.'s foster parents intervened and moved to strike

Gardiner's petition for lack of standing. The trial court granted their motion and struck Gardiner's petition. She appealed the order.

Because the order Gardiner appeals was not a final judgment and she points to no statutory authorization for an interlocutory appeal of the order, we dismiss the suit for lack of appellate jurisdiction.

## Background

When M.B. ("Michael") was about three months old, his mother, K.L.S., entered an assistance facility seeking temporary housing. She had Michael with her. The mother had a history of drug use and had had her parental rights to six older children terminated.

The Department of Family Protective Services intervened due to concerns about the mother's ability to provide a stable environment and care for Michael. In January 2018, the Department was named Michael's managing conservator. The Department sought termination of the mother's parental rights to Michael. The Department's goal was adoption by his foster parents.

Michael lived with his adoptive foster parents for more than a year. According to trial testimony, he became well bonded with the adoptive placement, including another child in the home. All the while, Michael's maternal great-grandmother, Jeane Gardiner, attended court hearings on his conservatorship and placement. According to the Department, Gardiner never showed any interest in

assuming primary responsibility for Michael. Gardiner disputes the Department's claim. She asserts that she was always willing to be Michael's conservator, though she preferred that a younger family member step in, if possible. Gardiner had adopted two of Michael's older siblings when the mother's parental rights were terminated as to those children. She wanted Michael to be with family, but she preferred that a younger relative take primary responsibility for Michael.

The foster parents actively pursued adoption of Michael as the case progressed. They testified that it was important to them that Michael maintain a relationship with his family members during his childhood. In support of that goal, Gardiner and other relatives were permitted visits with Michael preceding the termination trial.

One year after Michael came into the Department's case, the parental rights of both of his parents were terminated under Subsections N (constructive abandonment) and O (failure to comply with court order). The Department was appointed sole managing conservator in January 2019 when Michael was 15 months old.

Less than three months later, Gardiner filed a petition in intervention seeking to be named Michael's sole managing conservator. The foster parents, who had a pending suit for adoption in another court, also petitioned to intervene. Along with that pleading, they filed various motions to challenge Gardiner's standing to seek

conservatorship, including a motion to strike her petition for lack of standing, a motion to deny Gardiner relief, and a plea to the jurisdiction and motion to dismiss based on her lack of standing. They also sought to consolidate their suit to adopt Michael with Gardiner's suit for conservatorship.[1] In several of their filings, including their petition to intervene, the adoptive foster parents asserted a claim against Gardiner for attorney's fees.

Gardiner amended her petition to intervene. The last version was an amended petition to modify the parent-child relationship in which she asserted that she had standing under Family Code sections 102.004(a)(1) and 102.006(c) and sought appointment as Michael's sole managing conservator. In an unsworn declaration, Gardiner made various assertions in support of her standing argument, including that it would threaten Michael's emotional health to be raised by non-family members given that his siblings had been taken in by family members, Gardiner had adopted two of those siblings and was able and willing to take Michael in too.

The trial court held permanency hearings throughout the suit. Gardiner attended these hearings and testified at some of them, as did the foster parents. After each hearing, the court maintained placement with the foster parents.

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[1] The record does not contain an order ruling on the motion to consolidate.

In August 2019, the trial court held a hearing on the foster parents' motions challenging Gardiner's standing. Gardiner and the foster parents testified. The foster parents argued that Gardiner had not met the standard for standing under Section 102.004(a)(1) because, first, she had not shown that Michael's circumstances would significantly impair his physical health or emotional development and, second, Gardiner was disqualified from conservatorship because she was not one of the categories of relatives excepted from the prohibition on family members' suing after a parental termination. TEX. FAM. CODE §§ 102.004(a)(1), 102.006.

Gardiner testified that she met her evidentiary burden for standing with her testimony that keeping Michael from being raised by family members who wanted him in light of siblings being taken in by those same family members would be devastating for him when he realized he was the only one not taken in. And she argued that she was one of the categories of relatives excepted from the post-termination prohibition on suing under Section 102.006 because the statutory term "grandparent" includes a great-grandmother.

The trial court granted the foster parents' motion to strike Gardiner's petition. It did not rule on the combination plea to the jurisdiction and motion to dismiss, concluding that its ruling on the motion to strike removed any "need" to rule on the other pending motions. In the same order, the trial court ordered the

Department to file a verified timeline of its efforts to place Michael with a relative and a copy of the home study completed on Gardiner. The order did not resolve the adoptive foster parents' claim for attorney's fees. Nor did it contain any finality language.

Gardiner filed a notice of appeal, seeking to overturn the trial court's order striking her petition. Gardiner is the appellant; the Department is the appellee. The adoptive foster parents are not a named party to the appeal.

The next month, the trial court held another permanency hearing, and Gardiner testified. The trial court maintained placement with the foster parents but ordered that Gardiner have overnight weekend visitation every other week until the next placement hearing.[2]

Gardiner and the Department filed briefs arguing the merits of the order, including whether a great-grandparent qualifies as a "grandparent" under Section 102.006. Neither party has briefed the issue of our appellate jurisdiction over these claims and the trial court's order. Yet we are required to consider our appellate jurisdiction even if the parties do not raise it. Thus, we notified the parties, before

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[2] The appellate record contains a docket sheet with notations regarding even later events, including an entry indicating that the trial court concluded it was in Michael's best interest to be placed with Gardiner and ordered the Department to place him with her in December 2019. A rotation schedule was listed on the docket sheet indicating the dates Michael would move between Gardiner's home and the foster parents' home. The docket sheet has notations about a "bonding assessment ordered" and a "de novo hearing set" for the following month.

oral argument, that they should be prepared to address appellate jurisdiction during their oral argument.

Shortly before oral argument, the adoptive foster parents filed an emergency motion to abate or dismiss the appeal. Their motion states that, after the parental rights of both of Michael's parents were terminated, another court approved their adoption of Michael. They were now Michael's parents and, they argued, any effort by Gardiner to pursue conservatorship of Michael was mooted.

Nowhere in the parties' briefing had there been any mention of Michael having been adopted. Gardiner and the Department responded to this turn of events by stating that they were unaware of the adoption.

The adoptive parents argue in their emergency motion that the appeal should be abated to allow them time to intervene and participate or that the appeal should be dismissed because Gardiner lacked standing and because their subsequent adoption of Michael mooted her appellate issues.

We held oral arguments. The foster parents were permitted to observe but not participate.

## Jurisdictional Analysis

We begin with whether this Court has jurisdiction over this appeal.

## A. Applicable law

The general rule is that an appeal may only be taken from a final judgment. *Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) (per curiam). A judgment is considered final if it disposes of all pending parties and claims in the record. *Guajardo v. Conwell*, 46 S.W.3d 862, 863–64 (Tex. 2001) (per curiam); *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 192 (Tex. 2001). When there is no conventional trial on the merits, a judgment is final for purposes of appeal only if it (1) disposes of all claims and parties before the court, regardless of its language or (2) states with unmistakable clarity that it is a final judgment. *Guajardo*, 46 S.W.3d at 863–64; *Lehmann*, 39 S.W.3d at 192, 200. The intent to finally dispose of the case must be expressed in the words of the order itself. *Lehmann*, 39 S.W.3d at 200. If other claims remain in the case, "an order determining the last claim is final." *Id.* Whether an order is a final judgment for purposes of appeal is determined from the order's language and the record in the case. *Id.* at 195.

Appellate courts lack jurisdiction to review interlocutory orders unless a statute specifically authorizes an exception to the general final-judgment rule. *Qwest Commc'ns Corp.*, 24 S.W.3d at 336; *N.E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

Courts have continuing jurisdiction over a minor who is the subject of a termination order and for whom the Department has been named managing conservator. *See* TEX. FAM. CODE § 155.001(a) ("Except as otherwise provided by this section, a court acquires continuing, exclusive jurisdiction over the matters provided for by this title in connection with a child on the rendition of a final order."); *In re Tex. Dep't of Fam. & Protective Servs.*, 245 S.W.3d 42, 49–50 (Tex. App.—Austin 2007, no pet.) ("When the court entered a final order . . . terminating the parental rights of C.L.H. and C.M.H.'s biological parents and establishing the Department as the permanent managing conservator, the court acquired continuing jurisdiction over C.L.H. and C.M.H. and retained the power to make future modifications to its order.").[3]

A motion to modify conservatorship begins a new suit, and modification orders are final and appealable as they issue. *In re Velez-Uresti*, 361 S.W.3d 200, 202 (Tex. App.—El Paso 2012, pet. denied); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 282 (Tex. App.—Austin 2002, no pet.) (comparing conservatorship modification orders to protective orders). But an order that dismisses a petition to modify

[3] There is an exception to the requirement that future litigation concerning a child be filed in the court with continuing, exclusive jurisdiction. "A suit in which adoption is requested may be filed in the county where the child resides or in the county where the petitioners reside, regardless of whether another court has continuing exclusive jurisdiction under Chapter 155." TEX. FAM. CODE § 103.001(b). "Except as provided by Section 155.201, a court that has continuing exclusive jurisdiction is not required to transfer the suit affecting the parent-child relationship to the court in which the adoption suit is filed." *Id.*

conservatorship is not a modification order and thus falls outside the rule that modification orders and final and appealable. *In re A.S.*, No. 02-18-00400-CV, 2019 WL 5996981, at *3 (Tex. App.—Fort Worth Nov. 14, 2019, no pet.) (mem. op.). For a dismissal of a modification suit to be immediately appealable, it must satisfy the general rule for finality: dispose of all claims and parties. *See In re C.K.M.*, No. 09-14-00172-CV, 2014 WL 4363742, at *1 (Tex. App.—Beaumont Sept. 4, 2014, no pet.) (mem. op.) (dismissing appeal for lack of jurisdiction where party appealed an order granting a motion to strike pleadings and dismiss suit for conservatorship because order neither disposed of all parties and all claims nor contained finality language).

**B. Analysis**

The adoptive foster parents intervened in Gardiner's suit to modify conservatorship. They requested dismissal of Gardiner's claim due to lack of standing. And they claimed attorney's fees.

The trial court granted the intervenors' motion to strike Gardiner's petition to modify conservatorship. That order contains no language of finality. In fact, it does the opposite. It orders additional actions to occur in the case: the Department is ordered to file a verified timeline detailing its earlier efforts to place Michael with a relative and file a copy of the home study done on Gardiner and her

residence. And, significantly, the order leaves unresolved the intervenors' claim for attorney's fees.

Because the order neither contained language of finality nor resolved all claims by all parties, it was not a final judgment. *See McNally v. Guevara,* 52 S.W.3d 195, 196 (Tex. 2001) (judgment was not final and appealable in part because "it did not dispose of the defendants' claim for attorney fees"). Without a final judgment, this Court will not have appellate jurisdiction unless there is a statutory authorization of appellate jurisdiction over this type of interlocutory order. Gardiner points us to none. Nor are we aware of any.

Because there is no final judgment in this case, we must dismiss the appeal for lack of appellate jurisdiction. *In re C.K.M.*, 2014 WL 4363742, at *1 (dismissing appeal of order granting motion to strike pleading in conservatorship suit for lack of appellate jurisdiction because order was not a final judgment) (mem. op.); *see In re E.S.*, No. 14-14-00328-CV, 2015 WL 1456979, at *2–3 (Tex. App.—Houston [14th Dist.] Mar. 26, 2015, no pet.) (mem. op.) (dismissing appeal of suit affecting parent-child relationship for lack of appellate jurisdiction because order neither disposed of all parties and all claims nor contained language of finality); *cf. In re Martin*, 523 S.W.3d 165, 170 (Tex. App.—Dallas 2017) (orig. proceeding) (challenge to order denying motion to dismiss grandparents' petition to modify parent-child relationship was reviewable by mandamus).

## Conclusion

We dismiss the suit for lack of jurisdiction. The adoptive parents' motion to abate is denied.

Sarah Beth Landau
Justice

Panel consists of Justices Goodman, Landau, and Guerra.