



Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-20-00274-CV

IN THE INTEREST OF T.D.L., a Child

From the 218th Judicial District Court, Wilson County, Texas
Trial Court No. CVW2000108
Honorable Donna S. Rayes, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Beth Watkins, Justice

Delivered and Filed: March 17, 2021

REVERSED AND REMANDED

Appellant C.C.-F. (“Grandmother”) appeals the trial court’s order dismissing her original suit affecting the parent-child relationship for lack of standing.¹ We reverse the trial court’s order and remand this matter to the trial court for proceedings consistent with this opinion.

BACKGROUND

T.D.L. was born to Grandmother’s son, T.L. (“Father”), and Father’s fiancée, appellee K.V. (“Mother”), in 2014. Between 2014 and 2020, Father, Mother, and T.D.L. resided in various locations, including a home in Alice, Texas; an apartment in Austin, where Mother worked; and Grandmother’s home in Wilson County. The record shows that from 2017 until 2019, T.D.L.

¹ To preserve the privacy of the minor child, we will refer to the child by his initials and to his parents and grandmother by initials or pseudonyms.

attended daycare in Wilson County, and he began attending school at Kenedy Independent School District—where Father worked as a teacher and coach—in August of 2019. The record also shows that from August of 2019 until January 22, 2020, Mother, Father, and T.D.L. shared a bedroom in Grandmother’s home.

On January 26, 2020, Father died while he, Mother, and T.D.L. were staying in the apartment in Austin. After Father’s death, Mother and T.D.L. moved into Mother’s parents’ home in Erath County. Mother also enrolled T.D.L. in school in Erath County.

On February 19, 2020, Grandmother filed an original SAPCR in Wilson County seeking sole managing conservatorship of T.D.L. In her petition, she specifically asserted she had standing under section 102.004 of the Texas Family Code. She also alleged T.D.L. had resided with her “for the majority of his life until his father’s death,” that she had “had substantial past contact with” him, and that Mother had “voluntarily relinquished possession and control of the child for the plurality of his life.” Grandmother’s petition incorporated a supporting affidavit that alleged Mother, Father, and T.D.L. moved into her home in late 2014, T.D.L. lived in her home “[f]or most of his life,” and Grandmother “took care of all of [T.D.L.’s] needs.” Grandmother also sought and obtained an ex parte writ of attachment granting her immediate possession of T.D.L. On February 24, 2020, an Erath County constable executed the writ of attachment, removed T.D.L. from his school in Erath County, and delivered him to Grandmother.

In response to Grandmother’s petition, Mother filed a plea to the jurisdiction and a motion to transfer venue to Erath County. In her plea to the jurisdiction, Mother argued Grandmother lacked standing to seek conservatorship of T.D.L. under section 102.004 of the Texas Family Code, which Mother identified as “the only section cited for standing in [Grandmother’s] petition.”

On March 16 and 19, 2020, the trial court held an evidentiary hearing on Mother’s plea to the jurisdiction and motion to transfer venue. The trial court heard testimony from fourteen

witnesses, three of whom testified that T.D.L. had primarily lived in Grandmother's home before Father died and that Grandmother served as his main caretaker. After the close of evidence, the parties and the trial court discussed whether Grandmother's pleadings alleged standing under section 102.003(a)(9), which provides that "[a]n original suit may be filed at any time by . . . a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE ANN. § 102.003(a)(9). Mother argued Grandmother's pleadings did not allege standing under section 102.003(a)(9) and that, as a result, she "didn't get notice of [102.003(a)(9)]" and "only prepared for the actual grandparent statute [section 102.004]." Grandmother responded that her supporting affidavit was incorporated into her petition and that the affidavit "specifically state[d] that she had been the one raising [T.D.L.]" from 2017 until 2020.

At the end of the hearing, the trial court found Grandmother "has not met the burden of proof under either Section . . . 102.004 or 102.003 for standing in this suit," and signed an order granting Mother's plea to the jurisdiction and dismissing Grandmother's SAPCR for lack of standing. The trial court also signed findings of fact and conclusions of law consistent with its order. In its findings and conclusions, the trial court concluded venue in this matter is proper in Erath County, but it did not sign an order to that effect. This appeal followed.

ANALYSIS

Grandmother's Standing

In her first issue, Grandmother argues the trial court erred by concluding she lacked standing to file an original SAPCR under section 102.003(a)(9) of the Texas Family Code.

Standard of Review

"Standing, like other issues implicating a court's subject matter jurisdiction, is a question of law that we review de novo." *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018). Where, as here, a

party's standing to bring suit is governed by statute, we apply principles of statutory interpretation to determine whether the plaintiff has shown she "falls within the category of persons upon whom such standing has been conferred." *Id.* The plaintiff bears the burden to allege facts showing the trial court's jurisdiction, and we construe the pleadings liberally in the plaintiff's favor. *In re Y.B.*, 300 S.W.3d 1, 4 (Tex. App.—San Antonio 2009, pet. denied). Unless the pleadings affirmatively negate the existence of jurisdiction, a plea to the jurisdiction should not be granted based on a pleading deficiency without giving the plaintiff an opportunity to amend. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–27 (Tex. 2004).

When a plea to the jurisdiction challenges the existence of jurisdictional facts, we review the relevant evidence to determine whether a fact issue exists. *In re Y.B.*, 300 S.W.3d at 4. "We take as true all evidence favorable to the nonmovant and indulge every reasonable inference in its favor." *Id.* Where, as here, the trial court issues findings of fact and conclusions of law, we review its factual findings for sufficiency of the evidence and its legal conclusions de novo. *Id.* If the evidence creates a fact question on the plaintiff's standing, the trial court cannot grant the plea, and the matter must be resolved by the factfinder. *Id.*

Applicable Law

Section 102.003(a)(9) provides that an original SAPCR may be filed at any time by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition." TEX. FAM. CODE § 102.003(a)(9). In computing the necessary time under this section, "the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit." *Id.* § 102.003(b). A non-parent makes the necessary showing of "actual care, control, and possession of the child" if she shows she "served in a parent-like role by (1) sharing a principal residence with

the child, (2) providing for the child's daily physical and psychological needs, and (3) exercising guidance, governance, and direction similar to that typically exercised on a day-to-day basis by parents with their children." *In re H.S.*, 550 S.W.3d at 160. Section 102.003(a)(9) does not require the non-parent to show the child's parents "wholly ceded or relinquished their own parental rights and responsibilities" or that the non-parent had "ultimate legal authority to control the child." *Id.*

Additionally, this court has previously held that a non-parent asserting standing under section 102.003(a)(9) need not establish that the parent's appointment as managing conservator would significantly impair the child's physical health or emotional development. *See In re S.S.J.-J.*, 153 S.W.3d 132, 137–38 (Tex. App.—San Antonio 2004, no pet.). This court concluded that under section 102.003(a)(9), that issue goes to the merits of the SAPCR, not the non-parent's right to bring the suit. *See id.*²

Application

Grandmother's Pleadings

Grandmother's pleadings did not explicitly assert section 102.003(a)(9) as a basis for her standing, and Mother's written plea to the jurisdiction did not attack that basis for Grandmother's standing. While Mother orally challenged the sufficiency of Grandmother's pleadings in the trial court, she has not done so on appeal. Nevertheless, because Grandmother bore the burden to affirmatively allege and establish standing within the parameters of the applicable statute, we must begin by considering the sufficiency of her pleadings. *See In re C.E.M.-K.*, 341 S.W.3d 68, 76–77 (Tex. App.—San Antonio 2011, pet. denied).

² In contrast, a non-parent asserting standing under section 102.004 must show either that the child's parents consented to the suit or that "the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development." TEX. FAM. CODE ANN. § 102.004(a).

Grandmother's petition and her supporting affidavit, taken together, allege: (1) T.D.L. lived with Grandmother "for the majority of his life" until Father's death on January 26, 2020; (2) Grandmother "took care of all [T.D.L.'s] needs," including feeding, bathing, and grooming him, taking him to and from school and medical appointments, and enrolling him in extracurricular activities; and (3) Grandmother "kept T.D.L. with [her] at all times to ensure he was safe and supervised." Additionally, the record shows Grandmother filed her petition less than 90 days after she alleged T.D.L. ceased residing in her home. *See* TEX. FAM. CODE § 102.003(a)(9).

These allegations, when liberally construed and taken as true, address each of section 102.003(a)(9)'s required showings. *See id.*; *In re S.S.J.-J.*, 153 S.W.3d at 134–35; *see also In re K.S.*, 492 S.W.3d 419, 425 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (considering affidavit attached to petition). Additionally, these allegations were sufficient to give Mother fair notice of the nature of Grandmother's claims, the basic issues in controversy, and what testimony would be relevant. *See In re K.K.R.*, No. 04-18-00250-CV, 2019 WL 451761, at *3 (Tex. App.—San Antonio Feb. 6, 2019, no pet.) (mem. op.). As a result, Grandmother's pleadings were sufficient to assert standing under section 102.003(a)(9). *See Miranda*, 133 S.W.3d at 230. We must therefore determine whether the jurisdictional evidence raised a fact question as to Grandmother's standing under that statute. *See id.* at 227–28.

Jurisdictional Evidence

In *H.S.*, a child's grandparents filed an original SAPCR alleging standing under section 102.003(a)(9). *In re H.S.*, 550 S.W.3d at 152. As support for this claim, the grandparents presented evidence that the child lived in their home while her mother underwent treatment for alcohol addiction. *Id.* at 153. They also presented evidence that they "directed [the child's] day-to-day activities and took care of her daily needs; provided her with a home, food, clothing, and shelter; and paid for her daycare. . . . [and] took [the child] to the doctor or to urgent care when necessary."

Id. They did not dispute, however, that both parents “were also involved in medical decisions” and the child’s mother continued to make and attend medical appointments for the child. *Id.* at 153–54. Additionally, the parents presented evidence that they remained involved in the child’s life, intended the child’s residence with the grandparents to be temporary, and did not intend to relinquish care and control to the grandparents. *Id.* Finally, the parties agreed the grandparents kept the parents informed about the child’s activities and “‘sought input’ from them on decisions that needed to be made about her.” *Id.* at 154.

After reviewing this evidence, the Texas Supreme Court concluded that the grandparents met their burden to show they had “actual care, control, and possession” of the child for the requisite time period and therefore had standing to file an original SAPCR under section 102.003(a)(9). *Id.* at 160–61. The court held that the parents’ evidence that they retained ultimate legal authority over the child did not “alter or negate” the grandparents’ standing. *Id.* The court also rejected the parents’ argument that the United States Supreme Court’s opinion in *Troxel v. Granville*, 530 U.S. 57 (2000) required a showing that the parents were unfit or had abdicated their own care, control, and possession of the child. *Id.* at 161–62.

In this case, the trial court specifically found “the evidence failed to show that the child was in the care, custody or control of [Grandmother] for six months, not ending more than 90 days before the filing.” Based on this finding, it concluded Grandmother lacked standing under section 102.003(a)(9). While we ordinarily defer to a trial court’s findings of fact, we may only do so if a finding is supported by sufficient evidence. *See In re Y.B.*, 300 S.W.3d at 4. Here, however, we conclude the evidence raises a fact question about Grandmother’s standing under section 102.003(a)(9). *In re H.S.*, 550 S.W.3d at 160–61; *In re Y.B.*, 300 S.W.3d at 4–5.

Multiple witnesses testified that while Mother, Father, and T.D.L. stayed in different residences during T.D.L.’s life, T.D.L. principally lived in Grandmother’s home in Wilson County

until Father's death. For instance, Grandmother's teenage daughter, who lived in Grandmother's home, testified that Mother, Father, and T.D.L. all lived with Grandmother from August of 2019 until January of 2020. Grandmother's daughter-in-law testified that Grandmother has cared for T.D.L. since he was born "except for the brief times when [T.D.L.] was with [Mother]" in other locations and that "even during those periods of time," T.D.L. was at Grandmother's home "nine months of the year." Finally, Grandmother testified T.D.L. "first came to stay with [her]" in the fall of 2016 and did not cease residing with her until January of 2020. This evidence, when viewed in the light most favorable to Grandmother, raises a fact question about whether Grandmother shared a principal residence with T.D.L.—and thus had "actual . . . possession" of him—for at least six months ending not more than 90 days before she filed her petition. *See* TEX. FAM. CODE §§ 102.003(a)(9), 102.003(b); *In re H.S.*, 550 S.W.3d at 160; *In re Y.B.*, 300 S.W.3d at 5–6. While Mother argues she presented evidence showing "that [Grandmother's] alleged possession of the child was always interrupted," the Family Code provides that in calculating the necessary time to establish standing under section 102.003(a)(9), we "may not require that the time be continuous and uninterrupted." TEX. FAM. CODE § 102.003(b).

The trial court also heard evidence that raises a fact question about whether Grandmother had "actual care [and] control" of T.D.L. for the requisite statutory period. *See id.* § 102.003(a)(9); *In re H.S.*, 550 S.W.3d at 160. The owner of a Wilson County daycare testified that T.D.L. was enrolled in her facility from August 29, 2017 until April 5, 2019 and that Grandmother was her primary contact regarding T.D.L.'s care. Grandmother testified that from 2017 until January 22, 2020, she was the person who changed T.D.L.'s diapers, fed him, bathed him, brushed his teeth, washed his clothes, enrolled him in and paid for daycare, and took him to the pediatrician. *See In re H.S.*, 550 S.W.3d at 160. She stated that she drove T.D.L. to and from school every day and supervised him in the mornings before school and the evenings after school "until he had his

supper, his teeth brushed, [and] his bath,” before finally “send[ing] him upstairs to [Mother’s] and [Father’s] bedroom” at bedtime. She also testified that Father gave her power of attorney over T.D.L. for the years 2017 through 2019. Grandmother’s daughter testified that she and Grandmother, not Mother and Father, helped T.D.L. with his homework, played with him, made his dinner, and gave him baths. Finally, Grandmother’s daughter-in-law testified that Grandmother was the person who primarily cared for T.D.L., even when Mother was present. This evidence raises a fact question about whether Grandmother provided for T.D.L.’s daily physical and psychological needs and exercised guidance, governance, and direction over him similar to that of a parent for at least six months ending not more than 90 days before she filed her petition. *See id.* at 160–61. While Mother argues there is no evidence showing she abdicated her parental responsibility to Grandmother, *H.S.* holds that such a showing is not necessary to establish a non-parent’s standing under section 102.003(a)(9). *Id.* at 158.

As Mother notes, the trial court heard conflicting evidence about the extent of Grandmother’s care, control, and possession of T.D.L. For that reason, this case is distinguishable from *H.S.*, where the evidence was largely undisputed. *Id.* at 160. Mother also notes that the trial court specifically found Grandmother’s own testimony was not credible. However, at the plea to the jurisdiction stage, Grandmother was only required to present evidence sufficient to create a fact question³ on the jurisdictional issue. *In re Y.B.*, 300 S.W.3d at 4; *see also In re K.D.H.*, 426 S.W.3d 879, 884 (Tex. App.—Houston [14th Dist.] 2014, no pet.). Because the evidentiary standard applicable to a plea to the jurisdiction “generally mirrors that of a summary judgment,” a

³ While certain provisions in the Texas Family Code require a non-parent to present “satisfactory proof” of standing to file a SAPCR, section 102.003(a)(9) is not one of those provisions. *Compare* TEX. FAM. CODE § 102.003(a)(9), *with id.* at § 102.004(a); *see also In re K.D.H.*, 426 S.W.3d at 884–85 (comparing evidentiary requirements of sections 102.003(a)(9) and 102.004(a) and describing section 102.004(a)’s satisfactory proof standard as a “gatekeeper” ruling). Even under the more rigorous gatekeeping function of a “satisfactory proof” statute, our sister court has declined to treat a trial court deciding a plea to the jurisdiction as “the factfinder who makes credibility determinations.” *In re K.D.H.*, 426 S.W.3d at 887.

trial court may not make credibility determinations or resolve conflicts in the evidence at this stage, but instead must “indulge every reasonable inference and resolve any doubts in the nonmovant’s favor.” *Miranda*, 133 S.W.3d at 228.

The question of whether a non-parent has standing to file an original SAPCR petition “is not about whether [the non-parents] will prevail in their suit; it is about whether they may bring it in the first place.” *In re H.S.*, 550 S.W.3d at 155. When viewed in the light most favorable to Grandmother, the evidence raises a fact question about whether Grandmother had “actual care, control, and possession of [T.D.L.] for at least six months ending not more than 90 days preceding the date of the filing of the petition.” TEX. FAM. CODE § 102.003(a)(9); *In re Y.B.*, 300 S.W.3d at 5. Accordingly, we sustain Grandmother’s first issue. *See In re H.S.*, 550 S.W.3d at 160–61. Having reversed the trial court’s order under Texas Family Code section 102.003(a)(9), we need not consider Grandmother’s second issue regarding her standing under section 102.004. *See* TEX. R. APP. P. 47.1 (requiring appellate court’s opinion to be “as brief as practicable” and to address only issues “necessary to final disposition of the appeal”).

Other Issues

In her third issue, Grandmother argues the trial court abused its discretion by finding her testimony was not credible. As explained above, a credibility determination at this stage of the proceedings was premature. *See Miranda*, 133 S.W.3d at 228; *In re K.D.H.*, 426 S.W.3d at 887. We therefore sustain Grandmother’s third issue.

In her fourth issue, Grandmother argues the trial court “had no authority to rule on the issues of jurisdiction and standing” because its findings of fact and conclusions of law state that venue over this matter is proper in Erath County. Based on this argument, she asks us to remand this case for transfer to Erath County. However, the trial court never signed an order transferring venue, and “we ordinarily do not address an issue absent a trial-court ruling.” *Chevriere v.*

Mitchell, No. 01-18-00761-CV, 2019 WL 1996498, at *2 (Tex. App.—Houston [1st Dist.] May 7, 2019, no pet.) (mem. op.). Moreover, we generally lack authority to review interlocutory venue rulings. *In re Estate of Aguilar*, 435 S.W.3d 831, 833 (Tex. App.—San Antonio 2014, no pet.). For these reasons, the venue issue is not properly before us, and we decline to consider it.

CONCLUSION

We reverse the trial court's order dismissing Grandmother's SAPCR for lack of standing and remand this matter to the trial court for further proceedings consistent with this opinion.

Beth Watkins, Justice