



**Fourth Court of Appeals**  
**San Antonio, Texas**

**OPINION**

No. 04-22-00430-CV

**IN THE INTEREST OF J.N.M., a Child**

From the 37th Judicial District Court, Bexar County, Texas  
Trial Court No. 2007-CI-07900  
Honorable Walden Shelton, Judge Presiding

Opinion by: Lori I. Valenzuela, Justice

Sitting: Irene Rios, Justice  
Beth Watkins, Justice  
Lori I. Valenzuela, Justice

Delivered and Filed: April 26, 2023

**REVERSED AND REMANDED**

Stepfather<sup>1</sup> appeals the trial court's order granting appellees' plea to the jurisdiction asserting Stepfather lacks standing to intervene under the Texas Family Code. We reverse and remand this cause to the trial court for further proceedings consistent with this opinion.

**BACKGROUND**

In 2006, Mother and Stepfather began a dating relationship and cohabited. At the time their relationship commenced, Mother was pregnant with J.N.M. from a previous relationship. On May 9, 2007, Mother gave birth to J.N.M. Stepfather was present for J.N.M.'s birth and cut the umbilical

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<sup>1</sup> To protect the privacy of the minor child, we refer to the parties by their relationship to the child or initials. TEX. FAM. CODE § 109.002(d); TEX. R. APP. P. 9.8(b)(2). For brevity, we refer to the child's former stepfather as "Stepfather."

cord. Shortly after J.N.M. was born, Mother filed an Original Petition in Suit Affecting the Parent-Child Relationship (“the 2007 SAPCR”).

Although Stepfather was not J.N.M.’s biological father, he embraced J.N.M. as his son since his birth and has remained the sole father figure in J.N.M.’s life. On July 23, 2007, Mother and Stepfather married. On August 26, 2010, Mother and Stepfather’s biological child, A.E., was born.

On March 11, 2015, Mother filed a motion in the 2007 SAPCR seeking to prevent J.N.M.’s biological father’s possession and access to J.N.M. Stepfather was not a party to the 2007 SAPCR at this time. In 2016, J.N.M.’s biological father voluntarily relinquished his parental rights to J.N.M., and his parental rights were terminated.

On July 19, 2018, Mother and Stepfather divorced. Because Stepfather did not legally adopt J.N.M. after his biological father’s parental rights were terminated, the divorce decree only addressed their biological child, A.E. Mother and Stepfather were awarded joint managing conservatorship of A.E. under a standard possession order. Although the decree did not address J.N.M., Mother and Stepfather treated the possession and custody periods set forth in the decree as applying to both children such that the siblings were kept together. After the divorce, Stepfather continued his role as J.N.M.’s only father figure. Stepfather exercised “standard possession,” and J.N.M. stayed in his own room in Stepfather’s house when J.N.M. resided with Stepfather. This continued for three years.

On July 30, 2021, Mother was admitted to the hospital. Mother asked Stepfather to keep the children while she was in the hospital, and it is undisputed that the children remained in Stepfather’s custody at least as early as that date. While Mother was hospitalized, her father (appellee “Grandfather”) traveled from his home in Virginia to San Antonio to visit her in the hospital. Grandfather demanded Stepfather turn over custody of J.N.M. to him and Grandmother—

Mother's mother and Grandfather's ex-wife. After Stepfather refused, Grandfather reported Stepfather to police for J.N.M.'s alleged kidnapping.

On August 26, 2021, Mother died of complications arising from COVID-19. On August 27, 2021, Stepfather filed a Motion to Modify Parent-Child Relationship in the 2007 SAPCR. Among other relief, the motion sought temporary orders appointing Stepfather as J.N.M.'s temporary sole managing conservator. The motion did not identify Grandfather or Grandmother, and they were not given formal notice of Stepfather's motion. Stepfather subsequently sought and obtained an emergency *ex parte* temporary restraining order preventing J.N.M. from being removed from enrollment from his high school in San Antonio or otherwise disturbing Stepfather's possession of J.N.M.

On September 13, 2021, Grandfather sent a letter to the trial court apprising the trial court of his and Grandmother's existence and demanding a copy of pleadings. The letter indicates Stepfather informally provided Grandfather screenshots of the motion to modify by text message. The letter concluded by stating a motion for co-conservatorship acceptable to all parties was contemplated and Grandfather's belief that "we can resolve any matters between us regarding the care and custody of [J.N.M.] via mediation."

On September 16, 2021, the parties entered into a Rule 11 Agreement that provided, "[J.N.M.] shall remain living with [Stepfather] until further agreement between the parties or order of the court. The child shall continue to attend [his current high school] until further agreement between the parties or order of the court." The Rule 11 Agreement further contemplated mediation no later than November 30, 2021.

On September 17, 2021, the trial court extended the temporary restraining order for an additional fourteen days. The extension specifically prevented J.N.M.'s removal from Bexar County, Texas. On September 21, 2021, Grandfather sent a second letter to the trial court.

Although the second letter re-acknowledged the mediation, it took a much more combative tone than the first letter. Nevertheless, J.N.M. continued to reside with Stepfather under his care, custody, and control.

On March 9, 2022, Grandfather and Grandmother filed a petition in intervention in the 2007 SAPCR and a plea to the jurisdiction seeking Stepfather's dismissal from the 2007 SAPCR for lack of standing. On March 18, 2022, Stepfather filed an original petition to intervene in the 2007 SAPCR asserting standing and seeking sole managing conservatorship of J.N.M.

On March 28, 2022, the trial court commenced a hearing on the plea to the jurisdiction. On that day, the trial court heard testimony from Stepfather and Grandfather. The hearing re-convened on April 25, 2022. In addition to completing Grandfather's testimony, the trial court heard on that day from Grandmother and two of Mother's friends. Mother's friends identified Stepfather as the father figure in J.N.M.'s life. At the conclusion of the hearing, the trial court orally granted the plea to the jurisdiction; ordered Grandfather and Grandmother to be named joint managing conservators; and ordered the parties to coordinate on immediately turning over possession of J.N.M. to Grandmother. It appears from the record that J.N.M. currently resides with Grandmother in North Carolina.

On May 2, 2022, Stepfather filed an amended petition in a separate action seeking to adopt J.N.M. Attached to the amended petition is a consent to adoption signed by J.N.M. on April 27, 2022, which states:

[Stepfather] is my Dad and I have always consider[ed] him to be my Dad. He has always been in my life and has always taken care of me, he has also helped me with school and if I was ever sick or injured, he was there to care and help me. I have always lived with my dad and my mom until the divorce that's when I started living with my dad every other weekend and he always made sure to take care of me and my brother. We were allowed to go see our Dad whenever we wanted when we were not seeing him on the weekends and we always spent holidays like Christmas, thanksgiving, new

year's, and birthdays with him; including my mom's and my Dad's birthday, and mothers and Dad's day. I have been with my Dad since my Mom got sick last summer and died.

Ever since I could remember my Dad has been there and I would talk with him and he was always there for me, me and I have always been close to my Dad. I remember that when I was young we had this Blockbuster TV stand which we used to play games on most times in the morning and hang out before school or on the weekends, my Dad and I still play games together and he got me my own laptop (Alienware) for school and to play games on so I didn't have to deal with chrome books and how slow they are, my Dad mainly got my laptop so I could work towards my goal in life which is working on computers and cybersecurity. My Dad encourages me and supports me with the loss of my Mom and tries to make sure I sleep well since I sometimes have a hard time sleeping. My Dad always makes sure that I eat because sometimes I go home and want to go straight to sleep but he makes sure I eat. My Dad will get on to me if I don't do well in school and if I do anything wrong, my Dad will take away my phone or playstation, he did this before and after my Mom passed away. My Dad made sure that at school I talked to a counselor about how I feel and about having the school bus pick me up so that I could ride to and from school. Recently my Dad talked to a school counselor to make sure that my grades are getting checked and fixed since my teacher was out for a while. My Dad even made appointments with the Director of student and outreach services: Ms. Phelps, to make sure that I did well in school. Since I'm in NJROTC my Dad makes sure every 2 weeks I get a haircut and that my shoes are shined and my uniform is set, in fact If it weren't for my Dad's help, I wouldn't have gotten the Bravo Zulu award from NJROTC. My Dad is also always trying to help me with my acne and skin care since I always wear a mask and a hoodie or caps.

I want my Dad, [Stepfather], to adopt me and I consent to the adoption of myself by [Stepfather]. [Sic throughout.]

On June 19, 2022, Stepfather filed a writ of mandamus with this court seeking review of the temporary orders and order granting the plea to the jurisdiction. On June 24, 2022, this court's order denying Stepfather's petition for writ of mandamus issued on the basis "[t]his court has reviewed orders granting pleas to the jurisdiction under Texas Family Code section 102.003(a)(9) on direct appeal." This appeal followed.

### 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). Generally, standing involves a threshold determination of whether a plaintiff has a sufficient “justiciable interest” in the suit’s outcome to be entitled to a judicial determination. *Id.* “Without standing, a court lacks subject matter jurisdiction” over the case, and the merits of the plaintiff’s claims thus cannot be litigated or decided. *Id.*

In evaluating standing, we construe the pleadings in the plaintiff’s favor, but we also consider relevant evidence offered by the parties. *Id.* 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 he “falls within the category of persons upon whom such standing has been conferred.” *Id.* 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 T.D.L.*, 621 S.W.3d 346, 350 (Tex. App.—San Antonio 2021, no pet.). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference in nonmovant’s favor. *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.*

Here, the merits of Stepfather’s claims have not yet been considered by any court and are not before us. *See In re H.S.*, 550 S.W.3d at 155. Thus, this case is not about whether Stepfather will prevail in his suit; it is about whether he may bring the suit in the first place. *See id.* And without standing, Stepfather is precluded not only from seeking custody of J.N.M. but also from seeking any type of visitation with him at all. *See id.*

## STANDING

In his first issue, Stepfather asserts standing under Section 102.003(a)(9) of the Texas Family Code.

### *Applicable Law*

Stepfather relies on subsection (a)(9), which confers such standing on “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 time necessary for standing” under this subsection, we “shall consider the child’s principal residence during the relevant time.” *Id.* § 102.003(b). The Texas Supreme Court interprets this language “to exclude nonparents who do not share a principal residence with a child for the statutory time period from establishing standing under section 102.003(a)(9), regardless of how extensively they participate in caring for [the child].” *In re H.S.*, 550 S.W.3d at 156.

A non-parent makes the necessary showing of “actual care, control, and possession of the child” if the non-parent “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.” *Id.* at 160.

### *Application*

On August 27, 2021, Stepfather first sought possessory conservatorship over J.N.M. by filing a “Motion to Modify Parent-Child Relationship.” Given Stepfather’s periodic possession of J.N.M. through informal agreement with Mother, the parties contest whether Stepfather satisfied the requisite statutory residency requirements to assert standing under subsection (a)(9) for the preceding six-month period. We need not address these arguments, however, because Stepfather

affirmatively established by uncontested evidence that he maintained actual care, control, and possession of J.N.M.—including sharing J.N.M.’s principal residence—for at least six months preceding the filing of his March 18, 2022 “Original Petition to Intervene in Suit Affecting the Parent-Child Relationship.”

It is undisputed that Stepfather assumed actual care, custody, and control of J.N.M. at least as early as when Mother was admitted to the hospital on July 30, 2021. J.N.M. remained in Stepfather’s actual care, custody, and control—and they resided together—from then until at least April 25, 2022. Therefore, assuming without deciding that Stepfather lacked standing under subsection (a)(9) at the time he filed his August 27, 2021 motion to modify, Stepfather nonetheless affirmatively demonstrated compliance with subsection (a)(9) for at least 231 days—July 30, 2021 through March 18, 2022. This period exceeds the six months required by subsection (a)(9).

Nevertheless, Grandparents contend our calculation is limited to Stepfather’s first-filed August 27, 2021 motion to modify under *In re C.E.M.-K.*, 341 S.W.3d 68, 77 (Tex. App.—San Antonio 2011, pet. denied). According to Grandparents, *C.E.M.-K.* “identifies the period relevant in calculating the statutory six-month period, including when it begins and ends.” We reject Grandparents’ reading of *C.E.M.-K.* While *C.E.M.-K.* does calculate the period applicable in that case, it does not establish a rule of when the applicable statutory period begins and ends. *See id.* at 78. Rather, this court in *C.E.M.-K.* added two non-continuous periods together to satisfy the requisite statutory period—an analysis wholly inapplicable here. *See id.*

Subsection (a)(9) authorizes an applicable person to file a suit “at any time” so long as the six-month period did not end “more than 90 days preceding the date of the filing of *the petition.*” TEX. FAM. CODE § 102.003(a)(9) (emphasis added). Stepfather filed “the petition” on March 18, 2022. We accordingly hold the plain language of the statute and the uncontested facts establishing Stepfather’s actual care, custody, and control of J.N.M. for more than six months ending not more



than 90 days preceding the filing of Stepfather's March 18, 2022 petition confer standing on Stepfather.

Having reversed the trial court's order under Texas Family Code section 102.003(a)(9), we need not consider Stepfather's second issue regarding his standing under section 102.005. *See* TEX. R. APP. P. 47.1. However, given the trial court's subsequent entry of temporary orders and a final order absent Stepfather's participation in the proceedings, we must address Stepfather's third issue regarding the scope of the relief warranted by our holding, which we construe as a due process challenge.

### **DUE PROCESS**

In his third issue, Stepfather asserts the subsequently rendered temporary orders and final order must be reversed because he was "denied his right to be present and present evidence at trial." In response, Grandparents assert Stepfather was required to challenge the temporary orders by mandamus because they do not constitute a final order; however, Grandparents do not challenge Stepfather's ability to challenge the final order by direct appeal.

#### ***Applicable Law***

The Fourteenth Amendment to the U.S. Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Univ. of Tex. Med. Sch. at Hous. v. Than*, 901 S.W.2d 926, 930 (Tex. 1995); *see also Shalit v. Shalit*, No. 04-19-00736-CV, 2022 WL 789347, at \*6 (Tex. App.—San Antonio Mar. 16, 2022, pet. denied); *Ferguson v. Tex. Dep't of Pub. Safety*, No. 04-19-00384-CV, 2020 WL 1931625, at \*1 (Tex. App.—San Antonio Apr. 22, 2020, no pet.). When parties are not afforded a meaningful opportunity to be heard, "the remedy for a denial of due process is due process." *B. Gregg Price, P.C. v. Series 1 - Virage Master LP*, 661 S.W.3d 419, 423 (Tex. 2023)

(quoting *Than*, 901 S.W.2d at 933); *cf. PNS Stores, Inc. v. Rivera*, 379 S.W.3d 267, 275 (Tex. 2012) (“[A] judgment is void if the defects in service are so substantial that the defendant was not afforded due process.”).

### ***Application***

As a preliminary matter, we note that Stepfather challenges on appeal not only the June 15, 2022 order issued after the trial court granted Grandparents’ plea to the jurisdiction, but also the June 23, 2022 order. Because the trial court granted Grandparents’ plea to the jurisdiction, Stepfather was prohibited from participating in all subsequent proceedings. Those proceedings resulted in the entry of temporary orders and the final order.

But because Stepfather maintained standing under subsection (a)(9), he was entitled to participate in those proceedings. Since Stepfather was not afforded a meaningful opportunity to be heard on the merits, “the remedy for a denial of [his] due process is due process.” Although an interlocutory appeal is not available for temporary orders,<sup>2</sup> this appeal is taken from a final order.<sup>3</sup> Therefore, we reverse not only the order granting the plea to the jurisdiction, but all subsequent orders so that Stepfather may exercise his due process right to participate in merits proceedings on remand.

### **CONCLUSION**

We reverse the trial court’s June 15, 2022 orders and June 23, 2022 order, and remand this cause to the trial court for further proceedings consistent with this opinion.

Lori I. Valenzuela, Justice

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<sup>2</sup> See TEX. FAM. CODE § 109.001(c) (“A temporary order rendered under this section is not subject to interlocutory appeal.”).

<sup>3</sup> See *id.* § 109.002(b) (“An appeal may be taken by any party to a suit from a final order rendered under this title.”).