



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-17-00310-CV

IN RE L.F.

RELATOR

ORIGINAL PROCEEDING
TRIAL COURT NO. 2011-20414-158

MEMORANDUM OPINION¹

I. INTRODUCTION

In this original proceeding, Relator L.F. (Mother) seeks a petition for writ of mandamus directing Respondent, the Honorable Steve Burgess, to grant her plea to the jurisdiction and to dismiss for lack of jurisdiction the petition to modify the parent-child relationship filed by Real Party in Interest C.B. (Step-Mom). Because Step-Mom failed to show that she has standing under Texas Family

¹See Tex. R. App. P. 47.4, 52.8(d).

Code section 102.003(a)(11), we will conditionally grant the petition for writ of mandamus.

II. BACKGROUND

When Mother and Father divorced in 2011, they were appointed joint managing conservators of their three children, and Mother had the right to designate the children's primary residence. The children lived with Mother but spent Monday nights and every other weekend with Father and ate dinner with him on Wednesday nights.

Approximately two years later, Father was diagnosed with cancer, and Mother and Father modified the child custody order. The modified order decreased Father's child support and life insurance obligations; added possession on Wednesday nights to his existing periods of possession; and ensured that if either Mother or Father became incapacitated or died, the children would have "ongoing, reasonable contact with the extended family of that parent, including half-siblings and grand parents." The modified child custody order required Father to pick up the children from school or from Mother's residence for his periods of possession.

Father married Step-Mom in 2014. In February 2016, Father was admitted to an ICU due to his cancer. He remained in the hospital or a long-term care center until his death in October 2016. Beginning in March 2016, the children

stayed overnight with Step-Mom at Father and Step-Mom's home only one night each weekend. All overnight visits with Step-Mom ceased in July 2016.

Father passed away on October 3, 2016, and Step-Mom filed her petition to modify the parent-child relationship on December 30, 2016. Step-Mom claims that she has standing under Texas Family Code section 156.002(b) by virtue of section 102.003(a)(11). Mother filed a plea to the jurisdiction asserting that Step-Mom lacked standing under Texas Family Code section 102.003(a)(11) because the children had not resided with Step-Mom for the requisite statutory six-month time period at the time Step-Mom filed her petition.

The trial court conducted an evidentiary hearing on Mother's plea to the jurisdiction. Mother and her current husband testified that the children had not spent the night with Step-Mom since July 2016. Step-Mom admitted that the children had visited her home on "very, very few" occasions after July 2016² but contended that Mother had "unilaterally changed possession" and that Step-Mom had not been permitted to see the children between July and November 2016. On June 1, 2017, Respondent signed an order denying Mother's plea to the jurisdiction.

III. MANDAMUS IS WARRANTED

In her petition for writ of mandamus, Mother sets forth three main issues and six subissues. Mother's analysis, however, addresses only two issues: (1)

²Step-mom claimed that the children stayed overnight at her house one night after July 2016—on November 5, 2016.

whether Respondent abused his discretion by denying Mother's plea to the jurisdiction and (2) whether Respondent's erroneous denial of Mother's plea to the jurisdiction lacks an adequate remedy by appeal. We address these two issues below.

A. Respondent Abused His Discretion by Denying Plea

In her first issue, Mother argues that Respondent abused his discretion by denying her plea to the jurisdiction because Step-Mom does not have standing to file suit under Texas Family Code section 102.003(a)(11). See Tex. Fam. Code Ann. § 102.003(a)(11) (West Supp. 2016).

1. Standard of Review and the Law on Standing

Whether a plaintiff has standing is a question of law that we review de novo. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004). When standing has been conferred by statute, the statute itself should serve as the proper framework for the standing analysis. *In re Russell*, 321 S.W.3d 846, 856 (Tex. App.—Fort Worth 2010, orig. proceeding [mand. denied]). If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision's words. *Id.* 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. See Tex. Fam. Code Ann. §§ 102.003–.007 (West 2014 & Supp. 2016); *Russell*, 321 S.W.3d at 856.

Under the family code, a person who, at the time of filing, has standing to file an original suit under chapter 102 may file a suit to modify the parent-child relationship. See Tex. Fam. Code Ann. § 156.002(b) (West 2014). Texas Family Code section 102.003(a) sets forth a list of who may file an original SAPCR, including

(11) a person with whom the child and the child’s guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition if the child’s guardian, managing conservator, or parent is deceased at the time of the filing of the petition[.]

Id. § 102.003(a)(11). The statute further provides that “[i]n computing the time necessary for standing under [s]ubsections (a)(9), (11), and (12), 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). The Texas Supreme Court has interpreted the phrase “have resided” to mean “living together in the same household.” *Tex. Dep’t of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

2. Step-Mom Does Not Have Standing

Here, the testimony at the hearing established that the children stayed overnight at Step-Mom’s house one night each weekend between April and July

2016 and one night in November 2016; such facts do not make Step-Mom's home the children's "principal residence" during the relevant time period. See Tex. Fam. Code Ann. § 102.003(b); *Sherry*, 463 S.W.3d at 861. Step-Mom has not proffered any computation showing that the children resided with her for periods of time adding up to six months. Nor are we able to discern six months' worth of time that the children resided with Step-Mom based on the record before us. Thus, Step-Mom has not satisfied section 102.003(a)(11)'s unambiguous six-month requirement. See Tex. Fam. Code Ann. § 102.003(a)(11); *Sherry*, 463 S.W.3d at 861 (holding that Sherry did not have standing to bring suit under subsection (11) because child had resided with another family for approximately four of the six months before Sherry filed the SAPCR).

Step-Mom argues in her response to Mother's petition for writ of mandamus that the reason the children did not reside in her home for six months is that Mother withheld them from Step-Mom in violation of the modified child custody order. No evidence exists, however, that Father or Step-Mom attempted to pick up the children from school or from Mother's residence, as required by the modified child custody order, and that Mother denied access to the children. Additionally, Step-Mom is not a party to the modified child custody order and therefore lacks standing to assert these alleged violations of it. See *generally Gunn v. Cavanaugh*, 391 S.W.2d 723, 724 (Tex. 1965) (holding person not a party to a judgment lacks standing to challenge it).

Step-Mom argues that the evidence showed that the children live with her because they have their own bedrooms in her home, the children's rooms were occupied or intended to be occupied consistently over a substantial period of time, and their rooms are permanent. These contentions, however, fail to demonstrate that the children "have resided [at her home in these rooms] 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)(11); *Sherry*, 46 S.W.3d at 861 (stating that "mere 'legal residence' is not sufficient to satisfy the 'have resided' requirement in subsection (11)").

Because Step-Mom failed to satisfy section 102.003(a)(11)'s six-month requirement, Step-Mom lacked standing to file a petition to modify the parent-child relationship. See Tex. Fam. Code Ann. § 102.003(a)(11); *Sherry*, 46 S.W.3d at 862. Respondent therefore abused his discretion by denying Mother's plea to the jurisdiction. Accordingly, we sustain Mother's first issue.

B. Mother Lacks an Adequate Remedy by Appeal

In her second issue, Mother argues that Respondent's erroneous denial of her plea to the jurisdiction lacks an adequate remedy by appeal. The Texas Supreme Court has held that mandamus review is appropriate when the trial court's jurisdiction is challenged in a proceeding involving child custody issues. See *Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding); see also *In re Green*, 352 S.W.3d 772, 774 (Tex. App.—San Antonio 2011, orig.

proceeding). This is due to the unique and compelling circumstances presented when the trial court decides issues pertaining to child custody. See *Geary*, 878 S.W.2d at 603; see also *In re Derzapf*, 219 S.W.3d 327, 334 (Tex. 2007) (orig. proceeding) (exceptional circumstances presented by challenge to temporary orders in suit for access to children support availability of mandamus review). Because eventual review of the jurisdictional question on appeal from a final judgment would be inadequate in this instance, mandamus review is therefore appropriate. See *Derzapf*, 219 S.W.3d at 335. Accordingly, we sustain Mother's second issue.

IV. CONCLUSION

Having sustained Mother's two issues, we hold that Mother is entitled to mandamus relief. We therefore conditionally grant Mother's petition for writ of mandamus and direct Respondent to set aside his June 1, 2017 order denying Mother's plea to the jurisdiction, to grant Mother's plea to the jurisdiction, and to dismiss for want of jurisdiction Step-Mom's petition to modify the parent-child relationship. See Tex. R. App. P. 52.8(c); *In re Kelso*, 266 S.W.3d 586, 591 (Tex. App.—Fort Worth 2008, orig. proceeding); *In re R.B.*, No. 02-16-00387-CV, 2016 WL 6803200, at *6 (Tex. App.—Fort Worth Nov. 17, 2016, orig. proceeding) (mem. op.). We are confident that Respondent will promptly comply; the writ will issue only if Respondent does not. Our disposition of this original proceeding

serves to lift the stay previously granted by this court. See Tex. R. App. P. 52.10(b).

/s/ Sue Walker
SUE WALKER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: October 19, 2017