In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-20-00143-CV

IN THE INTEREST OF H.L., A CHILD

On Appeal from the 325th District Court
Tarrant County, Texas
Trial Court No. 325-680984-20

Before Sudderth, C.J.; Gabriel and Wallach, JJ.
Opinion by Chief Justice Sudderth

OPINION

I. Introduction

This is a grandparent-possession-and-access case, *see* Tex. Fam. Code Ann. § 153.432, in which the trial court, in a private termination suit, terminated the parental rights of eight-year-old Hillary's[1] biological parents[2] and granted possession and access to Appellees M.L. and E.L., Hillary's paternal grandparents. In their first of four issues, Appellants K.L. and C.L.,[3] Hillary's managing conservators, argue that because E.L.'s affidavit supporting Appellees' petition for grandparent possession or access did not provide adequate facts to establish standing under Family Code Section 153.432(c), the trial court erred by denying Appellants' motion to dismiss Appellees' petition. We agree, sustain Appellants' first issue, reverse without reaching their remaining three issues, *see* Tex. R. App. P. 47.1, and render judgment dismissing the grandparent access suit. *See* Tex. R. App. P. 43.2(f).

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[1]We use aliases to refer to the child and her relatives. *See* Tex. R. App. P. 9.8(b)(2); *see also* Tex. Fam. Code Ann. § 109.002(d).

[2]The trial court severed the grandparent-access case from the termination case, and we affirmed the trial court's judgment terminating the parental rights of Hillary's biological parents. *See In re H.L.*, No. 02-20-00120-CV, 2020 WL 5949920, at *1 (Tex. App.—Fort Worth Oct. 8, 2020, no pet. h.) (mem. op.).

[3]C.L. and K.L. are E.L.'s niece and nephew-in-law, respectively.

II. Discussion

A. Standard of Review

Standing, a component of subject matter jurisdiction, is a constitutional prerequisite to maintain suit that we review de novo. *See In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018); *In re Clay*, No. 02-18-00404-CV, 2019 WL 545722, at *3 (Tex. App.—Fort Worth Feb. 12, 2019, orig. proceeding [mand. denied]) (mem. op.); *In re J.W.L.*, 291 S.W.3d 79, 85 (Tex. App.—Fort Worth 2009, orig. proceeding [mand. denied]) ("Standing is . . . a question related to the jurisdiction of the trial court over the parties and subject matter[.]"); *see also In re J.M.G.*, 553 S.W.3d 137, 141 (Tex. App.—El Paso 2018, orig. proceeding) ("A party's lack of standing deprives the trial court of subject-matter jurisdiction and renders any action of the trial court void.").

A party seeking relief in a suit affecting the parent-child relationship must allege and establish standing within the parameters of the language used in the relevant Family Code statute. *Clay*, 2019 WL 545722, at *3. If the party fails to do so, the trial court must dismiss the suit. *Id.*

B. Standing under Texas Family Code Section 153.432(c)

A grandparent's standing to seek possession of or access to a child is conferred by Section 153.432.[4] *In re B.G.D.*, 351 S.W.3d 131, 140 (Tex. App.—Fort Worth

[4]Family Code Section 153.432, "Suit for Possession or Access by Grandparent," sets out the following requirements: (1) the petitioner must be a biological or adoptive grandparent and may request possession of or access to a grandchild by filing either an original suit or a suit for modification under Chapter

2011, no pet.) (noting that although a successful access suit might require the grandparent to satisfy Section 153.433, whether the grandparent ultimately will succeed is a different question than whether he or she has the right simply to bring suit); *see In re Russell*, 321 S.W.3d 846, 858 (Tex. App.—Fort Worth 2010, orig. proceeding [mand. denied]) (holding that real parties in interest lacked standing to seek grandparent access under Section 153.432(a) because they were not biological or adoptive grandparents as required by the statute). Thus, the trial court is required to make a preliminary determination regarding standing under that section. *J.M.G.*, 553 S.W.3d at 142; *In re Sullender*, No. 12-12-00058-CV, 2012 WL 2832542, at *3 (Tex. App.—Tyler July 11, 2012, orig. proceeding) (mem. op.); *cf. In re J.J.R.*, No. 13-11-00502-CV, 2012 WL 1810211, at *1–2 (Tex. App.—Corpus Christi–Edinburg May 17, 2012, no pet.) (mem. op.).[5]

156; (2) the petitioner may request possession of or access to the grandchild in a suit filed for the sole purpose of requesting the relief, without regard to whether the appointment of a managing conservator is an issue in the suit; and (3) the petitioner must execute and attach a "sufficient" affidavit. Tex. Fam. Code Ann. § 153.432.

[5]In *J.J.R.*, the child's biological father objected that the maternal grandmother's plea in intervention, seeking to be appointed joint managing conservator, did not meet Section 153.432(c)'s requirement of an affidavit, but after a recess, the maternal grandmother's counsel provided the trial court with an unverified document entitled "INTERVENOR'S SUPPORTING AFFIDAVIT." 2012 WL 1810211, at *1. The trial court did not rule on his subsequent objection that the grandmother's petition did not meet Section 153.432(c)'s requirements but concluded that the grandmother had standing. *Id.* at *2. The court of appeals concluded that the father had not preserved his complaint about the affidavit's lack of verification and did not address whether this would have affected standing. *Id.*

Under Family Code Section 153.432(c), a person filing suit for grandparent possession or access must execute and attach an affidavit containing specific items in order to avoid dismissal of the suit:

> [T]he person filing the suit must execute and attach an affidavit on knowledge or belief that contains, *along with supporting facts*, the allegation that denial of possession of or access to the child by the petitioner would significantly impair the child's physical health or emotional well-being. *The court shall deny the relief sought and dismiss the suit unless the court determines that the facts stated in the affidavit, if true, would be sufficient to support the relief authorized under Section 153.433*.[6]

Tex. Fam. Code Ann. § 153.432(c) (emphases added); *Sullender*, 2012 WL 2832542, at *3 (holding that because grandmother failed to make the necessary allegations supported by facts under Section 153.432(c), the trial court should have granted the mother's motion to dismiss her petition instead of conducting an evidentiary hearing).

If the meaning of statutory language is unambiguous, we must adopt the interpretation supported by the plain meaning of the provision's words. *In re L.F.*,

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[6]Family Code Section 153.433, "Possession of or Access to Grandchild," sets out the conditions under which a court may order reasonable possession of or access to a grandchild by a grandparent once Section 153.432's standing requirements have been satisfied. *See* Tex. Fam. Code Ann. § 153.433(a). Those conditions are that (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had his or her parental rights terminated, (2) the requesting grandparent has overcome the parental best-interest presumption by proving by a preponderance of the evidence that denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being, and (3) the requesting grandparent is a parent of the child's parent, who has been incarcerated for three months prior to filing the petition, has been found by a court to be incompetent, is dead, or does not have actual or court-ordered possession of or access to the child. *Id.*

No. 02-17-00310-CV, 2017 WL 4684025, at *2 (Tex. App.—Fort Worth Oct. 19, 2017, orig. proceeding) (mem. op.). We are also bound by the interpretations of the statutory language promulgated by the supreme court. *See id.*

According to the supreme court, a grandchild's "lingering sadness" from lack of contact with her grandparents does not sufficiently demonstrate "significant" harm to the child when that sadness does not manifest as depression, behavioral problems, or acting out so as to rise to a level of significant emotional impairment. *In re Derzapf*, 219 S.W.3d 327, 330, 333–34 (Tex. 2007) (per curiam) (orig. proceeding). A child's display of anger or her isolated instances of bed-wetting and nightmares are also insufficient to reach the statutory threshold. *See In re Scheller*, 325 S.W.3d 640, 643–44 (Tex. 2010) (per curiam) (orig. proceeding) ("Like the children in *Derzapf*, there is nothing in the record here to indicate anything more substantial than the children's understandable sadness resulting from losing a family member and, according to [the grandparents], missing their grandparents.").

One of our sister courts has held an affidavit insufficient to meet the standing threshold when the paternal grandmother asserted merely that she had a close relationship with her two teenage grandchildren and saw them frequently from 2009 to June 2016 (when their father was incarcerated), that she had attended many school activities and other events, and that the grandchildren had told her that they missed her and wanted to have visitation with her. *J.M.G.*, 553 S.W.3d at 143 (noting that the affidavit did not allege any facts pertaining either directly or indirectly to the

grandchildren's physical or emotional well-being or to show that they were suffering any impairment, much less significant impairment). Another likewise held the affidavit insufficient to meet the standing threshold when the paternal grandmother stated that until her son's death, the grandchildren had spent almost every weekend at her home but that since his death, she had only been allowed short, supervised visits with them and expressed that she was "very concerned about [the older grandchild's] emotional well-being." *Sullender*, 2012 WL 2832542, at *1, *3.

C. Analysis

The question before us is whether the averments in E.L.'s affidavit were sufficient as a matter of law to meet Section 153.432(c)'s standing threshold.

In her affidavit, Appellee E.L. recounted the following with regard to her involvement with Hillary since the child's birth in the fall of 2011:

- For about a year after Hillary's birth, Hillary and her siblings and parents lived with Appellees before moving to a residence two miles away.
- After Hillary's family moved, E.L. helped take Hillary to day care and to doctor's appointments and spent "considerable" time with her until the fall of 2014, when Hillary was removed from her parents by Child Protective Services (CPS) and a CPS placement with Appellees was not an option.[7]

[7]E.L. stated in her affidavit that this was not an option because she had been blamed for a child's suffering abuse in October 2008. She denied having caused the child's injury.

- From January to July 2015, Appellants dropped Hillary off at Appellees' home one Saturday a month for visits lasting from 9 a.m. or 10 a.m. to 7 p.m. or 8 p.m.
- From July 2015 until 2017, these previously monthly visits diminished to five or six weeks apart and then to six or eight weeks apart.
- There were only three visits in 2017—on Hillary's birthday for about four hours, during [Hillary's] great grandmother's 90th birthday party, and for a few hours on Christmas day—and all three were supervised.
- The Christmas 2017 visit was the last visit.

E.L. stated in her affidavit that C.L. had started finding excuses for not letting them see Hillary and seemed "to have a great deal of animosity" toward them. After the Christmas 2017 visit, E.L. stated that C.L. "became irritated" with M.L. because he would often ask when they could see Hillary again, and that C.L. had said that after the Christmas 2017 visit, they would not see Hillary again.

E.L. stated,

> When my husband talked to [Hillary] at Christmas, she expressed her frustration that she can no longer see us. She talked about how she dearly misses us. This has been conveyed to other members of the family as well. [Hillary] has drawn pictures for us and has inquired when she can see us again. We do not get the pictures. [Hillary] has cried about all of this and she was upset when she had to leave us during visits. We believe that the denial of possession of or access to [Hillary] by [K.L. and C.L.] would significantly impair the child's physical health or emotional well-being. They are trying to erase us and [H.L.'s biological] father from her life. We were a big part of it. [C.L.'s]

> animosity toward us will rub off on [Hillary]. It will teach her that people can be abandoned. It will teach her that we don't love her.[8]

As a matter of law, the facts set forth in E.L.'s affidavit were insufficient to meet Section 153.432(c)'s requirements because E.L. set forth no facts to support her allegation that the denial of possession of or access to Hillary would *significantly* impair Hillary's physical health or emotional well-being. At best, they reflect frustration, anger, or perhaps a "lingering sadness," as in *Derzapf*, 19 S.W.3d at 330, 333–34, or *Scheller*, 325 S.W.3d at 643–44, but there are no facts in E.L.'s affidavit that rise to the level of significant impairment.

Much like the grandmothers in *J.M.G.* and *Sullender*, E.L. referenced a close relationship of day-long, once-a-month visits for six months in 2015, then sporadic visits until 2017, when there were only three supervised visits, but she did not allege any facts pertaining either directly or indirectly to Hillary's current physical or emotional well-being or to show that Hillary had suffered any significant impairment yet. *See J.M.G.*, 553 S.W.3d at 143; *Sullender*, 2012 WL 2832542, at *3. Instead, E.L. made a conclusory assertion about the results of denial of possession or access and made unsupported predictions about what the lack of possession or access would teach the child in the future. *See*, *e.g.*, *In re Kelly*, 399 S.W.3d 282, 284 (Tex. App.—San

[8]E.L. also stated that she and M.L. had been paying their son's child support for Hillary, which she understood had irritated C.L. because C.L. wanted to terminate his parental rights, and that when M.L. had attempted to text [C.L.] to see if they could see [Hillary] again, C.L. accused them of harassing her.

Antonio 2012, orig. proceeding) (holding, within context of Section 153.433's[9] burden, that although grandparents testified about close relationship with grandchild, they failed to meet the strict requirement that denying them access to the grandchild would significantly impair his physical health or emotional well-being); *In re Johnson*, No. 03-12-00427-CV, 2012 WL 2742122, at *3 (Tex. App.—Austin July 3, 2012, orig. proceeding) (mem. op.) (holding, within context of Section 153.433's burden, that the mere opinion of an interested, nonexpert witness describing instances of interactions with her grandchildren provided no evidence about the grandchildren's physical health or emotional well-being, nor did nurse's opinion that it would be "harmful" to deny access to grandmother); *In re A.N.G.*, No. 02-09-00006-CV, 2010 WL 213975, at *3 (Tex. App.—Fort Worth Jan. 21, 2010, no pet.) (mem. op.) (holding, within context of Section 153.433's burden, that without more, grandparents' testimony was merely that they were accustomed to spending time with the grandchild and that the grandchild missed them and wanted to see them more—"circumstances that, in general, are not uncommon amongst grandparents and grandchildren"); *cf. In re S.S.*, No. 03-17-00116-CV, 2017 WL 1228888, at *5 (Tex. App.—Austin Mar. 28, 2017, orig. proceeding) (mem. op.) ("[W]e cannot hold on this record that the trial court

[9]While we acknowledge that the burden under Section 153.433 is on the merits rather than merely allegations to support standing, the statutory language is virtually identical: "denial of possession of or access to the child . . . would significantly impair the child's physical health or emotional well-being." *Compare* Tex. Fam. Code Ann. § 153.432(c), *with id.* § 153.433(a)(2).

abused its discretion in determining that Grandmother's affidavit made the bare minimum of allegations necessary under section 153.432" to reach the merits but concluding that there was insufficient evidence to overcome parental presumption and directing trial court to vacate its temporary orders).

Accordingly, because E.L.'s affidavit was insufficient, the trial court erred by denying Appellants' motion to dismiss. We sustain Appellants' first, dispositive issue without reaching their remaining issues. *See* Tex. R. App. P. 47.1.

III. Conclusion

Having sustained Appellants' dispositive issue, we reverse the trial court's order granting possession and access and render judgment dismissing the grandparent access suit.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Delivered: November 12, 2020