



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

No. 02-22-00470-CV

IN THE INTEREST OF K.W., A CHILD

On Appeal from the 90th District Court
Young County, Texas
Trial Court No. 34701

Before Kerr, Birdwell and Walker, JJ.
Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

Grandmother¹ filed an original petition seeking possession or access to K.W., the child of Grandmother's deceased son. *See* Tex. Fam. Code Ann. §§ 153.432, 433. The trial court dismissed her petition, finding that her affidavit failed to "establish that the denial of possession of or access to the child by [Grandmother] would significantly impair the child's physical health or emotional well-being." *See* Tex. Fam. Code Ann. § 153.432(c). Grandmother's motion for new trial and for reconsideration of the previous order (based on new evidence) was similarly rejected by the trial court. Grandmother now appeals, arguing that the trial court abused its discretion in dismissing her suit and that the trial court should have granted her motion for new trial in order to reconsider its earlier dismissal order. *We* affirm.²

I. BACKGROUND

According to Grandmother's petition and affidavit,³ K.W. was born in April 2020 and is the daughter of Mother by Grandmother's deceased son. K.W. currently lives with Mother. However, K.W. apparently lived with Grandmother for

¹We refer to the children in this case using their initials and to other family members by their relationships to the children. *See* Tex. Fam. Code Ann. § 109.002(d); Tex. R. App. P. 9.8(b)(2).

²Mother opposed Grandmother's petition in the trial court but has not filed a brief in this court.

³There was no testimony in the trial court.

the first seven months of her life (though Mother visited K.W. on what Grandmother characterized as “intermittent occasions”).

Grandmother’s affidavit described Mother as an “unfit parent.” According to Grandmother, K.W.’s older half-sister (M.W.) had been sexually molested by one of Mother’s male friends. Grandmother also averred:

- When K.W. was two weeks old, Mother left her with Grandmother. A few months later, Mother claimed that Grandmother had kidnapped K.W., and Grandmother gave her back to avoid prosecution.
- M.W. is K.W.’s older half-sister. While M.W. was with Mother, one of Mother’s male friends molested M.W. Grandmother also thinks that Mother was unable to provide for M.W. when she was Mother’s only child.
- Between 2018 and 2020, Mother had a series of menial jobs and was unable to make “significant contribution” to K.W.’s upbringing.
- Mother has engaged in “mental and physical abuse” of K.W.’s sister, M.W. According to Grandmother, Mother was more interested in spending money on alcohol than in taking care of M.W.
- There are occasions when K.W. was not “properly bathed.”
- One time, Mother gave K.W. “spoiled formula.”
- Grandmother’s access to K.W. has been thwarted by Mother, Grandmother is concerned about K.W.’s “welfare and well-being,” and Grandmother fears that

K.W. may be “exposed to the physical and mental abuse” that M.W. has experienced.

- Grandmother is better situated to take care of K.W. financially.

Mother filed a motion to dismiss due to lack of standing. The trial court agreed and dismissed Grandmother’s petition. Subsequently, Grandmother filed a motion to reconsider and a motion for new trial. Attached to her motion was a supplemental affidavit in which Grandmother alleged that Mother had taken M.W. and K.W. to live in Oklahoma with M.W.’s father and grandfather. According to Grandmother, she learned from a private background check website that M.W.’s father had been convicted of child abuse and child neglect and received a prison sentence of eight years. Further, using a similar website, Grandmother discovered that M.W.’s grandfather had received a felony drug conviction. The trial court overruled her motion, again finding that Grandmother failed to establish standing.

II. STANDING UNDER SECTION 153.432

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); *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. *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.). If the party fails to do so, the trial court must dismiss the suit. *Id.*

A grandparent’s standing to seek possession of or access to a child is conferred by section 153.432. *In re B.G.D.*, 351 S.W.3d 131, 140 (Tex. App.—Fort Worth 2011, no pet.) (distinguishing between ultimately prevailing in a suit for access with whether a grandparent has standing to bring suit under section 153.432). Therefore, the trial court is required to make a preliminary determination regarding standing under that section. *J.M.G.*, 553 S.W.3d at 142.

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 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.

Tex. Fam. Code Ann. § 153.432(c) (emphasis added); *see In re Derzapf* 219 S.W.3d 327, 333 (Tex. 2007) (orig. proceeding) (“A trial court abuses its discretion when it grants access to a grandparent who has not met this standard. . . .”); *In re Sullender*, No. 12-12-00058-CV, 2012 WL 2832542, at *3 (Tex. App.—Tyler July 11, 2012, orig. proceeding) (mem. op.) (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 the petition instead of conducting an evidentiary hearing).

A trial court cannot “infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a ‘better’ decision could be made.” *Troxel v. Granville*, 530 U.S. 57, 72–73, 120 S. Ct. 2054, 2064 (2000) (plurality op.) (internal quotations omitted). A nonparent seeking conservatorship, possession, or access to a child must allege and prove that a parent is unfit before that person has standing to seek such relief. *Id.* at 68–69, 120 S. Ct. at 2061. Therefore, the nonparent's burden of overcoming the “fit parent presumption” embodied in Section 153.432 has been described by the Texas Supreme Court as a “high threshold” and “hefty.” *In re Scheller*, 325 S.W.3d 640, 643 (Tex. 2010) (per curiam) (orig. proceeding).

III. ANALYSIS

The issue in this case is whether Grandmother's affidavits are sufficient as a matter of law to show that denial of Grandmother's access to K.W. would “significantly impair” K.W.'s physical health or emotional well-being. Tex. Fam. Code Ann. § 153.432(c). We conclude that Grandmother's allegations⁴ fall short of overcoming this significant burden.

⁴We will consider the factual claims made both in Grandmother's original petition and in her motion for reconsideration and for a new trial.

First, by Grandmother's own admission, she has had no contact with K.W. since November 2020. Whatever Grandmother's suppositions about Mother's past conduct, her opinions concerning K.W.'s current environment simply cannot be justified where she lacks personal knowledge about Mother's and K.W.'s home life. *See In re D.W.J.B.*, 362 S.W.3d 777, 781 (Tex. App.—Texarkana 2012, no pet.) (holding grandmother's affidavit was insufficient to demonstrate standing where she had no personal knowledge of alleged conditions of grandchild's home and thus could not show that child suffered significant impairment at home).

Second, Grandmother's claims amount to little more than speculation about Mother's current conduct and the possibility that K.W.'s well-being has been impaired. In essence, Grandmother simply says that she thinks Mother is a bad parent and that Grandmother would do a better job with K.W. This is not enough. *See Rolle v. Hardy*, 527 S.W.3d 405, 420 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (“A nonparent cannot meet [her] burden by evidence showing that [s]he would be a better custodian of the child[], that [s]he has a strong and on-going relationship with the child[], or that the parent would not have been a proper custodian in the past.”).

Grandmother's burden is to show “significant impairment,” but her allegations are mere suppositions, not facts supporting an inference that K.W.'s welfare will be impaired significantly. For example, Grandmother's worries appear to center on how K.W.'s sister (but not K.W.) was ill-treated in the past, how Mother had trouble with alcohol in the past, and how Mother now lives with two persons who may have

criminal records.⁵ This is not enough to demonstrate significant impairment as to K.W. See *J.M.G.*, 553 S.W.3d at 143 (holding grandmother had no standing because she failed to allege “any facts pertaining either directly or indirectly to the grandchildren’s physical or emotional well-being”); *In re H.L.*, 613 S.W.3d 722, 727 (Tex. App.—Fort Worth 2020, no pet.) (holding that grandmother merely “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”). In addition, Grandmother fails to offer any causative theory explaining why K.W. had been significantly impaired by a denial of Grandmother’s access to her.⁶ See *In re S.W.*, No. 02-21-00409-CV, 2022 WL 325385, at *8 (Tex.

⁵As Grandmother points out in her brief, she “obviously has no personal knowledge of these facts.”

⁶We note that Grandmother did not seek to divest Mother of managing conservatorship of K.W. under section 102.004(a)(1) of the Family Code. To establish standing under that provision, Grandmother would have had to demonstrate—as she attempted to do here—that K.W.’s “present circumstances would significantly impair [her] physical health or emotional development.” Tex. Fam. Code Ann. § 102.004(a)(1); see *In re T.H.*, 650 S.W.3d 224, 239–40 (Tex. App.—Fort Worth 2021, no pet.) (holding that parents’ history of alcohol and drug abuse, incarceration, and abandonment of their child constituted sufficient evidence of impairment of physical and emotional well-being); see also Tex. Fam. Code Ann. § 153.131 (establishing a rebuttable presumption that appointment of parent as managing conservator is in child’s best interest and requiring a showing on the merits that appointment of parent as managing conservator would significantly impair the child’s physical health or emotional development). But a grandparent may not file an original suit requesting only possessory conservatorship. Tex. Fam. Code Ann. § 102.004(b). Here, Grandmother did not show standing under the only statute applicable to the particular relief she sought, i.e., she did not allege facts showing that Mother’s denying possession or access of K.W. to Grandmother specifically would

App.—Fort Worth Feb. 3, 2022, orig. proceeding) (mem. op.) (noting that grandmother did not show that child “had been significantly impaired by Grandmother’s having less access to and possession of her”).

IV. CONCLUSION

Grandmother, in both her original petition and her subsequent motion for reconsideration, failed to demonstrate that she had standing to pursue her claim for possession of or access to K.W. This lack of standing left the trial court without subject-matter jurisdiction over her access claim, and the trial court did not abuse its discretion in dismissing Grandmother’s petition and overruling her motion for reconsideration and for a new trial. We affirm the trial court’s judgment.

/s/ Brian Walker

Brian Walker
Justice

Delivered: December 7, 2023

impair K.W.’s “physical health or emotional well-being.” Tex. Fam. Code Ann. § 153.432(c).