

## **NON-PARENT STANDING**

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## I. Scope of Article

Standing is a mandatory requirement, but fitting your case to one of the many options under the Family Code can be complicated. The goal of this paper is to discuss how to apply standing requirements from a client-based perspective. The paper is organized by type of person seeking standing (e.g., grandparent, aunt, foster parent), together with the relevant statutes and caselaw applying to each. The paper was designed to provide useful information, organized by how you're most likely to need to access it.

## II. What is Standing?

Standing is an issue that family law practitioners frequently encounter in a very practical way. While knowing the explicit requirements of the Family Code is key, it can be useful to have an understanding of the abstract legal doctrines underlying the requirement of standing. The Texas Supreme Court opinion in the *Texas Ass'n of Business v. Air Control Bd.*<sup>1</sup> case contains a thorough discussion of the sources of the standing requirement, which is summarized below:

Standing is a feature of subject matter jurisdiction, which is essential to the authority of a court to decide a case. Subject matter jurisdiction is never presumed and cannot be waived. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and the open courts provision.

The separation of powers doctrine stems from both the United States and Texas constitutions. Under this doctrine, governmental authority vested in one branch of government cannot be exercised by another, unless expressly permitted by the constitution. Thus, courts are prohibited from issuing advisory opinions, because that is the function of the executive branch. The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. Texas courts, like federal courts, have no jurisdiction to render such opinions.

Under the Texas Constitution, the standing requirement is also derived from the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."<sup>2</sup>

Because standing is a component of subject matter jurisdiction, it cannot be waived and may be raised by any party or by the court on its own motion. The issue of standing may even be raised for the first time on appeal.

Standing is determined at the time suit is filed in the trial court.<sup>3</sup> **Standing to sue does not mean a right to win, but merely a right to be heard in court.**<sup>4</sup>

### A. Common Law

The general test for standing in Texas requires that there (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.<sup>5</sup> Standing requires the claimant to demonstrate a particularized injury distinct from that suffered by the general public—there must be an actual grievance, not a hypothetical or generalized grievance.<sup>6</sup> This general test incorporates the requirements that courts may only decide real cases or controversies brought by a person who has suffered an actual injury.

### B. Specific Statutory Authority

In family cases, it is usually obvious that there is a real controversy, but the difficult part of the test is determining which groups of people should qualify as persons who have suffered an injury. The Family Code spells out specific categories of people that the Legislature has determined meet this standing requirement.

**Standing for Original Suits.** Tex. Fam. Code Chapter 102, §§ 102.003-102.007.

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<sup>2</sup> TEX. CONST. art. I, § 13.

<sup>3</sup> *In re M.P.B.*, 257 S.W.3d 804, 808 (Tex. App.--Dallas 2008, no pet.).

<sup>4</sup> *Doncer v. Dickerson*, 81 S.W.3d 349, 356 (Tex.App.--El Paso 2002, no pet.).

<sup>5</sup> *Board of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955).

<sup>6</sup> *Glover v. Union Pac. R.R.*, 187 S.W.3d 201, 209 (Tex.App.-Texarkana 2006, pet. denied); see *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex.2001); see also *In re H.C.S.*, 219 S.W.3d 33, 34 (Tex. App.-San Antonio 2006, no pet.).

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<sup>1</sup> 852 S.W.2d 440, 443-48 (Tex. 1993).

**Standing for Modifications.** Tex. Fam. Code § 156.002(b): “A person or entity who, at the time of filing, has standing to sue under Chapter 102 may file a suit for modification in the court with continuing, exclusive jurisdiction.”

The Family Code is more restrictive than the constitutional requirement of a justiciable interest.<sup>7</sup> The common-law criteria regarding standing do not apply when the Texas Legislature has conferred standing through a statute.<sup>8</sup> In statutory standing cases, the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls in that category.<sup>9</sup>

### C. Parental Presumption

In an original suit affecting the parent child relationship, Texas courts apply a “parental presumption.” The presumption that the best interest of the child is served by awarding custody to the parent is deeply embedded in Texas law.<sup>10</sup> The parental presumption is codified in the Family Code in § 153.131(a). To prevail in an original suit, a nonparent must rebut the parental presumption by showing that the appointment of the parent would significantly impair the child's health or development, or that the natural parent has voluntarily relinquished the child.<sup>11</sup>

Courts have held that modifications are different from original suits. Since modification suits are governed by Chapter 156, the parental presumption contained in Chapter 153 does not apply.<sup>12</sup> Further, courts have held that the constitution does not require the parental presumption to apply in modification actions, because there are different public policy concerns.<sup>13</sup>

Most importantly for standing, a nonparent **does not** have to overcome the parental

presumption merely to have standing to bring suit.<sup>14</sup>

## III. Standing Provisions, Organized by Client

### A. Grandparents

Family law cases have increasingly focused on the rights of grandparents both in seeking conservatorship and seeking visitation with their grandchildren. Many standing issues experienced by grandparents are examined below through statutes and relevant case law.

#### 1. General Standing for Conservatorship Under Texas Family Code §102.003

Grandparents, as non-parents litigants, have limited options to maintain standing to file an original SAPCR seeking custody of a grandchild. If a grandparent can qualify under any of the fourteen categories of the general standing statute as set forth above, a grandparent could potentially have standing to file for custody under § 102.003. The most likely applicable categories under the “general” standing statute, would be under §102.003(13) which gives standing to a relative of the child within the third degree of consanguinity (which includes grandparents), if both parents of the child are deceased at the time of filing or through § 102.003(a)(9) which grants standing to 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)(13). Under these statutes, a grandparent may file an original suit for custody.

In order to have standing under § 102.003(a)(9), a grandparent must show “actual care, control, and possession” and it must be within the specified time frame. §102.003(a)(9) does not specifically speak to grandparents, but provides means for a grandparent seeking standing to file an original suit. The statute specifically mentions that the time frame need not be continuous and uninterrupted. Tex. Fam. Code §102.003(b). In the case *In the Interest of S.S.J.*, the child’s mother had died and a maternal grandmother was seeking appointment as managing conservator.<sup>15</sup> The child at issue had

<sup>7</sup> *In re A.M.S.*, 277 S.W.3d 92, 97 (Tex.App.--Texarkana 2009, no pet.).

<sup>8</sup> *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001).

<sup>9</sup> *In re Sullivan*, 157 S.W.3d 911, 915 (Tex.App.--Houston [14th Dist.] 2005, orig. proceeding, [mand. denied]); see also *Tex. Dep’t of Protective and Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 859-61 (Tex. 2001).

<sup>10</sup> *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000).

<sup>11</sup> *Id.* at 342.

<sup>12</sup> *Id.*

<sup>13</sup> See *In re M.N.G.*, 113 S.W.3d 27 (Tex.App.--Fort Worth 2003, no pet.).

<sup>14</sup> *In re Vogel*, 261 S.W.3d 917, 921 (Tex.App.—Houston [14th Dist.] 2008, orig. proceeding).

<sup>15</sup> 153 S.W.3d 132, 137 (Tex.App. – San Antonio, 2004, no pet.).

lived with the grandparents under their care, custody, and control since birth. The father of the child argued that even if the grandparents proved the requisite time frame required for standing under §102.003(a)(9), they must still overcome the parental presumption. *Id.* The court held that the grandparents had standing under §102.003(a)(9). Nothing in the code or case law requires that a grandparent must go beyond the general requirements of 102.003(a)(9) to obtain standing to allege facts showing that the appointment of the parent would significantly impair the child's physical health or emotional development in order to have standing. The parental presumption must be overcome during a trial on the merits. *Id.*

Conversely, the court *In the Interest of M.J.G and J.M.J.G.*, denied standing to grandparents under §102.003(a)(9).<sup>16</sup> The grandparents did not establish the requisite six month period of actual care, custody, and control necessary to establish their standing to file an original SAPCR under §102.003(a)(9). Additionally, the evidence at trial showed that the children's parents were also living in the house with the grandparents. There was no evidence that the parents did not also care for the children. *Id.*

## **2. Standing Under Texas Family Code §102.004**

While grandparents may obtain standing under the general provisions of Texas Family Code §102.003 as set forth above, they may also obtain standing under additional statutes.

Texas Family Code §102.004 provides as follows:

**102.004:** (a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

(b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

(c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153.

Section 102.004 applies only to SAPCR's filed on or after September 1, 2007. Under §102.004, in the event if a grandparent does not have standing under the general standing statute, the fact that the person is a grandparent may confer standing to file either an original suit or an intervention in a pending suit if the grandparent can show that the child's physical health or emotional stability would be impaired by remaining with the parents or if the parents consent.

Numerous court cases have considered in what circumstances standing may be conferred upon a grandparent under Texas Family Code §102.004.

A suit by a grandparent requesting managing conservatorship may only be filed when the child's present environment presents a serious question concerning the child's physical health or

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<sup>16</sup> No. 2-07-105-CV, 2008 WL 344473 (Tex. App.--Fort Worth).

welfare.<sup>17</sup> The Texas Supreme Court has held that a child must be in imminent danger of physical or emotional harm for there to be a serious question concerning the child's physical health or welfare.<sup>18</sup> The court cases show that a challenge to a grandparent's standing asserted under Texas Family Code § 102.004(a)(1) requires the grandparent to make a prima facie showing of potential harm. The grandparents must be fully prepared to put on evidence of facts that will demonstrate a serious question or concern about the child's health or welfare. A grandparent seeking custody has an incredibly high burden of proof to meet the standing requirements.

The grandparents in *In the Interest of ALS*, filed suit requesting appointment as managing conservators after the death of their son.<sup>19</sup> The father had filed for divorce from the child's mother months before his death. The child, father and mother sometimes lived at the grandparents' home. The grandparents filed a petition claiming they had standing under 102.004(a)(1). The evidence showed that the mother was bi-polar, had been under psychiatric care on and off, hospitalized, and had threatened suicide. *Id.* The grandparents presented an affidavit from an aunt attesting to specific instances of abuse of the child by the mother. There was also evidence of the mother's inability to parent, including failure to supervise the child, acts of sexual promiscuity and pornography in the home, and unsanitary conditions in the home. The court held that the grandparents did have standing under § 102.004(a).

Conversely, in another case where the grandparents sought standing under §102.004(a)(1), the court held that the maternal grandparents did not have standing to maintain an original suit under §102.004(a)(1).<sup>20</sup> There was no evidence to show that the child's current circumstances presented a significant impairment of the child's physical health or emotional development of violence witnessed by the children. *Id.* The entire premise of the grandparents' argument was that if the court were

to restrict their close relationship with the children, the children would suffer serious physical or emotional harm. This was insufficient evidence that the children would be impaired. *Id.*

At least one appellate case has held that the statute does not require that the grandparent and the child need not have a close bond or a long standing relationship if the "significant impairment" test is met. In *In re M.A.M.*, the court held that the phrase "deemed by the court to have had substantial past contact" refers to "other person" and not "grandparent."<sup>21</sup> As such, the mere fact that an intervenor in a pending suit is a biological grandparent confers standing on the grandparent. *Id.*

### 3. Standing to Intervene

Though grandparents may initiate an original lawsuit seeking appointment as a managing conservator, they may not file an original lawsuit seeking appointment as a possessory conservator. Texas Family Code §102.004(b) provides that grandparents may only seek appointment as a possessory conservator through intervention. While the statute requires that any person besides a grandparent seeking possessory conservatorship have had "substantial past contact with the child," such requirement is not necessary for grandparents.<sup>22</sup> Courts have held that there is a difference between an original suit and an intervention, thus necessitating the difference in requirements for standing between both. In the case *In the Interest of N.L.G., A Child*, the court held that filing a suit may create disruption in a child's relationship with his or her parents, whereas intervening in a pending case, where the relationship between parent and child is already disrupted, does not create such disruption.<sup>23</sup> In the case where a relationship is already disrupted, intervention may enhance the court's ability to adjudicate the cause in the best interest of the child. *Id.*

Despite the court's view that intervention might enhance a court's ability to determine the best interest of a child, grandparents do not have unfettered access to intervene in any and all custody matters. The grandparents must show that

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<sup>17</sup> *In re R.D.Y.*, 51 S.W.3d 314, 325 (Tex. App.—Houston [1st Dist.], 2001).

<sup>18</sup> *McElreath v. Stewart*, 545 S.W.2d 955, 958 (Tex. 1977).

<sup>19</sup> No. 09-05-062 CV, 2006 WL 75369 (Tex. App -- Beaumont).

<sup>20</sup> *In the Interest of M.J.G. and J.M.J.G.*, No. 2-07-105-CV, 2008 WL 344473 (Tex. App.--Fort Worth).

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<sup>21</sup> *In re M.A.M.*, 35 S.W.3d 788, 790 (Tex.App.—Beaumont 2001, no pet.).

<sup>22</sup> *In re M.A.M.*, 35 S.W.3d 788, 790 (Tex.App.—Beaumont 2001, no pet.).

<sup>23</sup> 238 S.W.3d 828, 830 (Tex.App.—Fort Worth, 2007).

there is “significant impairment” of the child’s physical health or emotional development in order to obtain standing in an intervention.<sup>24</sup>

#### 4. Possession and Access by a Grandparent Under the “Grandparent Access Statute”

The Texas Family Code provides a route for grandparents to file suit for possession and access of their grandchildren in sections 153.421 and 153.432 of the Texas Family Code.

**153.431:** If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.

**153.432:** (a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:

- (1) an original suit; or
- (2) a suit for modification as provided by Chapter 156.

(b) A grandparent may request possession of or access to a 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.

(c) In a suit described by Subsection (a), the 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.

Section 153.431 of the Texas Family Code governs suits for access, whether original or modification and applies to grandparents, both biological and adoptive. Texas Family Code §153.432 allows a biological or adoptive grandparent to request possession of or access to a grandchild by filing an original suit or a suit for modification. Courts have held that “significant impairment” is a high threshold for grandparents to overcome.<sup>25</sup> A grandparent may file suit requesting only possession of or access to a grandchild without regard to whether the appointment of a managing conservator is an issue in the lawsuit. Tex.Fam.Code §153.432(b).

However, the third prong of this section presents difficulty in many cases as the person filing the lawsuit 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. Tex.Fam.Code 153.432(c). The court shall deny the relief sought and dismiss the lawsuit 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. *Id.* A trial court abuses its discretion if it grants grandparents access to their grandchildren without meeting this standard.<sup>26</sup>

It is important to note that a biological or adoptive grandparent may not request possession of or access to a grandchild if:

- (1) each of the biological parents of the grandchild has:
  - (A) died;
  - (B) had the person’s parental rights terminated; or
  - (C) executed an affidavit or waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an

<sup>24</sup> *In re M.J.G.*, 248 S.W.3d 753, 761 (Tex.App.—Fort Worth, 2008).

<sup>25</sup> *In re Derzaph*, 219 S.W.3d 327, 331 (Tex. 2007).

<sup>26</sup> *Derzaph*, 219 S.W.3d at 333; *In re J.M.T.*, 280 S.W.3d 490, 493 (Tex.App.—Eastland 2009, no pet.).

authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator for the child' and

(2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

Tex.Fam.Code §153.434.

## **B. Siblings**

### **1. Managing Conservatorship**

An adult sibling has standing to seek conservatorship if they can meet one of the general standing requirements in Chapter 102. The general standing terms most likely to apply to a sibling are:

**102.003(a)(9):** 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;

**102.003(a)(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; or

**102.003(a)(13):** a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition.

**102.004(a):** In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

(1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or

(2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

### **2. Possessory Conservatorship**

An adult sibling may obtain possessory conservatorship by intervening in a pending suit:

**102.004(b):** An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

### **3. Access**

An adult sibling has standing to file a suit seeking access to siblings who have been separated through DFPS actions:

**102.0045:** (a) The sibling of a child may file an original suit requesting access to the child as provided by Section 153.551 if the sibling is at least 18 years of age.

(b) Access to a child by a sibling of the child is governed by the standards established by Section 153.551.

**153.551:** (a) The sibling of a child who is separated from the child because of an action taken by the Department of Family and Protective Services may request access to the child by filing:

(1) an original suit; or

(2) a suit for modification as provided by Chapter 156.

(b) A sibling described by Subsection (a) may request access to the child 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.

(c) The court shall order reasonable access to the child by the child's sibling described by Subsection (a) if the court finds that access is in the best interest of the child.

**156.002(c):** The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction.

Although only the first section contains an explicit requirement that the sibling be at least 18 years of age, one court has held that minor siblings do not have any standing to seek access: “Although section 153.551 establishes a statutory right to seek sibling access, section 102.0045 requires the sibling requesting access to be at least 18 years of age. Since [the minor child] is not at least eighteen years of age, she does not have standing to seek sibling access.”<sup>27</sup>

### **C. Aunts, Uncles, and Other Relatives within the Third Degree of Consanguinity**

#### **1. Definition of Consanguinity**

##### **Tex. Gov. Code § 573.022. Determination of Consanguinity:**

- (a) Two individuals are related to each other by consanguinity if:
  - (1) one is a descendant of the other; or
  - (2) they share a common ancestor.
- (b) An adopted child is considered to be a child of the adoptive parent for this purpose.

##### **Tex. Gov. Code § 573.023. Computation of Degree of Consanguinity:**

- (a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on.
- (b) If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:
  - (1) the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and

- (2) the number of generations between the relative and the nearest common ancestor.

(c) An individual's relatives within the third degree by consanguinity are the individual's:

- (1) parent or child (relatives in the first degree);
- (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and
- (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).

Note: A cousin is not a relative within the third degree of consanguinity.<sup>28</sup> A great-aunt or great-uncle is not a relative within the third degree of consanguinity.<sup>29</sup>

Section 102.004 requires the relationship to be within three degrees of consanguinity, not three degrees of affinity.<sup>30</sup> While often used together, consanguinity and affinity are distinct concepts with different definitions.<sup>31</sup> Courts presume the Texas Legislature was familiar with the definitions and chose to permit petitions filed by individuals related within three degrees of consanguinity, but not within three degrees of affinity.<sup>32</sup> Therefore, a person who is related by marriage but who does not share a common ancestor with the child cannot qualify for standing under the sections of the Family Code requiring consanguinity.

#### **2. Both Parents Deceased**

If both of a child's parents are deceased, then a relative within the third degree of consanguinity can have standing under the following sections:

**102.003(a)(13):** a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's

<sup>27</sup> *In re S.L.M.*, No. 4-07-00566-CV (Tex.App.—San Antonio June 18, 2008) (memo op.).

<sup>28</sup> *Ex parte Fierro*, 79 S.W.3d 54, 56 (Tex.Crim.App. 2002).

<sup>29</sup> *In re N.L.D.*, No. 06-10-00132-CV (Tex.App.—Texarkana 2011).

<sup>30</sup> *In re A.M.S.*, 277 S.W.3d 92, 98 (Tex.App.—Texarkana 2009, no pet.).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

parents are deceased at the time of the filing of the petition.

**153.431:** If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.

### 3. Living Parent(s)

If a child has a living parent or parents, a relative may be able to have standing, if they can show that the parent(s) consented or that the child's circumstances are harmful:

**102.004(a):** In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:

- (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or
- (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

For standing, there is no requirement that the relative prove an *immediate* danger.<sup>33</sup> That requirement does not appear in the current statute, and it is assumed that the Legislature excluded the immediacy requirement for a purpose.<sup>34</sup> The *Vogel* court found that the father's long-term alcoholism and recent drinking, as well as testimony that it would be harmful for the child to live with the father, were sufficient for the trial court to find that the child's present circumstances, if he were to live with the father, would significantly impair his physical health or emotional development.<sup>35</sup>

### 4. Possessory Conservatorship

A relative within the third degree of consanguinity may file suit seeking possessory conservatorship by intervening in a pending suit, if

he or she has had substantial past contact with a child:

**102.004(b):** An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

The Chavez<sup>36</sup> case discusses this relaxed standing requirement: Generally, an intervenor must show standing to maintain a suit in his own right in order to intervene.<sup>37</sup> This showing requires that the intervenor have some present justiciable interest in the subject matter of the suit.<sup>38</sup> However, Section 102.004(b) of the Family Code specifically provides that grandparents who have substantial past contact with the child may be granted leave to intervene in a SAPCR. Thus, a grandparent need not have standing sufficient to institute a SAPCR in their own right in order to intervene in a pending SAPCR.<sup>39</sup> This relaxed standing rule promotes the overriding policy in all SAPCR suits, that of protecting the best interest of the child.

## D. Stepparents

### 1. Deceased Parent

A stepparent who has resided with the child can seek standing upon the death of the child's natural parent:

**102.003(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

<sup>33</sup> *In re Vogel*, 261 S.W.3d 917, 921 (Tex.App.—Houston [14th Dist.] 2008, orig. proceeding).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Chavez v. Chavez*, 148 S.W.3d 449, 457 (Tex.App.—El Paso 2004, no pet.).

<sup>37</sup> *Segovia-Slape v. Paxson*, 893 S.W.2d 694, 696 (Tex.App.—El Paso 1995, orig. proceeding); *McCord v. Watts*, 777 S.W.2d 809, 812 (Tex.App.—Austin 1989, no writ).

<sup>38</sup> *Segovia-Slape*, 893 S.W.2d at 696.

<sup>39</sup> *See Segovia-Slape*, 893 S.W.2d at 696.

conservator, or parent is deceased at the time of the filing of the petition.

Subsection 102.003(a)(11) was designed as a "stepparent" statute, affording standing to, among others, a stepparent who helps raise a child when the stepparent's spouse—one of the child's parents—dies.<sup>40</sup> A traditional application would indicate that upon the death of the mother, as a sole managing conservator of the child, her current husband would have standing.<sup>41</sup>

Note, however, that the statutory language is not limited merely to stepparents; literally it can also include an unmarried cohabitant or even an adult sibling of the child of a deceased parent.<sup>42</sup>

## 2. Living Parents

A stepparent who has resided with the child for six months has standing to bring suit:

**102.003(a)(9):** 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.

Although the stepparent would not have to overcome the parental presumption to gain standing, in order to prevail in an original suit, the stepparent must overcome the parental presumption. For example, even though a husband finds out that he is not the biological father of the child, he has standing to sue for appointment as managing conservator because he had actual possession and control of the child for six months immediately before the suit was filed.<sup>43</sup> Because of the parental presumption, however, a stepfather or live-in boyfriend of six months does not litigate custody against the mother on equal terms.<sup>44</sup>

The statute does not require that the person asserting standing demonstrate he had exclusive control of the child.<sup>45</sup> However, the person must have some legal right of control over the child or authority to make decisions on behalf of the child.<sup>46</sup> The dissent disagreed with the holding that the biological parent must somehow relinquish

care of the child in order for the other person to have standing, and described facts more similar to the previous *T.W.E.* case.<sup>47</sup>

There is a line of cases that holds that it is very difficult for a person to get standing under this provision if the child's parent(s) were also living with the children. The *M.J.G.* case held that "Even though the children were living in the [grandparents'] home and the [grandparents] performed day-to-day caretaking duties for the children, the children's parents were also living with the children in the home, and there was no evidence that [the parents] did not also care for the children or that [the parents] had abdicated their parental duties and responsibilities to the grandparents."<sup>48</sup> The court in that case found that the grandparents failed to show six months actual care, control, and possession sufficient to establish standing.

There is no bright line rule in the cases showing exactly how much the biological parent must have relinquished control in order for the other resident of the household to have standing to seek conservatorship. However, courts are looking for some actual relinquishment of caregiving duties by the biological parent. It is clear that in order to prevail on the case, the non-parent would have to overcome the parental presumption, but it is unclear how much courts are expecting with regards to merely obtaining standing.

## E. Non-relative

The provisions governing standing for a non-relative are found in §102.003(a) or §102.004(b).

**102.003(a):** An original suit may be filed at any time by:

.....

- (2) the child through a representative authorized by the court;
- (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
- (4) a guardian of the person or of the estate of the child;
- (5) a governmental entity;
- (6) an authorized agency;
- (7) a licensed child placing agency;

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<sup>40</sup> *Id.* at 358.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 356

<sup>43</sup> *T.W.E. v. K.M.E.*, 828 S.W.2d 806, 808 (Tex.App.—San Antonio 1992, no writ).

<sup>44</sup> *Id.* at 809.

<sup>45</sup> *In re K.K.C.*, 292 S.W.3d 788, 793 (Tex.App.—Beaumont 2009, orig. proceeding).

<sup>46</sup> *See Id.*

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<sup>47</sup> *Id.* at 794-95.

<sup>48</sup> *In re M.J.G.*, 248 S.W.3d 753, 758-59 (Tex.App.—Fort Worth 2008, no pet.).

(8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;

(9) 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;

(10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;

(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;

(12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;

(13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573, Government Code, if the child's parents are deceased at the time of the filing of the petition; or

(14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born.

Section 102.004(b) allows non-parents to intervene in a pending SAPCR.

**102.004(b):** An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing

conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

For a non-relative to meet this burden, such individual must show that he or she has had substantial past contact with the child. However, the term "substantial past contact" is not defined by statute or case law.

*In the Interest of H.B.N.S., a Child*, involved the termination of parental rights and adoption proceeding where two unrelated couples were attempting to adopt a child. The court held that the parents of the child's babysitter had standing to intervene based upon their substantial past contacts with the child.<sup>49</sup> In the case, the birth mother allowed the child to go home from the hospital after birth with the Bolton family. While they did not intend to adopt her, the Boltons took her home and cared for her. During that year, they hired a babysitter to care for the child and the babysitter would take the child to her parent's home. Two years later, the birth mother executed an Affidavit of Relinquishment of Parental Rights and designated the Boltons as managing conservators of the child. The Boltons then file a termination and adoption suit. The babysitter's parents, the Shultzes, petitioned for intervention and were ultimately granted standing after showing that they provided ongoing care for extensive periods of time; took the child on family vacations; had the child participate in family celebrations and holidays; provided the child with a room in their home and lake house; and were the ones contacted by the school and had authority to pick up the child from school.<sup>50</sup> Ultimately, the appellate court terminated the birth parents' rights and appointed the Shultzes as the child's sole managing conservator and the Boltons as the possessory conservator based upon their extensive involvement in the child's life.

The case, *In the Interest of N.B.B. and J.B.B.* extending standing to a neighbor of a parent under §102.004(b).<sup>51</sup> The case involved an unmarried mother and father who had two children, one with Downs Syndrome. The parents

<sup>49</sup> 2007 Tex.App. LEXIS 5541 (Tex.App.—Houston [14<sup>th</sup> Dist.] 2007, pet. denied, Nov. 9, 2007).

<sup>50</sup> *Id.*

<sup>51</sup> 2007 Tex.App. LEXIS 8639 (Tex.App. San Antonio Oct. 31, 2007).

separated and the mother moved away from the father and placed the child with Downs Syndrome in a residential facility and let the other child live with a neighbor when she found out that she was terminally ill. Upon the mother's death, the father came to Texas to take possession of the children, but the neighbor refused to surrender the child in her possession. The father brought a SAPCR action and the neighbor filed a counterpetition. Upon review, the appellate court confirmed the trial court and appointed the father and the neighbor joint managing conservators of the child and granted the neighbor the exclusive right to designate the residence of the children. It is interesting to note that the court found that besides the neighbor having had substantial past contact with the children, that appointing the father as a sole managing conservator would significantly impair the children's health and emotional development.

#### **F. Foster parents**

Foster parents may obtain standing through Texas Family Code §102.003(a)(12), §102.003(c) or §102.004(b). An original suit may be filed as follows:

##### **1. Family Code 102.003(a)(12)**

A person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition.

##### **2. Family Code 102.004(b)**

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

##### **3. Family Code 102.003(c)**

Notwithstanding the time requirements of Subsection (a)(12), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt

the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted.

An original suit may be filed at any time by a person who is the foster parent of a child placed by the Department of Protective and Regulatory Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition. Tex. Fam. Code § 102.003(a)(12). In computing the time necessary for standing under subsection (a)(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." Tex. Fam. Code § 102.003(b). The elements of residency for this section are: (1) a fixed place of abode within the possession of the party; (2) occupied or intended to be occupied consistently over a substantial period of time; (3) which is permanent rather than temporary.<sup>52</sup> Notwithstanding the time requirements of Subsection (a)(12), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted. Tex. Fam. Code § 102.003(c). The filing of a petition to terminate parental rights by foster parents who have standing under Section 102.003(a)(12) grants a trial court jurisdiction to terminate those rights even after the trial court loses jurisdiction over the petition to terminate filed by the Texas Department of Family and Protective Services.<sup>53</sup> However, if the foster parents' plea in intervention is contingent on upon, and not independent of, the allegations of the Texas Department of Family and Protective Services, and the foster parents have no pending claims for affirmative relief, the foster parents lose standing if the Texas Department of Family and Protective Services nonsuits its claims.<sup>54</sup>

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<sup>52</sup> *Doncer v. Dickerson*, 81 S.W.3d 349, 356 (Tex.App.--El Paso 2002, no pet.).

<sup>53</sup> *In re C.V.G.*, 112 S.W.3d 180, 184 (Tex. App.—Houston [1st Dist.] 2003, orig. proceeding).

<sup>54</sup> *In re Roxsane R.*, 249 S.W.3d 764, 773-74 (Tex. App.—Fort Worth 2008, orig. proceeding).

## **G. Prospective Adoptive Parent Standing**

### **1. Family Code 102.003(a)(14)**

An original suit may be filed at any time by a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born. Tex. Fam. Code §102.003(a)(14).

### **2. Family Code 102.0035**

A pregnant woman or a parent of a child may execute a statement to confer standing to a prospective adoptive parent as provided by Section 102.0035 to assert standing under Section 102.003(a)(14). A statement to confer standing under Section 102.0035 may not be executed in a suit brought by a governmental entity under Chapter 262 or 263. Tex. Fam. Code § 102.0035(a). The statement may not be used for any purpose other than to confer standing in a proceeding for adoption or to terminate the parent-child relationship. Tex. Fam. Code §102.0035(c).

A statement to confer standing is not required in a suit brought by a person who has standing to file a suit affecting the parent-child relationship under Sections 102.003(a)(1)-(13) or any other law under which the person has standing to file a suit. Tex. Fam. Code § 102.0035(e). For a statement to confer standing to be effective, a parent-child relationship must exist and may be as follows. A father-child relationship is established between a man and a child by an un rebutted presumption of paternity; an unrevoked and unchallenged acknowledgment of paternity; an adjudication of paternity; the man's adoption of the child; or his consent to his wife's use of assisted reproduction. Tex. Fam. Code § 160.201(b). An alleged father is a man who alleges himself to be, or is alleged to be, the genetic father or a possible genetic father of the child, but whose paternity has not been determined. Tex. Fam. Code § 101.0015(a). A statement to confer standing executed by a man as an alleged father does not confer standing.<sup>55</sup> A person who executes a statement to confer standing may revoke the statement at any time before the person executes an affidavit for voluntary relinquishment of parental rights. The

revocation of the statement must be in writing and must be sent by certified mail, return receipt requested, to the prospective adoptive parent. Tex. Fam. Code §102.0035(f). On filing with the court proof of the delivery of the revocation of a statement to confer standing under Subsection (f), the court shall dismiss any suit affecting the parent-child relationship filed by the prospective adoptive parent named in the statement. Tex. Fam. Code § 102.0035(g).

### **3. In the Interest of S.S.G.**

*In the Interest of S.S.G.* considered issues involving prospective adoptive parents that took possession of the child at issue soon after its birth.<sup>56</sup> The prospective adoptive parents filed a SAPCR seeking termination of the parent-child relationship and adoption of the child. *Id.* The trial court terminated the parental rights and appointed the prospective adoptive parents as managing conservators. The Court of Appeals reversed and denied relief to the appellants and appellants filed a petition for review with the Texas Supreme Court which was denied. Appellants, the prospective adoptive parents, had possession of the child during the entire period. Following the denial by the Supreme Court, appellants filed a new SAPCR under §102.003(a)(9), based on the duration of time the child had resided with the parties, thereby affording appellants standing.

The trial court in the second SAPCR pleading noted an exception to §102.003(a)(9), which provides that "if possession is maintained in violation of a valid court order, that possession does not confer standing to bring suit affecting the parent-child relationship." *Id.* The Court held that the prospective adoptive parent's continued possession was not in violation of a court order due to the fact that neither the trial court nor the Court of Appeals entered an order requiring appellants to return the child to the biological parents, and therefore, because they had actual care, custody and possession of the child for six months not ending more than ninety days prior to the filing of the petition, appellants had standing to file the second suit. *Id.*

<sup>55</sup> *In re Mata*, 212 S.W.3d 597, 608 (Tex. App.—Austin 2006, orig. proceeding).

<sup>56</sup> 208 S.W.3d 1, 2006 Tex.App. LEXIS 1544 (Tex.App.Amarillo 2006).

## H. Same Sex couples

### 1. Family Code 102.003(a)(9)

Same sex partners most frequently utilize §102.003(a)(9) to attempt to acquire standing. The section states that to establish “actual care, control, and possession” as required by section 102.003(a)(9), the party must demonstrate (i) more than temporary or occasional possession, though it need not be exclusive, and (ii) more than the control “implicit in having care and possession of the child.”<sup>57</sup> To establish the six month requirement of “actual care, control, and possession of the child” as required by section 102.003(a)(9), some cases say that the party must demonstrate the child “principally resided” with him, though the residency of the child with the party need not be continuous and uninterrupted.<sup>58</sup> However, visitation in accordance with the Standard Possession Order found in section 153.312 of the family code may satisfy the standing requirement.<sup>59</sup> Whether a party satisfies the standing requirement under section 102.003(a)(9) is necessarily fact specific and determined on a case by case basis.<sup>60</sup> Several cases, as discussed below, have considered standing issues for same sex couples.

#### a) *In re M.K.S.-V.*

*In re M.K.S.-V.*, involved dismissal of a partner’s (K.V.) suit for conservatorship or adoption of a child born in 2004 to the ex-partner (T.S.) who became pregnant with the child through artificial insemination by a sperm donor.<sup>61</sup> The partners co-parented the child for over a year when the relationship ended and T.S. moved out with the child. The partners set up an agreed written schedule for the child to visit K.V. overnight once a week, alternate Sunday afternoons, alternate weekends beginning on Friday afternoons during the school year and Thursday afternoons in the summer and certain holidays. The schedule began in August of 2005 and continued until April of 2007 when T.S. discontinued the visits because K.V. had accessed

the child’s school record without T.S.’s agreement. The following month K.V. filed suit seeking to be appointed joint managing conservator or the child or in the alternative to adopt the child. Since K.V. was not the biological parent of the child, she asserted standing to sue for conservatorship under section 102.003(a)(9) as a person who 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).

K.V. appealed the trial court’s decision that she lacked standing to sue for conservatorship, maintaining that she satisfied the standing requirement by virtue of her weekly overnight possessions of the child and possessions on “some holidays”, alternate weekends, and alternate Sundays. Noting that the court in *Doncer* compared the term “principal residence” as used in the determination of the six month possession requirement in §102.003(a)(9) with the term “primary residence” as defined in a joint managing conservatorship in connection with whom the child lives once conservators have been appointed, the Appellate Court concluded the term “principal residence” means a “fixed place of abode, occupied consistently over a substantial period of time, which is permanent rather than temporary.” K. V. argued that her home was a principal residence of the child because it was “a fixed place of abode” that the child occupied consistently and in a permanent fashion, in accordance with the possession agreement. The Appellate Court held that an intent that the child occupy K.V.’s home consistently over a substantial period of time alone established only the six month requirement of section 102.003(a)(9), and to establish standing, K.V. also had to establish that she exercised more than the control implicit in having care and possession of the child.

The Appellate Court placed emphasis on the fact that even though the “possession agreement” shared characteristics of a standard possession order, nothing in the record showed that it was accompanied by the rights a parent conservator enjoys “at all times,” or that T.S. relinquished or shared any of her rights as a parent. The Appellate Court thus rejected K.V.’s argument that she established standing to sue for

<sup>57</sup> See *K.K.C.*, 292 S.W.3d 788 (Tex.App. -Beaumont 2009, orig. proceeding); *In re M.J.G.*, 248 S.W.3d 753, 758-59 (Tex.App.-Fort Worth 2008, no pet.).

<sup>58</sup> *Doncer v. Dickerson*, 81 S.W.3d 349, 361 (Tex.App.- El Paso 2002, no pet.); See Tex. Fam. Code Ann. §102.003(b).

<sup>59</sup> See *Doncer*, 81 S.W.3d at 362.

<sup>60</sup> *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex.App. - Dallas 2008, no pet.).

<sup>61</sup> 301 S.W.3d 460 (Tex.App.—Dallas 2009).

conservatorship by virtue of her possession agreement.

The Dallas Appellate Court, on December 1, 2009, withdrew the August opinion, vacated the judgment of that date, and issued a new opinion finding that the trial court erred in determining that K.V. did not meet the standing requirement.<sup>62</sup> In finding that K.V. did establish the six month period of actual care, custody, and control requisite to establish her standing to file an original SAPCR, the Dallas Court of Appeals focused on the fact that the child had her own room in K.V.'s house where the child kept toys, movies, a television and an aquarium. *Id.* K.V. had modified her house by building a wrap around deck with gates to create a safe environment for the child, would pick up the child from school on occasions when the child was sick and then purchase and administer medication. *Id.* K.V. was listed as a parent on the child's school records, attended school activities and the teachers were aware that K.V. picked up the child during K.V.'s periods of possession. *Id.* Witnesses testified that T.S. had referred to K.V. as the child's mother and treated K.V. as a parent. *Id.* K.V. established a college fund for the child and after the relationship with T.S. ended, the couple still attended church with the child as a family unit. *Id.* The Appellate Court stated that the record did not suggest that the pattern of possession and care giving was intended to be a temporary arrangement. *Id.* "To the contrary, the possession agreement and the parties' actions evidenced intent that the child occupy K.V.'s home consistently over a substantial period of time." *Id.*

#### **b) In re Smith**

In *In re Smith*, Charlena Smith gave birth to twins conceived by artificial insemination from an anonymous donor, and when the twins were four months old, Smith and her same sex partner, Sheila Haley, filed a joint SAPCR petition.<sup>63</sup> In October 2002, when the twins were five months old, the trial court signed an Agreed SAPCR Order appointing Smith and Haley as joint managing conservators and gave them equal possession of the children at all times and stating "that no stated provisions for possession and access are necessary in light of the fact that the parties cohabited in the same primary residence."

*Id.* Haley and Smith separated in February 2008, and Smith filed a motion to vacate the agreed order, and Haley filed a petition to modify the order. *Id.* The trial court denied Smith's motion to vacate and she filed for mandamus arguing that the 2002 agreed order naming Haley as joint managing conservator was void because Haley lacked standing. *Id.* The Appellate Court conditionally granted Smith's petition for writ of mandamus and directed the trial court to vacate its orders. In doing so, the appellate court noted that at the temporary hearing in 2008, Haley acknowledged that she did not have standing at the time the original petition was filed pursuant to section 102.003(a)(9), in that she was not "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 original petition." *Id.* at 466. When Haley and Smith filed the joint petition, the twins were four months old so the six month requirement had not been met. *Id.* The Appellate Court also rejected Haley's argument that because she and Smith had a written agreement concerning conservatorship incorporated into the agreed order, that Smith's standing was enough to confer jurisdiction. Haley relied on section 153.007(b) of the Texas Family Code, providing that the court "shall render an order in accordance with the parenting plan." Regardless, the Appellate Court stated that section 153.007(b) presupposes standing, and Haley had not established standing under the Family Code's general standing statute or under a more specific Family Code statute. *Id.* at 466.

Haley then filed an original petition in 2008 seeking to be named as sole managing conservator under Chapter 153 of the Texas Family Code arguing standing to do so pursuant to §102.003(a)(9).<sup>64</sup> The trial court dismissed the petition for lack of standing and made written findings of fact and conclusions of law as set forth as follows:

"1. There is no evidence that, during the relevant time period, the parent, Ms. Smith, totally abdicated her parental responsibilities over the children to the non parent, Ms. Haley.

<sup>62</sup> *In re M.K.S.-V.*, 05-08-00568-CV (Tex.App.-Dallas 2009).

<sup>63</sup> 262 S.W.3d 463 (Tex.App.-Beaumont 2008)

<sup>64</sup> *In the Interest of C.T.H.S. and C.R.H.S.*, 311 S.W.3d 204 (Tex.Civ.App.—Beaumont 2010).

2. There is no evidence that, during the relevant time period, the parent Ms. Smith did not exercise some care for, some control over or some supervision over the children at the same time that the non parent Ms. Haley exercised some care for, some control over and some supervision over the children.

3. There is no evidence that, during the relevant time period, the non parent Ms. Haley exercised exclusive care for, control over and supervision over the children to the exclusion of the parent Ms. Smith.

4. A parent must totally abdicate their parental responsibilities to another person during the relevant time period before that other person can acquire standing to file an original SAPCR with respect to that parent's child.

5. A parent's allowing of a non parent to have some care for, some control over and some supervision over the parent's child during the relevant time period is insufficient for the non parent to acquire standing to file an original SAPCR with respect to that child.

6. If a parent, to any extent whatsoever, retains or exercises any care for, any control over or any supervision over their child during the relevant time period, then a non-parent cannot as a matter of law acquire standing to file an original SAPCR with respect to that child.

7. During the relevant time period, a non-parent must exercise exclusive care for, control over and supervision over a child (not necessarily continuous for the entire time period, but during the relevant time period) to the exclusion of the child's parent in order to acquire standing to file an original SAPCR with respect to that child." *Id.*

Haley appealed the trial court's dismissal of her petition for lack of standing. *Id.* On appeal, the court in considering if she had standing focused on the specific statutory words "actual care, control, and possession" in §102.003(a)(9) of the Texas Family Code and stated that they would give each "word effect if it is reasonable and possible to do so." *Id.* at 208. The appellate court stated that "actual care" must be interpreted in

context with the responsibilities and liberty interests of the parent. *Id.* In giving effect to the words "actual care," the appellate court considered §102.003(a)(11) which provides standing for a person with whom the child has resided for six months if the parent is deceased at the time suit is filed. *Id.* The appellate court theorized that a person living with a parent and a child may care for the child over a period of time but would not acquire standing by providing the care normally associated with residing in the same household. *Id.* at 209.

The appellate court compared the case to *In re M.J.G.*,<sup>65</sup> where the Fort Worth court of appeals denied standing to grandparents holding that although the children lived with the grandparents since birth and the grandparents performed day to day care taking duties, the parents also lived with the grandparents and had not "abdicated their parental duties and responsibilities to the grandparents." *Id.* at 209, citing *In re M.J.G.*

Haley argued the *M.J.G.* decision incorrectly construed §102.003(a)(9) and that a parent often lives with others and that the best interest of the children should be the primary consideration. *Id.* The appellate court disagreed with Haley and stated that "standing does not turn on whether a trial court agrees or disagrees with a parent's decision concerning the best interest of her children, or a parent's decision regarding who may associate with her children." *Id.* at 209. Further, that the inquiry of the court for a non-parent claiming standing pursuant to the "actual care" requirement of §102.003(a)(9) focuses on "whether the parent is adequately caring for her children." *Id.*, citing Tex. Fam. Code §102.003(a)(9). The appellate court concluded that although Haley lived with the children, Smith also lived in the home with the children and had not "abdicated her parental duties and responsibilities" nor did the record show that Smith failed to adequately care for her children. *Id.* at 209-210. As such, the court affirmed the trial court's ruling that Haley failed to meet her burden and did not have standing to file suit. *Id.*

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<sup>65</sup> 248 S.W.3d 753 (Tex.App.-Fort Worth 2008, no pet.)

## 2. Same Sex Adoption

The Texas Family Code does not preclude same sex adoption. Section 162.001 sets forth who may adopt and who may be adopted:

- 162.001:** (a) Subject to the requirements for standing to sue in Chapter 102, an adult may petition to adopt a child who may be adopted.
- (b) A child residing in this state may be adopted if:
- (1) the parent-child relationship as to each living parent of the child has been terminated or a suit for termination is joined with the suit for adoption;
  - (2) the parent whose rights have not been terminated is presently the spouse of the petitioner and the proceeding is for a stepparent adoption;
  - (3) the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, the person seeking the adoption has been a managing conservator or has had actual care, possession, and control of the child for a period of six months preceding the adoption or is the child's former stepparent, and the nonterminated parent consents to the adoption; or
  - (4) the child is at least two years old, the parent-child relationship has been terminated with respect to one parent, and the person seeking the adoption is the child's former stepparent and has been a managing conservator or has had actual care, possession, and control of the child for a period of one year preceding the adoption.
- (c) If an affidavit of relinquishment of parental rights contains a consent for the Department of Protective and Regulatory Services or a licensed child-placing agency to place the child for adoption and appoints the department or agency managing conservator of the child, further consent by the parent is not required and the adoption

order shall terminate all rights of the parent without further termination proceedings.

Additionally, §102.0035 allows a pregnant woman or any parent of a child to sign a statement to confer standing to a prospective adoptive parent and allow that individual to bring a suit for adoption or for termination and adoption under §102.003(a)(14). Several cases have considered the issue of standing in same sex adoptions.

In *Goodson v. Castellanos*,<sup>66</sup> Goodson traveled to Kazakstan to adopt a 3-year old child. After returning, she and her same-sex partner, Castellanos, adopted the child. A year later, when the parents separated, Castellanos filed a SAPCR and after trial, the court appointed Castellanos as sole managing conservator. On appeal, Goodson alleged that the Texas adoption was void because the court lacked subject matter jurisdiction over an adoption of a child by two members of the same sex. She used various definitions of “parent” in Texas Family Code § 101.024 and 101.025 and also cited the Texas Health and Safety Code § 192.008(a) that says amended birth certificates “must be in the names of the adoptive parents, one of whom must be a female . . . and the other of whom must be a male.” The court rejected these arguments, saying that the court issuing the adoption order is a court of general jurisdiction that “may hear and determine any cause that is cognizable by courts of law or equity and may grant any relief that could be granted by either courts of law or equity.” *Id.* at 747. The court also pointed out that the Family Code “specifically authorizes district courts to issue adoption orders. *Id.* at 748. The court held that Goodson could not collaterally attack the adoption decree. *Id.* at 749.

Goodson also argued that the coparent adoption “violates the public interest of the state of Texas that a child have at most one parent of each sex.” *Id.* at 750. The court again disagreed. The Court held that if a parent wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that party parental authority the exercise of which may create a profound bond with the child. *Id.* at 752.

In *Hobbs v. Van Stavern*,<sup>67</sup> Hobbs was the child’s biological mother who conceived the child

<sup>66</sup> 214 S.W.3d 741 (Tex.App.—Austin 2007).

<sup>67</sup> 249 S.W.3d 1 (Tex.App.—Houston [1<sup>st</sup> Dist.] 2006).

through donor insemination and Van Stavern adopted the child when the child was 3 years old. A year and a half later, the parents separated and Van Stavern moved out of the home and filed a SAPCR. When Hobbs attacked the validity of the adoption, the court responded that the attack was untimely, and held that the validity of an adoption order is not subject to attack after six months after the date the order was signed. *Id.* Hobbs also claimed that appointing Van Stavern as a joint managing conservator of the child violated public policy because it was “tantamount to a proclamation validating same-sex relationships.” *Id.* Noting that Van Stavern had “little substantive argument and no citation to authority,” the court found that, because the Code permitted Van Stavern to seek custody, it was “constrained to follow the provisions of the Family Code as enacted” and overruled the public policy argument. *Id.* at 4-5.

#### **I. Designated Guardian: Connecting the Probate Code to the Family Code**

An attorney practicing primarily family law may not have a working familiarity with the Probate Code, nonetheless, it can provide standing in certain instances. Under Tex. Fam. Code 102.003(a)(4), a guardian of the person or of the estate of the child has standing to file an original suit. Such a person also has standing to file a modification suit, pursuant to Tex. Fam. Code § 156.002(b).

In the Probate Code, the term “guardian” is defined to mean a person who is appointed guardian under Section 693 of the Probate Code, or a temporary or successor guardian.<sup>68</sup> The term “guardian” in Section 102.003(a)(4) of the Family Code must be construed in accordance with the Probate Code’s definition of “guardian.”<sup>69</sup>

Section 676 of the Probate Code allows the surviving parent of a minor, by will or written declaration, to appoint any eligible person to be guardian of the person of the parent's minor children after the death or incapacity of the parent.<sup>70</sup> After the parent’s death or a finding of incapacity, the court shall appoint the person designated in the will or declaration to serve as guardian of the person of the parent's minor

children.<sup>71</sup> If a parent has engaged in estate planning, and has designated a guardian for a child, then that person, upon being appointed guardian, would have standing to file suit.

#### **J. Standing to Adjudicate Parentage**

Unless a voluntary acknowledgment of paternity has been executed by another man, a prospective father has standing to seek adjudication of paternity.

**102.003(a)(8):** a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise.

**160.602(a):** Subject to Subchapter D [voluntary acknowledgment of paternity] and [the time limits in] Sections 160.607 and 160.609 and except as provided by Subsection (b), a proceeding to adjudicate parentage may be maintained by:

- (1) the child;
- (2) the mother of the child;
- (3) a man whose paternity of the child is to be adjudicated;
- (4) the support enforcement agency or another government agency authorized by other law;
- (5) an authorized adoption agency or licensed child-placing agency;
- (6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, is incapacitated, or is a minor;
- (7) a person related within the second degree by consanguinity to the mother of the child, if the mother is deceased; or
- (8) a person who is an intended parent.

(b) After the date a child having no presumed, acknowledged, or adjudicated father becomes an adult, a proceeding to adjudicate the parentage of the adult child may only be maintained by the adult child.

Prior to 2007, there was debate over whether a sperm donor had standing to adjudicate parentage. *In re Sullivan*<sup>72</sup> held that where a mother and a donor had executed a co-parenting agreement, he

<sup>68</sup> Tex. Prob. Code § 601(11).

<sup>69</sup> *In re A.D.P.*, 281 S.W.3d 541, 549 (Tex.App.—El Paso 2008, no pet.).

<sup>70</sup> Tex. Prob. Code § 676(d).

<sup>71</sup> Tex. Prob. Code § 676(e).

<sup>72</sup> *In re Sullivan*, 157 S.W.3d 911 (Tex.App.—Houston [14th Dist.] 2005, orig. proceeding [mand. denied]).

had standing to bring a suit; while *In re H.C.S.*<sup>73</sup> held that a donor did not have standing. In 2007, Tex. Fam. Code § 160.7031 was revised to clarify the issue.

Another interesting case held that, where a man seeking to be adjudicated the father has standing as of the filing of the case, the court does not lose subject matter jurisdiction over the parentage action when the DNA test results determine that he is not the father.<sup>74</sup>

#### IV. Challenging Standing

The *Sullivan*<sup>75</sup> case contains a discussion on the proper procedure for challenging standing:

Standing is a prerequisite to subject-matter jurisdiction, which is essential to a court's power to decide a case.<sup>76</sup> A party may challenge the absence of subject-matter jurisdiction by a plea to the jurisdiction and by other procedural vehicles.<sup>77</sup> A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat the alleged claims, without regard to whether they have merit.<sup>78</sup> The purpose of a dilatory plea is not to force a plaintiff to preview its case on the merits, but to establish a reason why the merits of its case should never be reached.<sup>79</sup>

Meeting the burden for standing is different than meeting the burden to prevail on the case. The Texas Supreme Court has emphasized that a court should not decide standing issues based on its views of the merits: "In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry. When we consider a trial court's order on a plea to the jurisdiction, we construe the pleadings in the plaintiff's favor and look to the pleader's intent."<sup>80</sup> A trial court accepts the factual allegations in the petition as true, unless the defendant pleads and proves the

allegations were made fraudulently to confer jurisdiction.<sup>81</sup> When reviewing a trial court's order on a plea to the jurisdiction, an appellate court may look to evidence outside of the pleadings: "[T]he issues raised by a dilatory plea are often such that they cannot be resolved without hearing evidence. And because a court must not act without determining that it has subject-matter jurisdiction to do so, it should hear evidence as necessary to determine the issue before proceeding with the case. But the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction....The court should, of course, confine itself to the evidence relevant to the jurisdictional issue."<sup>82</sup>

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<sup>73</sup> *In re H.C.S.*, 219 S.W.3d 33 (Tex.App.-San Antonio 2006, no pet.).

<sup>74</sup> *In re K.I.A.*, 205 S.W.3d 14 (Tex.App.—Eastland 2006, no pet.).

<sup>75</sup> *In re Sullivan*, 157 S.W.3d 911, 914-15 (Tex.App.--Houston [14th Dist.] 2005, orig. proceeding, [mand. denied]).

<sup>76</sup> *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000).

<sup>77</sup> *Id.* at 554.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 554-55.

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<sup>81</sup> *Id.* at 554; *TAC Realty, Inc. v. City of Bryan*, 126 S.W.3d 558, 561 (Tex.App.-Houston [14th Dist.] 2003, pet. denied).

<sup>82</sup> *Id.* at 554-55.

## V. Appendix A, Texas Family Code Standing Provisions

### A. Chapter 102

#### Tex. Fam. Code § 102.003.

##### GENERAL STANDING TO FILE SUIT.

- (a) An original suit may be filed at any time by:
- (1) a parent of the child;
  - (2) the child through a representative authorized by the court;
  - (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
  - (4) a guardian of the person or of the estate of the child;
  - (5) a governmental entity;
  - (6) an authorized agency;
  - (7) a licensed child placing agency;
  - (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;
  - (9) 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;
  - (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
  - (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;
  - (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;
  - (13) a person who is a relative of the child within the third degree by consanguinity, as determined by Chapter 573,

Government Code, if the child's parents are deceased at the time of the filing of the petition; or

- (14) a person who has been named as a prospective adoptive parent of a child by a pregnant woman or the parent of the child, in a verified written statement to confer standing executed under Section 102.0035, regardless of whether the child has been born.
- (b) In computing the time necessary for standing under Subsections (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.
- (c) Notwithstanding the time requirements of Subsection (a)(12), a person who is the foster parent of a child may file a suit to adopt a child for whom the person is providing foster care at any time after the person has been approved to adopt the child. The standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted.

#### Tex. Fam. Code § 102.0035.

##### STATEMENT TO CONFER STANDING.

- (a) A pregnant woman or a parent of a child may execute a statement to confer standing to a prospective adoptive parent as provided by this section to assert standing under Section 102.003(a)(14). A statement to confer standing under this section may not be executed in a suit brought by a governmental entity under Chapter 262 or 263.
- (b) A statement to confer standing must contain:
- (1) the signature, name, age, and address of the person named as a prospective adoptive parent;
  - (2) the signature, name, age, and address of the pregnant woman or of the parent of the child who is consenting to the filing of a petition for adoption or to terminate the parent-child relationship as described by Subsection (a);
  - (3) the birth date of the child or the anticipated birth date if the child has not been born; and
  - (4) the name of the county in which the suit will be filed.

- (c) The statement to confer standing must be attached to the petition in a suit affecting the parent-child relationship. The statement may not be used for any purpose other than to confer standing in a proceeding for adoption or to terminate the parent-child relationship.
- (d) A statement to confer standing may be signed at any time during the pregnancy of the mother of the unborn child whose parental rights are to be terminated.
- (e) A statement to confer standing is not required in a suit brought by a person who has standing to file a suit affecting the parent-child relationship under Sections 102.003(a)(1)-(13) or any other law under which the person has standing to file a suit.
- (f) A person who executes a statement to confer standing may revoke the statement at any time before the person executes an affidavit for voluntary relinquishment of parental rights. The revocation of the statement must be in writing and must be sent by certified mail, return receipt requested, to the prospective adoptive parent.
- (g) On filing with the court proof of the delivery of the revocation of a statement to confer standing under Subsection (f), the court shall dismiss any suit affecting the parent-child relationship filed by the prospective adoptive parent named in the statement.

**Tex. Fam. Code § 102.004.  
STANDING FOR GRANDPARENT OR  
OTHER PERSON.**

- (a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or another relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof to the court that:
  - (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or
  - (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.
- (b) An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person

deemed by the court to have had substantial past contact with the child leave to intervene in a pending suit filed by a person authorized to do so under this subchapter if there is satisfactory proof to the court that appointment of a parent as a sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

- (c) Possession of or access to a child by a grandparent is governed by the standards established by Chapter 153.

**Tex. Fam. Code § 102.0045.  
STANDING FOR SIBLING.**

- (a) The sibling of a child may file an original suit requesting access to the child as provided by Section 153.551 if the sibling is at least 18 years of age.
- (b) Access to a child by a sibling of the child is governed by the standards established by Section 153.551.

**Tex. Fam. Code § 102.005.  
STANDING TO REQUEST TERMINATION  
AND ADOPTION.**

An original suit requesting only an adoption or for termination of the parent-child relationship joined with a petition for adoption may be filed by:

- (1) a stepparent of the child;
- (2) an adult who, as the result of a placement for adoption, has had actual possession and control of the child at any time during the 30-day period preceding the filing of the petition;
- (3) an adult who has had actual possession and control of the child for not less than two months during the three-month period preceding the filing of the petition;
- (4) an adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- (5) another adult whom the court determines to have had substantial past contact with the child sufficient to warrant standing to do so.

**Tex. Fam. Code § 102.006.  
LIMITATIONS ON STANDING.**

- (a) Except as provided by Subsections (b) and (c), if the parent-child relationship between the child and every living parent of the child has

been terminated, an original suit may not be filed by:

- (1) a former parent whose parent-child relationship with the child has been terminated by court order;
  - (2) the father of the child; or
  - (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or of the father of the child.
- (b) The limitations on filing suit imposed by this section do not apply to a person who:
- (1) has a continuing right to possession of or access to the child under an existing court order; or
  - (2) has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit.
- (c) The limitations on filing suit imposed by this section do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is a sister of a parent of the child, or an uncle who is a brother of a parent of the child if the adult sibling, grandparent, aunt, or uncle files an original suit or a suit for modification requesting managing conservatorship of the child not later than the 90th day after the date the parent-child relationship between the child and the parent is terminated in a suit filed by the Department of Family and Protective Services requesting the termination of the parent-child relationship.

**Tex. Fam. Code § 102.007.**

**STANDING OF TITLE IV-D AGENCY.**

In providing services authorized by Chapter 231, the Title IV-D agency or a political subdivision contracting with the attorney general to provide Title IV-D services under this title may file a child support action authorized under this title, including a suit for modification or a motion for enforcement.

**B. Chapter 153**

**Tex. Fam. Code § 153.431.**

**APPOINTMENT OF GRANDPARENT, AUNT, OR UNCLE AS MANAGING CONSERVATOR.**

If both of the parents of a child are deceased, the court may consider appointment of a parent, sister, or brother of a deceased parent as a managing conservator of the child, but that consideration does not alter or diminish the discretionary power of the court.

**Tex. Fam. Code § 153.432.**

**SUIT FOR POSSESSION OR ACCESS BY GRANDPARENT.**

- (a) A biological or adoptive grandparent may request possession of or access to a grandchild by filing:
- (1) an original suit; or
  - (2) a suit for modification as provided by Chapter 156.
- (b) A grandparent may request possession of or access to a 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.
- (c) In a suit described by Subsection (a), the 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 § 153.433.**

**POSSESSION OF OR ACCESS TO GRANDCHILD.**

- (a) The court may order reasonable possession of or access to a grandchild by a grandparent if:
- (1) at the time the relief is requested, at least one biological or adoptive parent of the child has not had that parent's parental rights terminated;
  - (2) the grandparent requesting possession of or access to the child overcomes the presumption that a parent acts in the best interest of the parent's child 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 grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
  - (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
  - (B) has been found by a court to be incompetent;
  - (C) is dead; or
  - (D) does not have actual or court-ordered possession of or access to the child.
- (b) An order granting possession of or access to a child by a grandparent that is rendered over a parent's objections must state, with specificity that:
  - (1) at the time the relief was requested, at least one biological or adoptive parent of the child had not had that parent's parental rights terminated;
  - (2) the grandparent requesting possession of or access to the child has overcome the presumption that a parent acts in the best interest of the parent's child by proving by a preponderance of the evidence that the denial of possession of or access to the child would significantly impair the child's physical health or emotional well-being; and
  - (3) the grandparent requesting possession of or access to the child is a parent of a parent of the child and that parent of the child:
    - (A) has been incarcerated in jail or prison during the three-month period preceding the filing of the petition;
    - (B) has been found by a court to be incompetent;
    - (C) is dead; or
    - (D) does not have actual or court-ordered possession of or access to the child.

**Tex. Fam. Code § 153.434.  
LIMITATION ON RIGHT TO REQUEST  
POSSESSION OR ACCESS.**

- A biological or adoptive grandparent may not request possession of or access to a grandchild if:
- (1) each of the biological parents of the grandchild has:
    - (A) died;
    - (B) had the person's parental rights terminated;
 or

- (C) executed an affidavit of waiver of interest in child or an affidavit of relinquishment of parental rights under Chapter 161 and the affidavit designates an authorized agency, licensed child-placing agency, or person other than the child's stepparent as the managing conservator of the child; and
- (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.

**Tex. Fam. Code § 153.551.  
SUIT FOR ACCESS.**

- (a) The sibling of a child who is separated from the child because of an action taken by the Department of Family and Protective Services may request access to the child by filing:
  - (1) an original suit; or
  - (2) a suit for modification as provided by Chapter 156.
- (b) A sibling described by Subsection (a) may request access to the child 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.
- (c) The court shall order reasonable access to the child by the child's sibling described by Subsection (a) if the court finds that access is in the best interest of the child.

**C. Chapter 156**

**Tex. Fam. Code § 156.002.  
WHO CAN FILE.**

- (a) A party affected by an order may file a suit for modification in the court with continuing, exclusive jurisdiction.
- (b) A person or entity who, at the time of filing, has standing to sue under Chapter 102 may file a suit for modification in the court with continuing, exclusive jurisdiction.
- (c) The sibling of a child who is separated from the child because of the actions of the Department of Family and Protective Services may file a suit for modification requesting access to the child in the court with continuing, exclusive jurisdiction.

## **D. Chapter 160**

### **Tex. Fam. Code § 160.602.**

#### **STANDING TO MAINTAIN PROCEEDING.**

- (a) Subject to Subchapter D and Sections 160.607 and 160.609 and except as provided by Subsection (b), a proceeding to adjudicate parentage may be maintained by:
- (1) the child;
  - (2) the mother of the child;
  - (3) a man whose paternity of the child is to be adjudicated;
  - (4) the support enforcement agency or another government agency authorized by other law;
  - (5) an authorized adoption agency or licensed child-placing agency;
  - (6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, is incapacitated, or is a minor;
  - (7) a person related within the second degree by consanguinity to the mother of the child, if the mother is deceased; or
  - (8) a person who is an intended parent.
- (b) After the date a child having no presumed, acknowledged, or adjudicated father becomes an adult, a proceeding to adjudicate the parentage of the adult child may only be maintained by the adult child.