

NON-PARENT STANDING

TASHA MCINNIS WILSON, *Houston*
Jacqueline Smith & Associates, P.C.

State Bar of Texas
MARRIAGE DISSOLUTION 101
April 11, 2018
Dallas

CHAPTER 7

TASHA MCINNIS WILSON

Jacqueline Smith & Associates, P.C.
735 Yale Street
Houston, Texas 77007
Telephone: (713) 863-0003
Facsimile: (713) 863-9303
Website: jacquesmithlaw.com
Email: Tasha@JacqueSmithlaw.com

EDUCATION:

University of Houston Law Center
Doctorate of Jurisprudence, May 2005

University of Southern Mississippi
BS, May 2000

PROFESSIONAL ACTIVITIES:

State Bar of Texas, Member- 2005- present
State Bar of Texas, Family Law Section, Member
Burta Rhoads Raborn Inn of Court, Member
Burta Rhoads Raborn Inn of Court, Team Leader, 2016-2018
Houston Bar Association, Member
Houston Bar Association, Family Law Section, Board of Director, 2017-2018
The Houston Family Law Group, Member
The Houston Family Law Group, Treasurer
Houston Young Lawyers Association, Fellow

PUBLICATION AND SPEAKER:

Author and Speaker: Nonparent Standing, Marriage Dissolution 101, April 2018
Speaker: Child Support, Family Law Essentials, 2017
Speaker, "Temporary Orders," Houston Family Law Group, July 2013

CIVIC ACTIVITIES:

Houston Volunteer Lawyers Program, Legal Lines – Family Law Expert and Liaison
Houston's Food Bank – Volunteer
True Gift of Hope Foundation – Volunteer
Delta Sigma Theta Sorority – Member

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. WHAT IS STANDING? 1

III. STANDING PURSUANT TO THE TEXAS FAMILY CODE 1

 A. Fam § 102.003 – General Standing to File Suit 2

 a. What is a “parent” vs. non-parent? 2

 b. Who is a Court Representative authorized to act on the child’s behalf? 2

 c. Who has Standing as a Custodian or Person having visitation by an order of the court?..... 3

 d. Standing as a Guardian pursuant to Texas Estates Code? 3

 e. What is a governmental entity? 3

 f. What is the Department of Family and Protective Services? 4

 g. What is a licensed child placing agency? 4

 h. What is actual care, control, and possession?..... 4

 i. Standing designated by an affidavit of relinquishment. 5

 j. The Step-parent standing statute..... 6

 k. The Foster parent standing statute. 6

 l. Grandparents, aunts, and uncles...oh my!..... 6

 m. Adoptive parent standing..... 7

 B. Time Sensitive Standing Statutes – Tex. Fam. Code § 102.003(A)(9), (11), (12) 7

 C. Standing for Grandparents and Other Nonparents – Tex. Fam. Code § 102.004..... 8

 D. Limits on Standing and Sibling Access – Tex. Fam. Code § 102.0045 and 102.006..... 9

 E. Suit to Request Termination and Adoption – Tex. Fam. Code § 102.005 9

IV. CHALLENGING STANDING..... 9

 A. Plea to the Jurisdiction and Motion to Dismiss 9

 B. Motion to Strike Intervention 9

V. CONCLUSION 10

APPENDICES 11

NON-PARENT STANDING

I. INTRODUCTION

Standing to file a suit under the Texas Family Code is limited and dictated by statutory framework. The Code outlines the requirements of a non-parent to maintain a lawsuit involving a child. This paper will explore the standing of non-parents who make up many of the litigants who participate in suits affecting the parent-child relationship as Petitioners, Respondents, or Intervenor. This paper will explore standing under Chapter 102 of the Texas Family Code.

II. WHAT IS STANDING?

Black's Law Dictionary defines standing as a "party's right to make a legal claim or seek judicial enforcement of a duty or right." Standing is a constitutional prerequisite to maintaining suit in either federal or state court. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.1993). As a general rule of Texas law, to have standing, unless it is conferred by statute, a plaintiff must demonstrate that he or she possesses an interest in a conflict distinct from that of the general public, such that the defendant's actions have caused the plaintiff some particular injury. *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex.1984).

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. Subject matter jurisdiction is never presumed and cannot be waived. *Texas Ass'n of Business*, 852 S.W.2d at 443. A lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction. *Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1061 (5th Cir.1991); *Simmons v. Interstate Commerce Comm'n*, 900 F.2d 1023, 1026 (7th Cir.1990); see also *Heckler v. Mathews*, 465 U.S. 728, 737, 104 S.Ct. 1387, 1394, 79 L.Ed.2d 646 (1984).

Subject matter jurisdiction is an issue that may be raised for the first time on appeal. *Texas Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782*, 163 Tex. 135, 352 S.W.2d 252, 253 (1961). Lack of subject matter jurisdiction makes the judgement void, not just voidable. *In re United Servs. Auto Ass'n*, 307 S.W.3d 299, 309 (Tex. 2010).

TAKE AWAYS

1. A party must have standing to bring suit.
2. Standing is a component of subject matter jurisdiction.
3. Standing cannot be waived or agreed to.
4. The issue of standing can be raised for the first time on appeal.
5. Lack of standing makes a judgment VOID!

III. STANDING PURSUANT TO THE TEXAS FAMILY CODE

The Texas Family Code promulgates the basis for standing under Chapter 102. The primary source of standing is detailed within section 102.003(a) which lays out fourteen categories of general standing to maintain a lawsuit. Texas law requires that a person or entity who brings a suit affecting the parent child relationship meet one of the statutory requirements under the general standing provision in section 102.003 or qualify under other tailored standing provision in the Family Code. *Tex. Fam. Code §§ 102.003, 102.0035(a), 102.004, 102.0045, 102.005*.

In Texas, "the standing inquiry 'focuses on the question of who may bring an action.'" *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015) (quoting *Patterson v. Planned Parenthood*, 971 S.W.2d 439,442 Tex. 1998)). The Code provides the statutory framework for determining. Additionally, the Code defines the persons or entities who have standing to bring an original suit affecting the parent-child relationship. *In re E.G.L.*, 378 S.W.3d 542, 547 (Tex. App.—Dallas 2012, pet. denied).

In suits affecting the parent-child relationship, standing is a prerequisite to the court's exercise of subject matter jurisdiction. *In re SSJ-J*, 153 S.W.3d 132, 134 (Tex. Ap.—San Antonio 2004, no pet.). A pleader's standing to maintain a claim is a threshold issue and the burden of proof is on the pleader to prove standing by a preponderance of the evidence. *In re Pringle*, 862 S.W.2d 722, 724 (Tex. App.—Tyler 1993, no writ). To establish standing, the pleader is required to plead facts in their petition to demonstrate to the court that subject matter jurisdiction is proper. *Id.* "The party seeking relief must allege and establish standing within the parameters of the statutory language. *In re H.G.*, 267 S.W.3d 120, 123 (Tex. App. —San Antonio 2008, no pet.). After a party has establish general standing, the party must also show the court that it has a justiciable interest in the lawsuit. *Mendez v. Brewer*, 626 S.W.2d 498, 499 (Tex. 1982). The pleader is required to allege facts in his or her petition to demonstrate that the trial court has jurisdiction to hear the case and that there is a

justiciable interest. *In re M.K.S.-V.*, 301 S.W.3d 460, 463 (Tex. App.—Dallas 2009, pet. denied).

Additionally, standing must exist at the time the pleader files suit and continue throughout the duration of the legal proceedings, including appeal. *La Tierra de Simmons Familia, Ltd. v. Main Event Entm’t, L.P.*, 03-10-00503-CV, 2012 WL 753184, at *4 (Tex. App. – Austin, Mar. 9, 2012, pet. denied) (mem. op.).

Though the legislature has codified the standing statute, the statute should be interpreted in conjunction with the constitutional principles as explained in *Troxel*. *Troxel v. Granville*, 530 U.S. 57 (2000). See *In re C.T.H.S.*, 311 S.W.3d 204, 208 (Tex. App.—Beaumont 2010, pet. denied).

TAKE AWAYS

1. Standing statutes - Texas Family Code §§102.003(a)(1)-(14), 102.0035(a), 102.004, 102.0045, 102.005.
2. The pleader must plead facts to show standing and a justiciable interest in the suit.
3. Standing must exist throughout the suit.
4. The principles of *Troxel* should be considered.

A. Fam § 102.003 – General Standing to File Suit

The general standing statute outlines several different avenues for maintaining standing to bring a suit affecting the parent-child relationship by non-parent parties. To understand who qualifies as a non-parent, it must be determined who is a parent pursuant to the Texas Family Code.

a. What is a “parent” vs. non-parent?

An original suit may be filed at any time by a parent of the child. *Tex. Fam. Code 102.003(a)(1)*

Texas Family Code §101.024 defines the following persons as “parents” of a child:

1. The mother;
2. A man presumed to be the father;
3. A man legally determined to be the father;
4. A man who has been adjudicated to be the father by a court of competent jurisdiction;
5. A man who has acknowledged his paternity under applicable law; or
6. An adoptive mother or father.

A non-parent is anyone who does not fall under the definition of a parent under Tex. Fam. Code §101.024 or a man alleging himself to be the child’s father in accordance with Chapter 160. Post *Obergefell*, the definition of a parent may soon be changing to take into

consideration the Supreme Court’s holding that persons of the same sex have a fundamental right to be married. *Obergefell v. Hodges*, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015). In *In re N.I.V.S.*, the Court held that a female who obtained an order changing her identity from female to male could not be a man alleging himself to be the father of a child (102.003(a)(8)) or a man whose paternity of the child could be adjudicated (102.003(a)(3)) and therefore, not a parent of the child. *In re N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913, at *4 (Tex. App.—San Antonio Mar. 11, 2015, no pet.) (mem. op.). In *In Re A.E.*, the Petitioner, a female spouse, attempted to establish parentage to a non-genetic child born during the marriage through the Texas Paternity Statute. *In re A.E.*, No. 09-16-00019-CV, 2017 Tex. App. (Tex. App.-Beaumont, April 27, 2017). On appeal, the Appellate Court agreed with the legal conclusion reached by the trial court that *Obergefell* does not confer standing upon a non-genetic same sex spouse to maintain a parentage claim. *Id.* Furthermore, the Court concluded that *Obergefell* does not require the Court to act as the Legislature and re-write the Texas statutes that define who has standing to bring a SAPCR. *Id.* The court reasoned that *Obergefell* did not hold that every state law related to the marital relationship or the parent-child relationship must be “gender neutral.” *Id.*

TAKE AWAY

When representing a party to a same-sex suit involving the parent-child relationship, plead standing under every possible standing statute, including but not limited to, the paternity statute.

b. Who is a Court Representative authorized to act on the child’s behalf?

An original suit may be filed at any time by the child through a representative authorized by the court. *Tex. Fam. Code 102.003(a)(2)*

A court ordered representative who can act on behalf of the child is usually reserved for those appointed as attorney ad litem, amicus attorneys, guardian ad litem, or guardians of the person or estate of the child. These officers of the court have the power to participate in the conduct of litigation to the same extent as an attorney for a party. Usually, a guardian ad litem does not fall under this category since he or she is appointed by the court to assist in protecting the child’s best interests rather than providing legal services; however, there is case law to support a guardian ad litem acting on the child’s behalf.

In *In re J.A. and N.A.*, Dallas County Child Protective Services filed a SAPCR and subsequently filed a termination of parental rights. *In re J.A. and N.A.*, 109 S.W.3d 869, 872 (Tex. App.- Dallas 2003, pet.

denied). After a dismissal order, CPS filed a new petition for termination of the parents' rights and at the emergency hearing, the trial court ordered that the child be returned to Mother on the following day. *Id.* The guardian ad litem for the children filed a petition to modify requesting termination of parental rights, grandparent access, and request for temporary orders. *Id.* The trial court granted the guardian ad litem's request for a temporary restraining order and the child was not returned to the Mother. *Id.* On appeal, the Appellants challenged the guardian ad litem's authority to file suit and seek removal of the child. *Id.* The Court of Appeals held that a guardian ad litem had the authority to seek temporary orders to maintain the status quo in a termination case because the role of a guardian ad litem is to ensure adequate representation of the child the subject of the suit. *Id.* at 873-874.

c. Who has Standing as a Custodian or Person having visitation by an order of the court?

An original suit may be filed at any time by 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. *Tex. Fam. Code 102.003(a)(3)*

In *In re B.N.L.-B.*, Logan and Bloom were in a committed relationship and entered into a donor agreement with Aguirre who agreed he would not claim any parental rights, except upon the death of both Bloom and Logan. *In re B.N.L.-B.*, 523 S.W.3d 254, 257 (Tex. App.—Dallas 2017). Logan and Bloom moved to Virginia with the child and allowed Aguirre limited possession. *Id.* Aguirre brought suit against Logan and Bloom in Virginia and the parties' signed a Consent Order giving Aguirre possession of the child on the third weekend of each month after Logan, Bloom, and the child moved to Texas in 2007. *Id.* After Logan and Bloom returned to Texas, they separated and refused to allow Aguirre to have possession of the child as agreed in the Consent Order. *Id.* Bloom filed a SAPCR against Logan and Aguirre intervened. *Id.* at 258. Logan challenged Aguirre's standing. *Id.* The trial court ruled that Aguirre did not have standing under sections 102.003(a)(3), (9), but ruled that he had standing under section 102.004(b) as a person with substantial past contact with the child. *Id.* Logan and Bloom reached an agreement with Aguirre in 2009 regarding possession. *Id.* In 2014, Aguirre filed a modification of the 2009 order seeking to be appointed a nonparent possessory conservator. *Id.* at 259. Logan filed a plea to the jurisdiction alleging that Aguirre did not have standing as a donor under the assisted-reproduction statute and that the prior order was void because the court did not have subject matter jurisdiction. *Id.* The trial court denied Logan's plea and awarded Aguirre some possessory rights and additional possession periods. *Id.* Logan appealed asserting that Aguirre did not have standing to intervene in 2008 or bring suit in 2014. *Id.*

at 260. The Appellate Court held that since Logan and Bloom had standing as parents of the child to bring their SAPCR in 2008 and agreed to the 2009 order allowing Aguirre to have limited possession of the child, then when Aguirre brought his 2014 petition to modify, he was a party affected by the 2009 order and had standing to bring the petition to modify that order. *Id.* at 260-261.

d. Standing as a Guardian pursuant to Texas Estates Code?

An original suit may be filed at any time by a guardian of the person or of the estate of the child. *Tex. Fam. Code 102.003(a)(4)*

Texas Estates Code defines "guardian" as a person appointed by the court to serve as a:

- (1) guardian under Subchapter D, Chapter 1101;
- (2) successor guardian; or
- (3) temporary guardian. *Tex. Est. Code 1002.012(a)(1)-(3).*

In *In re A.D.P.*, Mary Anna the primary conservator of A.D.P. left her entire estate to A.D.P. and appointed her adopted daughter, Jaimee, to be the guardian of the person and estate of A.D.P. *In re A.D.P.*, 281 S.W. 3d 541, 543 (Tex. App.—El Paso 2008). Following Mary Anna's death, A.D.P. was placed with non-relatives, Tammie and Allen, who enrolled A.D.P. in school in Ward County on January 23, 2006. *Id.* Tammie and Allen filed an application for temporary guardianship in Ward County and the county judge appointed them as temporary guardians of A.D.P. on March 9, 2006. *Id.* On that same day, Tammie and Allen filed a SAPCR seeking to be appointed non-parent sole managing conservators of A.D.P. *Id.* Ida Mae, the grandmother, and Jaimee filed a counter-petition seeking to be appointed the sole managing conservators of A.D.P. *Id.* At 544. The court appointed Tammie and Allen as the sole managing conservators of A.D.P. and granted Ida Mae reasonable access. *Id.* Ida Mae and Jaimee appealed contending that Tammie and Allen, as "temporary" guardians, lacked standing to seek managing conservatorship of A.D.P. under Section 102.003(a)(4). *Id.* The Appellate Court held that the term "guardian" in Section 102.003(a)(4) of the Texas Family Code must be construed in accordance with the term "guardian" in Section 601(11) of the Probate Code which defines "guardian" to mean a person who is appointed guardian under Section 693 of the Probate Code, or a temporary or successor guardian. *Id.* at 549.

e. What is a governmental entity?

An original suit may be filed at any time by a governmental entity. *Tex. Fam. Code 102.003(a)(5)*

In Texas, a governmental entity means:

- (A) the state;
- (B) a municipality, county, public school district, or special-purpose district or authority;
- (C) a district, county, or justice of the peace court;
- (D) a board, commission, department, office, or other agency in the executive branch of state government, including an institution of higher education as defined by Section 61.003, Education Code;
- (E) the legislature or a legislative agency; or
- (F) the Supreme Court of Texas, The Texas Court of Criminal Appeals, a court of appeals, or the State Bar of Texas or another judicial agency having statewide jurisdiction. *Tex. Govt. Code 2252.001*

In *In re A.E.D.*, the Appellant contended that the Attorney General lacked standing to seek a modification asking the trial court to modify a 1998 order to include provisions regarding conservatorship. *In re A.E.D.*, No. 09-13-00555-CV, 2014 Tex. App. (Tex. App.—Beaumont, September 4, 2014). The Court held that the State of Texas is a governmental entity with independent standing to bring an original or modification suit affecting the parent-child relationship. *Id.* See also, *Attorney Gen. of Tex. V. Lavan*, 833 S.W.2d 952, 955 (Tex. 1992).

f. What is the Department of Family and Protective Services?

An original suit may be filed at any time by the Department of Family and Protective Services. *Tex. Fam. Code 102.003(a)(6)*

The Texas Department of Family and Protective Services “DFPS” provides protective and prevention services and processes reports of abuse, neglect, and exploitation of children and adults who have disabilities or are 65 years of age or older. The agency works to protect children from abuse and neglect through investigations, services, foster care, and adoption. State law requires anyone who believes a child is being abused or neglected to report it to CPS. The agency interviews children, parents, and others who know about the family to help determine if abuse or neglect happened, if children are safe, and to gauge the risk of further harm. CPS investigators also consider physical evidence such as injuries, illegal drug use, and other factors such as lack of food or medical care. CPS may ask a judge to remove the child from the parents’ custody and place the child in a relative’s care or foster care.

On May 31, 2017, Governor Greg Abbott signed HB 5 into law, which made DFPS an independent state agency, separate from the Health and Human Services system. Effective September 1, 2017, DFPS became an independent agency, reporting directly to the Governor of Texas.

g. What is a licensed child placing agency?

An original suit may be filed at any time by a licensed child placing agency. *Tex. Fam. Code 102.003(a)(7)*

A licensed child placing agency is an agency authorized to provide services for foster care and/or for adoption. Texas Department of Family and Protective Services regulates daycare, foster care, adoption agencies, residential treatment centers, before and after school programs, and maternity homes. Licensed child placing agencies can be searched at www.dfps.state.tx.us/Child_Care/Search_Texas_Child_Care/ppFacilitySearchAdoption.asp.

In *DFPS v. AIM*, the court determined whether AIM had standing and a justiciable interest to intervene in a lawsuit after DFPS challenged AIM’s standing. *Dept. of Fam. and Pro. Svcs v. AIM*, 210 S.W.3d 794, 797 (Tex. App.—Houston [1st Dist.] 2006). It was undisputed that AIM was a licensed child placing agency who received affidavits of relinquishments from Mom and Dad that designated AIM as a managing conservator. *Id.* at 797-798. DFPS argued that the parents did not have rights since DFPS was named the temporary sole managing conservator; however, the Court held that the affidavits served to transfer the rights that the parents still possessed thus AIM stepped in the shoes of the parents and had a justiciable interest in the suit. *Id.* at 798-802.

h. What is actual care, control, and possession?

An original suit may be filed at any time by 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)*

A person asserting standing under 102.003(a)(9) must have or have had “actual care, control, and possession” of the child within a certain timeframe prior to filing. There is not a clear consensus among the courts regarding “actual care, control, and possession” as provided in the statute. Most courts determine standing under the statute by collectively using “actual care, control, and possession” to mean the actual power or authority to guide, manage the child, direct and/or restrict the child.

The common idea in most courts that found standing under “actual care, control, and possession” statute was that the person asserting standing (1) lived in the same home as the child or in a home that the child frequented overnight, (2) provided financial support to the child, (3) was involved in the child’s education, and (4) was involved in raising the child. *In re M.K.S.-V.*, 301 S.W.3d at 463-65. The standing requirement under section 102.003(a)(9) is fact specific and determined on a case-by-case basis. *Id.* at 464; *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.).

The legislature designed the statute for persons who have developed and maintained a relationship with a child by providing for the child's basic needs, providing structure, love, and support, and daily care, protection, control, and reasonable discipline.

In *Jasek*, the primary issue on appeal was whether the Jaseks had "actual control" of the children to allow them standing to bring suit pursuant to 102.003(9). *Jasek v. TX Dept. of Fam. And Pro. Svcs.*, 348 S.W.3d 523, 526 (Tex. App.—Austin 2011). In April 2007, after filing termination proceedings, DFPS placed the children with the Jaseks and the parents' parental rights were terminated in January 2008. *Id.* at 526-527. In October 2009, Phillip Jasek tested positive for marijuana and the children were removed. *Id.* The trial court concluded that the Jaseks lacked standing because they did not have "control" of the children since DFPS was the sole managing conservator of the children. *Id.* The Jaseks appealed.

The Court of Appeals in *Jasek* went through an extensive analysis of the words "actual" and "control". The Court observed the word "actual" to modify "care, control, and possession" to mean "actual care," "actual control," and "actual possession." *Id.* at 532. The Court reasoned that the term "actual" when used in the statute indicates something that exists in fact, and not something that exists merely as a function of legal duty. *Id.* at 533. "Actual control" of a child for standing purposes means the actual power to guide, manage, direct, or restrict the child as opposed to the legal or constructive power to do so. *Id.*

The Court held that the Jaseks had standing under 102.003(a)(9) because they had actual control of the children without regard to whether they had the legal or constructive power or authority to manage the children. *Id.* at 537.

The Jaseks showed:

- The children lived with the Jaseks continuously from April 2007 to October 2009.
- The Jaseks enrolled the children in school and were required under the placement authorization agreement to provide the children with daily care, protection, control, and reasonable discipline.
- The Jaseks provided basic needs for food, clothing, medical care, and therapeutic needs, and shelter.
- The Jaseks provided love and support to the children. *Id.*

In *Troxel*, the United States Supreme Court held that a Washington statute permitting nonparent visitation violated a parent's right to make decisions regarding the care, custody, and control of his children. *Troxel v. Granville*, 530 U.S. 57 (2000). Texas courts have consistently held, in conjunction with *Troxel*, that when a parent exercises physical possession of the child,

determines where the child lives and for how long, makes all relevant decisions regarding the child's education, then there is no relinquishment of the parent's right of control and the nonparent cannot establish standing to maintain a suit. *See In re Wells*, 373 S.W.3d 174, 178 (Tex. App.—Beaumont 2012, orig. proceeding); *In re S.D.*, No. 02-14-00102-CV, 2014 WL 6997169 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)(mem. op.); *In re C.T.H.S.*, 311 S.W.3d at 208-09; *see also In re M.K.S.-V.*, 301 S.W.3d at 460. However, there is one exception to this standing rule. If the party has possession of the child in violation of a court order, that possession does not confer standing to maintain a suit. *Perez v. Williamson*, 726 S.W.2d 634, 636 (Tex. App.—Houston [14th Dist.] 1987, no writ).

i. Standing designated by an affidavit of relinquishment.

An original suit may be filed 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. *Tex. Fam. Code 102.003(a)(10)*

An affidavit of voluntary relinquishment is a document utilized by a parent to voluntarily give up his or her parental rights concerning their child. The affidavit must contain: (1) the name, county of residence, and age of the parent relinquishing; (2) the child's name, age, and birth date; (3) the names and addresses of the guardians of the child's person and estate, if any; (4) a statement about whether the parent relinquishing is under a court order to pay child support; (5) a full description and valuation of any property in the child's ownership or possession; (6) a statement that the termination is in the best interest of the child; (7) information regarding the child's other parent; (8) a statement that the parent relinquishing his or her rights have been informed of her parental rights and duties; (9) a statement that the affidavit is irrevocable if it designates the DFPS or a licensed child-placing agency, irrevocable for a stated period of time, no more than 60 days after the date of execution, or revocable. The affidavit must contain the name and address of the person to whom a revocation must be delivered, and a statement in bold-faced type that the parent has the right to revoke the affidavit only within ten days after it is executed; and (10) a statement that designates a prospective adoptive parent, DFPS, or a licensed child-placing agency as managing conservator. *Tex. Fam. Code § 161.103(b)*.

The affidavit must be voluntary and executed under oath and witnessed by two credible people. An affidavit of voluntary relinquishment cannot be signed until at least 48 hours after the child's birth. *Tex. Fam. Code § 161.103(a)(1)*.

A person designated as managing conservator has (1) a superior right to possession of the child over the parent who executed the affidavit, (2) the right to consent to medical, surgical, dental, and psychological treatment of the child, and (3) the rights and duties of a possessory conservator. *In re K.M.L.*, 443 S.W.3d 101, 113 (Tex. 2014).

In *In re A.T.*, the Wilsons were designated as managing conservators and prospective adoptive parents by Mother and Father in unrevoked affidavits of relinquishments. *In re A.T.*, No. 14-14-00071-CV (14th Dist.) July 15, 2014. The trial court held that the Wilsons did not have standing to intervene in the termination suit filed by DFPS under substantial past contact and refused to consider the affidavits of relinquishment. *Id.* The Court of Appeals held that the trial court erred by striking the Wilsons' petition to intervene without taking into account whether there was standing under section 102.003(a)(10). *Id.* Also, for example, in *DFPS v. AIM*, after DFPS had been appointed as the temporary managing conservator of the children, the biological mother and father signed voluntary affidavits of relinquishment in favor of AIM, a licensed child-placing agency. *DFPS v. AIM*, 210 S.W.3d 794, 797. AIM moved for summary judgment seeking termination and appointment as the managing conservator of the children. *Id.* at 798. DFPS argued that the parents could not appoint a managing conservator via an affidavit of relinquishment because DFPS were the temporary managing conservators and the parents did not have the legal authority to designate AIM as managing conservators. *Id.* The trial court granted the summary judgment terminating the parental rights of the parents and naming AIM as the managing conservator. *Id.* The Appellate Court remanded the case to the trial court and held that the affidavits of the parents served only to transfer those rights that the parents still possessed which were only possessory rights. *Id.* 799-800.

j. The Step-parent standing statute.

An original suit may be filed 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. *Tex. Fam. Code 102.003(a)(11)*

Texas Family Code Section 102.003(a)(11) is generally known as the step-parent standing statute. At the death of the child's guardian, managing conservator, or parent, this statute allows an avenue for persons who have had an extended relationship with a child to bring suit. Due to the time restrictions imposed by the statute, it is imperative for persons who qualify under this statute to bring suit immediately to avoid missing the filing deadline. The Supreme Court has interpreted

"have resided" to mean "living together in the same household" and not "mere legal residence." *Tex. Dep't of Protective & Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 861 (Tex. 2001).

In *In re P.D.M. and K.E.M.*, a grandmother filed a suit affecting the parent child relationship after the children's mother died. *In re P.D.M. and K.E.M.*, 117 S.W.3d 453, 454 (Tex. App.—Fort Worth 2003). The evidence showed that for nearly a year, the grandmother lived in the home with the mother and children and assisted them during the Mother's illness. *Id.* The Father was granted a no-evidence summary judgment and the Grandmother appealed. *Id.* at 455. The Appellate Court held that the trial court erred by granting the no-evidence summary judgment on the ground that Grandmother produced no evidence that Father's appointment as managing conservator would significantly impair the children's physical health or emotional development. *Id.* at 465. Additionally, the Court reasoned that the Texas Legislature's intent behind section 102.003(a)(11) was to provide stable home environments for children by granting standing, following the death of a managing conservator, to persons with whom the managing conservator and children resided with at least six months prior to filing. *Id.* at 464.

k. The Foster parent standing statute.

An original suit may be filed 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. *Tex. Fam. Code 102.003(a)(12)*

The foster parent standing statute is time sensitive and requires that the child have resided in the foster parent's home at least 12 months and ending no more than 90 days prior to filing suit. The foster parent statute, like the step-parent statute, was adopted to ensure children have home stability and that their best interests are of primary concern.

Prior to September 1, 2017, foster parents had the right to intervene under *Tex. Fam. Code* § 102.004(b). Now, pursuant to Section 102.004(b-1), a foster parent may only be granted leave to intervene if the foster parent would have standing to file an original suit pursuant to Section 102.003(a)(12).

l. Grandparents, aunts, and uncles...oh my!

An original suit may be filed 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. *Tex. Fam. Code 102.003(a)(13)*

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). *Tex. Govt. Code Sec. 573.023.*

A person related to a child by affinity does not obtain standing under 102.003(a)(13).

m. Adoptive parent standing.

An original suit may be filed 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)*

The requirements of a statement to confer standing are found in *Tex. Fam. Code 102.0035*. The statement can be executed by a pregnant woman or parent of the child and can only be used for the purpose of conferring standing in a suit for termination or adoption. The statement to confer standing must contain: (1) the signature, name, age, and address of the person named as a person adoptive parent, (2) the signature, name, age,

and address of the pregnant woman or the parent of the child who is conferring standing, (3) the child's date of birth or anticipated date of birth, (4) the name of the county where the suit will be filed. *Tex. Fam. Code § 102.0035(b)(1-4)*.

The statement to confer standing can be revoked, in writing, anytime before the person executes an affidavit of voluntary relinquishment. The revocation must be sent by certified mail, return receipt requested, to the prospective adoptive parents. Upon receipt of the revocation by the court, the court must dismiss the suit. *Tex. Fam. Code § 102.0035(f) and (g)*.

TAKE AWAYS

1. When pleading standing, plead as many standing statutes as may be relevant.
2. When standing is conferred by an Affidavit of Relinquishment or a Statement to Confer Standing, remember to attach the document as an Exhibit.
3. When pleading under the actual care, control, and possession statute, know the controlling law in your appellate district.

B. Time Sensitive Standing Statutes – Tex. Fam. Code § 102.003(A)(9), (11), (12)

As stated in *Tex. Fam. Code § 102.003(b)*, in calculating the time necessary for these standing provisions, the court may not require the time be continuous and uninterrupted. The court is required to consider the child's principal residence during the relevant periods preceding the filing of the suit. *Doncer v. Dickerson*, 81 S.W.3d 349, 358-59 (Tex. App. –El Paso 2002, no pet.). A child's principal residence is determined by the following: (1) a fixed place of dwelling, (2) occupied consistently over a period of time, and (3) that is permanent. *Doncer*, 81 S.W.3d at 362.

TAKE AWAYS

1. Be mindful that time is a crucial factor when pleading under §§ 102.003(A)(9), (11), (12).
2. If standing is contested, prepare exhibits to show the relevant periods of time and proof of principal residence. Use exhibits such as school records, doctor records, a calendar of time spent at the home, journals, etc.
3. Pull applicable case law and provide a copy to the court and opposing counsel.

C. Standing for Grandparents and Other Nonparents – Tex. Fam. Code § 102.004

In addition to the general standing to file suit provided under 102.003, the code provides that a grandparent, or another relative of the child within the third degree of consanguinity, may bring an original suit seeking conservatorship if there is satisfactory proof to the court that (1) the order 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. *Tex. Fam. Code § 102.004(a)*. Oral consent is sufficient if it is given by the proper party and established in the record. *In re A.M.S.*, 277 S.W.3d 92, 98 (Tex. App.—Texarkana 2009, no pet.). When both parents have been appointed joint managing conservators, both conservators must consent to the suit before standing can be conferred under 102.004(a)(2). However, in *In re J.W.L.*, the grandparents had standing under 102.004(a)(2) when only one of the two managing conservators consented to the suit. *In re J.W.L.*, 291 S.W.3d 79, 85-86 (Tex. App.—Fort Worth 2009, orig. proceeding).

An original suit requesting possessory conservatorship may not be filed by a grandparent or nonparent (except see grandparent filing under Tex. Fam. Code §§ 153.432-434); however, the court may grant a grandparent or nonparent with substantial past contact with the child leave to intervene in a pending suit if there is satisfactory proof that the appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development. *Tex. Fam. Code § 102.004(b)*. Foster parents may intervene in a suit if the foster parent would have standing to file an original suit under Section 102.003(a)(12). *Tex. Fam. Code § 102.004(b-1)*. To intervene, the claim must arise from the same transaction or occurrence and it must have a common question of law or fact as the original claim. *Tex. R. Civ. P. 40(a)*.

The statutory hurdles that a nonparent must overcome under 102.004 are steep. In conjunction with *Troxel*, a "fit" parent's liberty interest in her children cannot be infringed upon. The first statutory hurdle for a nonparent in an original suit is the parental presumption, which applies unless the nonparent shows that appointment of the parent would significantly impair the child's physical health or emotional development by presenting evidence of specific and identifiable conduct by the parent that is likely to cause harm to the child's physical health or emotional development. *Gray v. Shook*, 329 S.W.3d 186, 195-98 (Tex. App.—Corpus Christi 2010, pet. filed). To prove that appointment of the parent would significantly impair the child's physical health or emotional, the

nonparent must offer evidence of specific actions or omissions by the parent that would result or would probably result in the physical or emotional harm to the child, not the speculation of possible harm. *Lewelling v. Lewelling*, 796 S.W.2d 164, 167 (Tex. 1990); *Critz v. Critz*, 297 S.W.3d 464, 474 (Tex. App.—Fort Worth 2009, no pet.); *In re M.W.*, 959 S.W.2d 661, 665 9Tex. App.—Tyler 1997, writ denied). "If the parent is presently a suitable person to have custody, the fact that there was a time in the past when the parent would not have been a proper person to have such custody is not controlling." *May v. May*, 829 S.W.2d 373, 377 (Tex. App.—Corpus Christi 1992, writ denied).

The second statutory hurdle for a nonparent is rebutting the presumption that the appointment of a parent as sole managing conservator or both parents as joint managing conservators is in the best interest of the child. These presumptions may be rebutted by a finding of a history of family violence involving the child's parents or a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, spouse, or child. *Tex. Fam. Code § 153.131(b), 153.004(b)*.

In *In re H.L. and S.L.*, an Uncle was named sole managing conservator of children based on Mother's past drug use, instability, and erratic behavior. *In re H.L. and S.L.*, No. 02-14-00388-CV (Tex. App.—Fort Worth [2nd Dist.] January 28, 2016). The trial court heard evidence that at the time of filing Mother had a history of illegal drugs, unstable housing, and displayed erratic behavior. *Id.* The Mother appealed asserting the Uncle did not standing to file a SAPCR under section 102.004(a)(1). *Id.* Accordingly, the Court of Appeals held the Uncle produced sufficient proof that Mother's appointment as managing conservator would significantly impair the children's physical health or emotional development. *Id.*

TAKE AWAYS

1. To prove "significant impairment" be prepared to subpoena the child's therapist or counselor or have other witnesses available to testify regarding the child.
2. When proving "harm", point to specific acts and/or omissions by the parent that has or would result in harm to the child.
3. When representing a non-parent against a parent, seek to modify an existing order rather than bringing an original suit.
4. The parental presumption applies in original suits and is a difficult presumption to overcome. The best interest standard applies in

modification suits and is a lower standard to overcome.

D. Limits on Standing and Sibling Access – Tex. Fam. Code § 102.0045 and 102.006

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 parental rights have been terminated, (2) the child's father, or (3) a family member or relative by blood, adoption, or marriage of either a former parent whose parental rights have been terminated or the child's father. *Tex. Fam. Code § 102.006(a)*. However, these limitations do not apply to a person who has a continuing right of possession or access to the child by court order or has the consent of the child's managing conservator, guardian, or legal custodian to bring the suit. *Tex. Fam. Code § 102.006(b)*. Additionally, these limitations do not apply to the following persons if an original suit or a suit for modification requesting managing conservatorship of the child is brought not later than the 90th day after the date the parent-child relationship has been terminated in a suit filed by the Department of Family and Protective Services: 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. *Tex. Fam. Code § 102.006(c)*.

The sibling of a child who is separated as a result of an action by the Department of Family and Protective Services may file an original suit or modification requesting access to the child without regard to the issue of managing conservatorship. The court shall expedite the matter and order reasonable access to the child if the court finds that access by the sibling is in the child's best interest. *Tex. Fam. Code §§102.0045 and 153.551*.

E. Suit to Request Termination and Adoption – Tex. Fam. Code § 102.005

If a grandparent or nonparent does not have standing under the general standing statute, he or she may have standing to file a suit requesting an adoption or a suit requesting termination and adoption if the person is (1) a stepparent of the child, (2) an adult who, as the result of an adoption placement, 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 § 102.005*.

IV. CHALLENGING STANDING

A challenge to standing may be brought at any time, including for the first time on appeal, since standing is a component to subject matter jurisdiction. Lack of subject matter jurisdiction is a fundamental error and can be raised at any time. *Sivley v. Sivley*, 972 S.W.2d 850, 855 (Tex. App.—Tyler 1998, no pet.). Standing cannot be waived or agreed to, and must exist at the time of filing and continue through to the conclusion of the suit.

A party may challenge standing by filing a Plea to the Jurisdiction and Motion to Dismiss or a Motion to Strike Intervention.

A. Plea to the Jurisdiction and Motion to Dismiss

1. A plea to the jurisdiction is a request for the court to dismiss the action without regard to whether the claim has merit. *Bland ISD v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). The plea challenges the court's authority to adjudicate the matter.
2. The plea to the jurisdiction should be captioned as a "Motion to Dismiss for Lack of Jurisdiction."
3. A verification of the motion is not necessary; however, if evidence is necessary, the motion should be verified and other affidavits and evidence attached to show jurisdictional evidence.
4. If contested, a response to the plea to the jurisdiction should be filed.
5. The trial court can rule on the plea to the jurisdiction by submission or a hearing. *Bland ISD v. Blue*, 34 S.W.3d 547, 550 (Tex. 2000).

B. Motion to Strike Intervention

If a party to a suit opposes an intervention, the party must challenge the intervention by filing a Motion to Strike Intervention.

1. The motion informs the court that the intervenor is not a property party who has standing.
2. The motion should be captioned as a "Motion to Strike Intervention."
3. Once the motion has been filed, the burden is on the intervenor to show standing.
4. The trial court usually conducts an evidentiary hearing to determine a ruling on the motion.

TAKE AWAYS

1. Plea to the Jurisdiction and Motion to Dismiss for Lack of Jurisdiction – Appendix 1.

2. Motion to Strike Intervention –
Appendix 2.

V. CONCLUSION

Though standing is the first line of offense or defense in a suit involving the parent-child relationship, it does not guarantee a party's right to win. Once standing has been established, each party must still prove his or her case to prevail. As attorneys representing nonparents in original suits affecting the parent-child relationship against parents, the ruling in *Troxel* and parental presumption must be ever present in the back of our minds. For nonparents filing suit against parents, one strategy is to file a modification, if possible. A person who has standing to bring an original suit, also has standing to modify or intervene in a suit. Being diligent and detailed in cases from start to finish will ensure that the best interest of the child remains in the forefront in suits brought by parents and nonparents alike.

NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA.

NO. 2020-CV-123456

<p>IN THE INTEREST OF</p> <p>JON SNOW</p> <p>A CHILD</p>	<p>§</p> <p>§</p> <p>§</p> <p>§</p> <p>§</p>	<p>IN THE DISTRICT COURT</p> <p>KING’S LANDING COUNTY, TEXAS</p> <p>300TH JUDICIAL DISTRICT COURT</p>
---	--	---

RESPONDENT’S PLEA TO THE JURISDICTION AND MOTION TO DISMISS FOR LACK OF JURISDICTION

Respondent, CATELYN TULLY, files this Plea to the Jurisdiction and Motion to Dismiss for Lack of Jurisdiction and shows the following:

1. Plea to the Jurisdiction

Respondent requests this Court to dismiss this action because this lacks subject-matter jurisdiction in this action under section 102.003(a)(1) of the Texas Family Code in that Petitioner, NED STARK, does not have standing to bring this suit because Petitioner is not a parent of the child.

2. Attorney’s Fees

It was necessary for Respondent to secure the services of Petyr Baelish, a licensed attorney, to preserve and protect the child’s rights. Petitioner should be ordered to pay reasonable attorney’s fees, expenses, and costs through trial and appeal, and a judgment should be rendered in favor of this attorney and against Petitioner and be ordered paid directly to Respondent’s attorney, who may enforce the judgment in the attorney’s own name. Respondent requests postjudgment interest as allowed by law.

3. Prayer

Respondent prays that the Court grant the relief requested in the Plea to the Jurisdiction and Motion to Dismiss for Lack of Jurisdiction.

Respondent prays for attorney’s fees, expenses, costs, and interest as requested above.

Respondent prays for general relief.

Respectfully submitted,

PETYR "Littlefinger" BAELISH
735 Capitol Street
King's Landing, Texas 77007
Tel: (713) 123-6767
Fax: (713) 234-7676

By: _____
Petyr Baelish
State Bar No. 262626262
Attorney for Catelyn Tully

Verification

The undersigned states under oath: "I am Respondent in the foregoing Respondent's Plea to the Jurisdiction. I have personal knowledge of the allegations and facts stated therein, and they are true and correct."

CATELYN TULLY

SIGNED under oath before me on _____.

Notary Public, State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been delivered or forwarded to all counsel as listed below, [] **by personal delivery**, or [] **by certified mail**, return receipt requested, by depositing the same, postpaid, in an official deposit under the care and custody of the United States Postal Service, enclosed in a wrapper properly addressed, [X] **by electronic document transfer**, or [X] **by electronic document transfer** to the recipient's current telecopier number, on this the ___ **day of February, 2018** in accordance with the Texas Rules of Civil Procedure:

*Tyrion Lannister
735 Yale Street
King's Landing, Texas 77007
713.234-5678 Facsimile*

*Jaime Lannister
301 Throne Drive, Suite 8120
King's Landing, Texas 77098
713.246.2468 Facsimile*

Petyr Baelish
Attorney for Catelyn Tully

NOTICE: THIS DOCUMENT
CONTAINS SENSITIVE DATA.

NO. 2020-CV-123456

IN THE INTEREST OF

JON SNOW

A CHILD

§
§
§
§
§

IN THE DISTRICT COURT

KING'S LANDING COUNTY, TEXAS

300TH JUDICIAL DISTRICT COURT

PETITIONER'S MOTION TO STRIKE INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Petitioner, NED STARK, as Movant herein and hereby requests that this Honorable Court Strike the Intervention of CERSEI LANNISTER, and shows the Court the following ground:

Petitioner moves for this Court to strike the Intervention as because Intervenor lacks standing to intervene in this suit.

WHEREFORE, PREMISES CONSIDERED, Movant prays for this Court to enter an Order Striking the Intervention for sufficient cause, and for such other and further relief to which Movant may be justly entitled.

Movant prays for general relief.

Respectfully submitted,

TYRION LANNISTER & ASSOCIATES, P.C.
735 Yale Street
King's Landing, Texas 77007
Tel: (713) 123-4567
Fax: (713) 234-5678

By: _____
Tyrion Lannister
State Bar No. 22222222
Attorney for Ned Stark

Notice of Hearing

The above motion is set for hearing on _____ at _____ .M. in the 300th Judicial District Court of King's Landing, Texas.

SIGNED on _____.

Judge or Clerk

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been delivered or forwarded to all counsel as listed below, [] **by personal delivery**, or [] **by certified mail**, return receipt requested, by depositing the same, postpaid, in an official deposit under the care and custody of the United States Postal Service, enclosed in a wrapper properly addressed, [X] **by electronic document transfer**, or [X] **by electronic document transfer** to the recipient's current telecopier number, on this the ___ **day of February, 2018** in accordance with the Texas Rules of Civil Procedure:

Petyr Baelish
735 Capitol Street
King's Landing, Texas 77007
Fax: (713) 234-7676

Jaime Lannister
301 Throne Drive, Suite 8120
King's Landing, Texas 77098
713.246.2468 Facsimile

Tyrion Lannister
Attorney for Ned Stark