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# INTERVENTIONS IN CPS CASES

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In CPS cases, legal interventions raise a number of issues. This chapter addresses:

- Standing requirements for non-parties to intervene in CPS legal cases and in cases with other stages of CPS involvement
- Considerations in responding to interventions filed
- Special issues when addressing an intervention in a CPS case

## A. Standing

There are two avenues for a non-parent party to establish standing in a SAPCR:

- Standing to file an original suit
- Standing to intervene in a pending suit

### 1. Standing to File Original Suit

[Tex. Fam. Code § 102.003](#) provides that an original suit may be filed at any time by:

- A parent of the child;
- The child through a representative authorized by the court;
- 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;
- A guardian of the person or of the estate of the child;
- The Department of Family and Protective Services;
- A licensed child placing agency;
- A man alleging himself to be the father of a child filing in accordance with [Tex. Fam. Code Chapter 160](#), subject to the limitations of that chapter, but not otherwise;
- 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;
- A person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under [Tex. Fam. Code Chapter 161](#) or to whom consent to adoption has been given in writing under [Tex. Fam. Code Chapter 162](#);
- 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

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filing of the petition if the child’s guardian, managing conservator, or parent is deceased at the time of the filing of the petition;

- 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;
- A person who is a relative of the child within the 3rd degree of consanguinity, as determined by [Tex. Gov’t Code Chapter 573](#), if the child’s parents are deceased at the time of the filing of the petition; or
- 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 [Tex. Fam. Code § 102.0035](#), regardless of whether the child has been born. [Tex. Fam. Code § 102.003\(a\)](#).

In computing the time necessary for standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#), [\(a\)\(11\)](#) and [\(a\)\(12\)](#), 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\(b\)](#).

Notwithstanding the time requirements of [Tex. Fam. Code § 102.003\(a\)\(12\)](#), 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 [Tex. Fam. Code § 102.003\(a\)\(12\)](#) applies only to the adoption of a child who is eligible to be adopted. [Tex. Fam. Code § 102.003\(c\)](#).

## Common Avenues for Original Standing in CPS Cases

### 2. Actual Care, Control and Possession

[Tex. Fam. Code § 102.003\(a\)\(9\)](#) provides 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.

#### a. Time-Specific in Applicability

- No standing when child in home for only five and a half months at time of filing (*In the Interest of E.C.*, [No. 02-13-00413-CV](#) Tex. App. LEXIS 10199 (Tex. App. – Fort Worth [2nd District] September 11, 2014)).
- No standing when child in home for only three months at time of filing (*In the Interest of C.M.J.*, [No. 02-12-00036-CV](#) (Tex. App. – Fort Worth, December 2012, no pet.)).

#### b. Elements of “Actual Care, Control, and Possession.” Under *Jasek v. Texas Department of Family and Protective Services*, the court looked to the composite elements of the care, control, and possession in reaching its decision, considering:

- The individual asserting standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#) will have:
  1. Lived in a home where the child consistently and frequently stayed overnight;

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2. Financially supported the child;
  3. Participated in the child's education; and
  4. Fed, clothed, and provided health care to the child.
- "Actual control" does not require the authority to make legal decisions for the child (*Jasek v. Texas Department of Family and Protective Services*, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)).
- c. A non-parent's "actual care, control, and possession" of a child does not need to be exclusive to have standing under [Tex. Fam. Code § 102.003\(a\)\(9\)](#). *In the Interest of H.S.*, 550 S.W.3d 151 (Tex. 2018).

### 3. 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:

- A stepparent of the child;
- 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;
- 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;
- An adult who has adopted, or is the foster parent of and has petitioned to adopt, a sibling of the child; or
- 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](#).

### 4. Standing for a Grandparent or Other Person

In addition to the general standing to file suit provided by [Tex. Fam. Code § 102.003](#), a grandparent, or other relative of the child related within the third degree of consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof that:

- The order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or
  - 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\(a\)](#).
- a. Relatives and degrees of consanguinity:
    - a parent or child (relatives of the first degree)
    - a brother, sister, grandparent, or grandchild (relatives of the second degree)

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- a great-grandparent, great-grandchild, aunt who is a sister of a parent of the child, an uncle who is the brother of a parent of the child, a nephew who is the child of a brother or sister of the child, or a niece who is a child of a brother or sister of the child (relatives of the third degree). [Tex. Gov't Code § 573.023\(c\)](#).
- b. Limits on [Tex. Fam. Code § 102.004\(a\)](#) Standing
- step-grandfather excluded (*In the Interest of E.C.*, [No. 02-13-00413-CV](#) Tex. App. LEXIS 10199 (Tex. App. – Fort Worth [2nd District] September 11, 2014))
  - step-uncle excluded (*In re A.M.S.*, [277 S.W.3d 92](#) (Tex. App. – Texarkana 2009, no pet.))
  - great-aunt or great-uncle excluded (*In re N.L.D.*, [412 S.W.3d 810](#) (Tex. App. – Texarkana 2013, no pet.))
- c. Proving Significant Impairment pursuant to [Tex. Fam. Code § 102.004\(a\)](#)
- significant impairment of child's physical health and emotional development found with evidence of parental drug use and criminal convictions and incarceration. (*In re K.D.H.*, [426 S.W.3d 879](#) (Tex. App. – Houston [14th Dist.] April 3, 2014, no pet.))
  - significant impairment of child's physical health and emotional well-being found with evidence of physical and emotional abuse of the child even if the last alleged incident occurred months before the filing of the petition when the parent's ideas regarding discipline had not changed during the period and the parent had not received any counseling or other services during that time to mitigate the risk of continued abuse. *In re McDaniel*, [408 S.W.3d 389](#) (Tex. App. – Houston [1st Dist.] 2011)
  - significant impairment of emotional development found where a parent fails to send their child to school on a regular basis and fails to provide necessary therapeutic interventions for a child with poor school performance and behavioral issues. *Maudlin v. Clements*, [428 S.W.3d 247](#) (Tex. App. – Houston 2014)
- d. Applicability and Implications of [Tex. Fam. Code § 102.004\(a\)](#) in CPS Cases
- avenue for grandparents and other relatives within the requisite degree of consanguinity to file for custody of a child in an investigation or Family Based Safety Services stage of a CPS case
  - an original action for conservatorship under [Tex. Fam. Code § 102.004\(a\)](#) does not have the rehabilitative and service requirements of a CPS case or the same strict timelines

## B. Standing to Intervene in a Pending Suit

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 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 the appointment of a parent as a

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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\(b\)](#).

### 1. Applicable to Pending SAPCRs

- A grandparent or other person can only utilize [Tex. Fam. Code § 102.004\(b\)](#) in SAPCRs that have not yet resulted in a final order.
- In the context of CPS cases, the SAPCR is no longer pending once DFPS is appointed PMC of the child.

### 2. Pleading Requirements

- The grandparent or other person must establish that they have had substantial past contact with the child; and
- The grandparent or other person must present satisfactory proof to the court that the appointment of the parent or parents as sole or joint managing conservators would significantly impair the child's physical health and emotional development. [Tex. Fam. Code § 102.004\(b\)](#).

### 3. Case Law related to Substantial Past Contact

Courts have applied the standard definition of “substantial” from the Random House Dictionary as “of ample or considerable amount, quantity, size, etc.” and have evaluated the amount of actual contact and not the difficulties of the intervening party maintaining contact. (*In re C.M.C.*, [192 S.W.3d 866](#) (Tex. App. – Texarkana 2006, no pet.))

“Substantial past contact” has been found to involve more than seeing a child regularly during his or her life. Substantial past contact has been shown by parties who have “frequently cared for the children, lived nearby, and spent a great deal of time with the family. (*Blackwell v. Humble*, [241 S.W.3d 707](#) (Tex. App. – Austin 2007, no pet.))

Relatives who have cared for a child for as few as 7 weeks have been found to have substantial past contact. The Court's analysis focused on the caretaker's daily supervision of the child during that time and found the intervening party to have established substantial past contact in undertaking the daily functions of legal custody during that time. (*In re A.L.W.*, [No. 02-11-00480-CV](#) (Tex. App. – Fort Worth Nov. 8, 2012, pet. denied)(mem. op.)).

In a case of first impression, the Dallas Court of Appeals has held that grandparents, as opposed “other persons,” are not required to establish substantial past contact under [Tex. Fam. Code § 102.004\(b\)](#). See *In re Nelke*, [537 S.W. 3d 917, 922-23](#) (Tex. App – Dallas 2019, no pet h.).

**Special Issue:** The determination of whether substantial past contact exists is a fact-intensive inquiry. The determination is not statutorily defined and case law does not establish a clear factual framework for judges to make the determination. Deference is usually given to the trial court's assessment.

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#### 4. Evidence that Appointment of Parent(s) as Managing Conservator would Significantly Impair the Child’s Physical Health and Emotional Development

A person with substantial past contact with a child will be unable to show evidence that the appointment of a parent as the managing conservator when facts show only speculation of potential harm if the parent is appointed conservator. (*In re S.M.D.*, 329 S.W.3d 8 (Tex. App. – San Antonio, 2010, pet. dismissed))

#### 5. “Significant Impairment” during Reunification Phase of a CPS Case

Alleged father who had independently raised the child for two and a half years submitted to paternity testing and was dismissed as a party to the case after genetic testing ruled him out as the father. He intervened alleging substantial past contact. He was denied leave to intervene because he failed to show that the appointment of the mother as sole managing conservator would significantly impair the child’s physical health and emotional development. Testimony offered by the Department at multiple hearings had shown that she had complied with all court orders and service plan requirements, that the child had already been placed with her and that the Department was recommending dismissal of the case. The Court of Appeals found no abuse of discretion in the trial court’s refusal to grant leave to intervene. (*L.J. v. Texas Department of Family & Protective Services*, No. 03-11-00435-CV (Tex. App. – Austin, August 1, 2012, pet. denied) (mem. op.))

### C. Foster Parent Interventions

#### 1. General Standing Provision, [Tex. Fam. Code § 102.003 \(a\)\(12\)](#)

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 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\(A\)\(12\)](#).

#### 2. Foster Parent Intervention Limited

[Tex. Fam. Code § 102.004\(b\)](#) allows persons with substantial past contact with a child leave to intervene in a pending suit if they can provide satisfactory proof to the court 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. However, a foster parent may only be granted leave to intervene under [Tex. Fam. Code § 102.004\(b\)](#) if the foster parent would have standing to file an original suit as provided by [Tex. Fam. Code § 102.003\(a\)\(12\)](#). [Tex. Fam. Code § 102.004\(b-1\)](#).

### D. Limitations on Standing

#### 1. Limitations on Standing

Except as provided by [Tex. Fam. Code § 102.006\(b\) 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:

- A former parent whose parent-child relationship has been terminated by court order;

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- The father of the child; or
  - A family member or relative by blood, adoption, or marriage of either a former parent whose parent-child relationship has been terminated or the father of the child. [Tex. Fam. Code § 102.006\(a\)](#).

The limitations on filing suit imposed by [Tex. Fam. Code § 102.006](#) do not apply to a person who:

- Has a continuing right to possession of or access to the child under an existing 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\(b\)](#).

The limitations on filing suit imposed by [Tex. Fam. Code § 102.006](#) do not apply to an adult sibling of the child, a grandparent of the child, an aunt who is the sister of a parent of the child, or an uncle who is the 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. [Tex. Fam. Code § 102.006\(c\)](#).

Courts have affirmed that [Tex. Fam. Code § 102.006\(c\)](#) serves to limit the standing of particular individuals when the parent-child relationship has been terminated; it does not confer standing. (*In re N.A.D.*, [397 S.W.3d 747](#) (Tex. App. – San Antonio 2013, no pet.)) and (*L.H. v. Texas Dep't of Family and Protective Services*, [No. 03-13-00348-CV](#) (Tex. App. – Austin Mar. 6, 2014, no pet.)).

**Special Issue:** [Tex. Fam. Code § 102.006\(c\)](#) may have the following practical effects for judges:

- Narrows the class of individuals who would otherwise have standing to file an original proceeding for modification or adoption.
- Restricts time period for filing.
- Note, the legal avenues for adoption and modification may impose obstacles even to those who have standing and who file within 90 days.

## 2. Consequences of Missing 90-Day Deadline

Even parties who would otherwise have standing will lose that standing if they fail to file their petition for custody or adoption within 90 days.

Petition to adopt children by aunt with substantial past contact filed 7 months after parental rights were terminated was barred by [Tex. Fam. Code § 102.006\(c\)](#) because it had not been filed within 90 days of the termination order. (*In re A.M.*, [312 S.W.3d 76](#) (Tex. App. – San Antonio 2010, pet. denied)).

## E. Petitions to Modify the Parent-Child Relationship

### 1. Procedural Requirements

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If a suit seeking to modify the designation of the person having the exclusive right to designate the primary residence of a child is filed not later than one year after the earlier of the date of the rendition of the order or the date of the signing of a mediated or collaborative law settlement agreement on which the order is based, the person filing the suit shall execute and attach an affidavit as provided by [Tex. Fam. Code § 156.102\(b\)](#). [Tex. Fam. Code § 156.102\(a\)](#).

The affidavit must contain, along with supporting facts, at least one of the following allegations that:

- The child’s present environment may endanger the child’s physical health or significantly impair the child’s emotional development;
- The person who has the exclusive right to designate the primary residence of the child is the person seeking or consenting to the modification and the modification is in the best interest of the child; or
- The person who has the exclusive right to designate the primary residence of the child has voluntarily relinquished the primary care and possession of the child for at least six months and the modification is in the best interest of the child. [Tex. Fam. Code § 156.102\(b\)](#).

The court shall deny the relief sought and refuse to schedule a hearing for modification under this section unless the court determines, on the basis of the affidavit, that facts adequate to support an allegation listed in [Tex. Fam. Code § 156.102\(b\)](#) are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, the court shall set a time and place for the hearing. [Tex. Fam. Code § 156.102\(c\)](#).

## 2. Modifications of Termination Orders in CPS Proceedings

Modifications must include a sworn affidavit that shows that the child’s present environment may endanger the child’s physical health or emotional development.

Grandparents filed Petition to Modify the Parent-Child Relationship immediately following the termination of parent-child relationship proceeding to which they were not parties and cited [Tex. Fam. Code § 102.006\(c\)](#) as basis for standing. No affidavit was attached. DFPS filed a Motion to Dismiss based on failure to attach the required affidavit under [Tex. Fam. Code § 156.102](#). Trial court dismissed suit and 4th Court of Appeals upheld dismissal finding [Tex. Fam. Code § 102.006](#) did not confer standing and the procedural requirements of [Tex. Fam. Code § 156.102](#) applied in cases where a modification of the Department’s conservatorship of a child is sought. (*In re N.A.D.*, [397 S.W.3d 747](#) (Tex. App. – San Antonio 2013, no pet.)).

Special Issue: *In re N.A.D.* may present practical implications for the court:

- Modification of an order entered only 90 days earlier may require facts that establish that the child’s present environment may endanger the child’s physical health or significantly impair the child’s emotional development.
- Modification facts may be difficult to establish if, as part of Trial Court findings at termination of parent rights proceedings, that the child’s current placement is meeting the child’s needs and continuation is in the best interest of the child.



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## F. Practical Considerations

### 1. Timing

#### a. Some courts have successfully struck interventions as untimely if filed too close to the dismissal deadline.

Grandmother filed petition in intervention two months before dismissal date when permanency plan changed from reunification to termination although she had been aware of the case for over a year. Motion to Strike granted and affirmed by Appellate Court as within the discretion of the Court. (*In the Interest of C.A.L.*, No. 2-05-308-CV, 2007, Tex. App LEXIS 1196 (App.—Fort Worth Feb. 15, 2007 orig. proceeding) (mem. op.)).

Grandfather who lived in Kentucky filed an intervention two months before trial. (Waiting to file an intervention when out of state and ICPC study required problematic). (*Anderson v. Texas Dep't of Family and Protective Services*, No. 03-06-00327-CV (Tex. App. – Austin May 9, 2007, pet. denied (mem. op.)).

#### b. Court should balance the complication of the issues in the case and the rights of the intervening party.

A trial court abuses its discretion if it strikes a petition in which (1) the intervener could bring the same action, or any part thereof, in their own names, (2) the intervention will not complicate the case by an excessive multiplication of the issues, and (3) the intervention is almost essential to effectively protect the interveners' interest. In applying that analysis, the court found that even though the intervention was filed only two weeks before trial that the intervening party had standing and should have been allowed to participate in the trial. (*Seale v. Texas Dept. of Family & Protective Services*, No. 01-10-00440-CV (Tex. App. – Houston [1st Dist.] Mar. 3, 2011, no pet.) (mem. op.)).

### 2. Procedural Issues

#### a. Effect of Intervention

Rule 60 of the Texas Rules of Civil Procedure provides that “any party may intervene by filing a pleading, subject to being stricken by the court for sufficient cause on the motion of any party.” Thus, intervening parties, absent a Motion to Strike, are immediately granted the status of a party and can participate in discovery, participate in hearings and mediations, and receive court reports, and other filings with the court. [Tex. R. Civ. P. 60.](#)

#### b. Leave of Court

The court may grant a grandparent or another 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 [Tex. Fam. Code Chapter 102](#) if there is satisfactory proof to the court that appointment of a parent would significantly impair the child's physical health or emotional development. [Tex. Fam. Code § 102.004\(b\).](#)

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Following the plain language of the statute, the court finds a request for leave to intervene is necessary under [Tex. Fam. Code § 102.004\(b\)](#) and that the Intervener’s Amended Petition for Intervention which requested that the court “grant the relief requested in this intervention” be read as a request for leave to intervene. (*In the Interest of A.T.*, No 14-14-00071-CV, (Tex. App. – Houston, July 15, 2014, (no pet.) (mem. op.)).

Court found that [Tex. R. Civ. P. 60](#) does not apply to interventions filed under [Tex. Fam. Code § 102.004\(b\)](#). Court noted that the legislature developed a separate provision governing intervention in family law cases and gave the trial court discretion to determine whether to allow an intervention even when the statutory requirements are met. Court then found that no written motion to strike was required. (*L.J. v. Texas Department of Family & Protective Services*, No. 03-11-00435-CV (Tex. App. – Austin Aug. 1, 2012, pet. denied) (mem. op.)).

### **c. Imperfect Pleadings Can Establish Standing**

Appellate courts review standing issues by construing the pleadings in favor of the petitioner and by looking to the pleader’s intent.

Question is whether a party provides other parties and the Court fair notice of his or her claim. (*Jasek v. TDFPS*, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)); *In the Interest of D.A.*, No. 02-14-00265-CV (Tex. App. – Fort Worth, February 5, 2015) (mem. op.); *In the Interest of N.I.V.S.*, No. 04-14-00108-CV (Tex. App. – San Antonio, March 11, 2015) (mem. op.).

## **G. Resources**

Hon. Melissa DeGerolami, Interventions: [Tips for Properly Addressing Interventions in CPS Cases](#), Child Welfare Judges Conference, 2015.

Mary Evelyn McNamara and Karen J. Langsley, Interventions in Suits Affecting the Parent-Child relationship, –State Bar of Texas 40th Annual Advanced Family Law Course, August 4-7, 2014.