TWO STEPPING IN A MINE FIELD: INTERVENING IN CPS CASES

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TWO STEPPING IN A MINE FIELD:
INTERVENING IN CPS CASES

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While struggling in the trenches of defending parents in CPS cases, several situations may present themselves, you may have the opportunity to represent a grandparent, foster parent or other third-party seeking custody of a child in a CPS case, or you may have to withstand a counterattack by a third party intervening in your client’s CPS case, laying a mine field of impending doom. The landscape of intervening in CPS cases is extremely treacherous to navigate because this area of law is still in a constant state of fluctuation. This paper will attempt to provide a playbook for representing or defending against third parties intervening in CPS cases and highlight contradictory areas of case law. In addition to CPS cases, the concepts discussed in this paper will be helpful in other types of family law cases.

In discussing CPS cases, the paper will be referring to on-going conservatorship cases where the Department has filed an Original Petition for Protection of a Child and awarded temporary custody. As these cases progress, third parties may desire placement of the child1 or pursue termination of parental rights themselves, regardless of the Department’s permanency goal.2

I. GENERAL REQUIREMENTS FOR INTERVENTION

In these circumstances, the third-party will need to intervene into the existing, on-going CPS cases. The purpose of an intervention, which is a type of joinder, is to participate as a party in a lawsuit already in progress. To intervene, a party must file a written pleading. In re C.A.H., No. 11-10-00040-CV 2011 WL 9477082 (Tex.App.-Eastland March 3, 2011, no pet.)(memo.op.); Diaz v. Attorney Gen., 827 S.W.2d 19, 22 (Tex. App.-Corpus Christi 1992, no writ). To file a Petition in Intervention, a party must have standing to intervene in the case. Normally, a person who has standing to file an Original Suit Affecting Parent Child Relationship would also have standing to intervene. However, even if a party does not have original standing to file suit, they may still intervene in certain situations under Texas Family Code § 102.004(b).

When standing has been conferred by a statute, such as § 102.004(b), the party seeking relief must allege and establish standing within the parameters of the language of the statute. In re H.G., 267 S.W.3d 120 (Tex.App.-San Antonio 2008, no pet.). If a party does not have sufficient standing to sustain the suit, the intervention must, if challenged, be dismissed. Id. at 124-152.

The courts cannot create standing out of principles of equity. In re H.G. at 124-125. In CPS cases when a nonparent has placement3 of the child and that placement fails to intervene, they are left to the capricious machinations of the Department. If the placement is no longer acceptable to the Department, the placement could be left without any recourse when the child is removed.4 See In re A.M., 312 S.W.3d 76 (Tex. App.-Antonio 2010 pet. denied). Regardless of how unfair it seems to take the child away from a placement, the court cannot create standing to intervene on the principles of equity, even if removal is not in the best interest of the child. In re H.G., at 124-125. Therefore, if the Department revokes the placement agreement, you must have statutory standing to judicially defend against the removal of the children.

A preferred manner for alleging sufficient facts for standing is not endorsed by either case law or the statute. Some cases refer to an affidavit; however, in others it is clear standing was established through testimony at a hearing. E.g., In re K.N.M., No. 2-08-308-CV, 2009 WL 2196125, (Tex.App.-Fort Worth July 23, 2009, no pet.)(memo.op.); In re A.M.S., 277 S.W.3d 92, 96 (Tex.App.-San Antonio 1990, writ

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1 In this paper, the author will refer to the child the subject of the CPS cases as a singular identity; of course, there could be more than one child the subject of the case.

2 When a child is in custody of the Department, in accordance with CPS’s own regulations, they must develop a permanency goal for the child. The permanency goal is the department’s current objective for this case which could include termination, reunification etc. Tex.Fam. Code § 236.3025 & 263.3026.

3 At the beginning of the CPS cases, the Department is required to locate a possible relative placement for the child. Texas Family Code § 262.114 O’Connor’s Family Code Plus (2010-11). The Department completes a home study on the relative and if the home study is approved, then children are placed in the home. The relative is required to sign a placement agreement with the Department. If a relative is not located, a close friend of the family could be considered for placement. This is a kinship placement. Only when these options are not available will the Department look at foster care.

4 A CPS placement and ultimately adopt the children the subject of the CPS case, without intervening. Irrespective of intervening, under Texas Family Code 161.207 (a), the trial court has authority to appoint a suitable, competent adult as managing conservator of a child upon termination of the parent-child relationship. In re R.A., No. 07-08-0084-CV, 2009 WL 77853m *2 (Tex.App.-Amarillo Jan. 13, 2009, no pet.)(memo.op.).
denied). If the attorney for the intervener does not plead or prove-up sufficient testimony to prove substantial past contact, they have created liability for themselves. The trial court can strike a party intervention on its own motion. In re M.J.G., 248 S.W.3d 753, 756 (Tex.App.-Fort Worth 2008, no pet.). Since standing is a component of subject matter jurisdiction, lack of standing may be raised for the first time on appeal. In re M.T.C., 299 S.W.3d 474, 479 (Tex.App.-Texarkana 2009, no pet.) citing Texas Ass'n of Bus. V. Texas Air Control Bd., 852 S.W.2d 440, 445-46 (Tex.1993). Lack of standing for an intervention is NOT waivable error. See Whitmore v. Whitmore, 222 S.W.3d 616 (Tex.App.-Houston [1st Dist.] 2007, no pet.); In re M.T.C., 299 S.W.3d 474 (Tex.App.-Texarkana 2009, no pet). Thus, even on appeal, a party could be struck from the suit due to lack of standing either by the other party or the court acting sua sponte.

A party who desires to intervene in an on-going CPS case has two available avenues: one, by having original standing to file a Suit Affecting Parent Child Relationship as defined by Texas Family Code § 102.003 and § 102.004(a) for custody of the child; or two, by having statutorily defined intervention standing under Texas Family Code § 102.004(b).

II. ORIGINAL STANDING

A person who has standing to file and maintain an original suit affecting parent child relationship has standing to intervene. In re M.J.G., 248 S.W.3d 753, 757 (Tex.App.-Fort Worth 2008, no pet.). Texas Family Code § 102.003 defines original standing by enumerating the persons who have standing to file an original petition for custody of a child. O’Connor’s Family Code Plus (2010-11). In addition to original standing under § 102.003, grandparents and other relatives of the child related within the third degree of consanguinity may file an original petition if they can prove that the order is necessary because present circumstances would significantly impair the child’s physical health or emotional development. Tex. Fam. Code § 102.004(a). O’Connor’s Family Code Plus (2010-11).

In addition to having original standing due to the risk of significant impairment, a grandparent or other relative, within third degree of consanguinity, may file an original petition with the consent of the parents. Tex. Fam. Code 102.004. (a)(2). O’Connor’s Family Code Plus (2010-11). A grandmother used this statute to successfully intervene on a private termination/adoption. In re S.B., No. 02-11-00081-CV, 2011 WL 856963, (Tex.App.-Fort Worth March 11, 2011, no pet.)(memo.op.). Unfortunately, the writer could not find a CPS case where this method was used to intervene in a CPS case.

When dealing with foster parents, a common mistake is to assume that they cannot intervene in a CPS case unless the child has been residing in their home for 12 months. However, this is the original standing provision for foster parents as defined by Texas Family Code 102.003(12), which could be used as an avenue to intervene. O’Connor’s Family Code Plus (2010-11). However, even if they do not have original standing, a foster parent can still rely on Texas Family Code § 102.004(b) to intervene.

III. STANDING UNDER § 102.004 (B)

If a party does not have original standing to intervene, as defined above, they must rely on 102.004(b). Unfortunately, the case law interpreting this statute is contradictory and convoluted.

Texas Family Code 102.004(b) states:

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

5 However if a party enters the lawsuit due to being joined as a necessary party by the Department, the Amarillo court believes that a party can waive error by not objecting to the joinder. In re J.W.M., 153 S.W.3d 541, 546 (Tex.App. – Amarillo 2004, no pet.). Texarkana disagreed with Amarillo in the In re M.T.C., 299 S.W.3d 474 (Tex.App.-Texarkana 2009, no pet.).

6 Two cases have ruled that a court abuses its discretion if it strikes a petition, without a motion being filed. Guaranty Fed.Sav.Bank v. Horseshoe Oper.Co., 793 S.W.2d 652, 657 (Tex.1990); Flores v. Melopalacios, 921 S.W.2d 399, 404 (Tex.App.-Corpus Christi 1996, writ denied).

7 Texas Family Code § 102.003 lists the persons who can file a Suit Affecting Parent Child Relationship and seeking custody of a child. This list includes a mother, presumed father, alleged father, an acknowledged father, adopted mother or father, a person who has had actual care and control of a child for six months, ending not more than 90 days before filing the petition, and foster parents who have the child placed in their home for one year ending not more than 90 days before filing the petition. Additional original standing requirements for grandparents and other relatives of the child can be found in §102.004(a). Section 102.004(a) will be discussed further in this paper in Section II.

8 Supra note 8.
managing conservator or both parents as joint managing conservators would significantly impair the child’s physical health or emotional development.

A. Substantial Past Contact

This statute provides two classes of people who may intervene in an on-going law suit where conservatorship is at issue: grandparents and other persons. The first ambiguity of this statute is substantial past contact. Courts disagree whether the statute requires a grandparent to establish substantial past contact or only other persons. For grandparents, the case law interpreting this statute is unclear and convoluted.

1. Grandparents

The Courts of Appeal disagree on whether the requirement of substantial past contact applies to grandparents or only to other persons. The disagreement began when the prior version of § 102.004(b) was still in effect. Before June 18, 2005, the prior version of the statute permitted “a grandparent or other person who had substantial past contact with a child to intervene in a pending suit filed by an authorized person under chapter 102.” See Acts of April 6, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex.Gen. Laws 113, 125 (amended 2005) (current version at Tex.Fam.Code Ann. § 102.004(b) (Vernon 2008)).

Cases prior to the 2005 amendment, consistently held that there was a relaxed burden for grandparents intervening in on-going custody cases because a grandparent did not have to rebut the parental presumption to intervene. However, to file and maintain an original petition for custody, they did have to rebut the parental presumption. Whitmore v. Whitmore, 222 S.W.3d 474, 621 (Tex.App.-Texarkana 2009, no pet.). After 2005, the legislature significantly increased the standing requirement for all intervening parties by amending the statute to require that the intervener prove that appointment of a parent as sole managing conservator or both parents as joint managing conservators would significantly impair the child’s physical or emotional development. In re S.M.D., 329 S.W.3d 8, 15 (Tex.App.-San Antonio 2010, no pet.). This requirement will be discussed in greater detail later in this paper.

Even though the relevant language of the two statutes is the same, it is interesting to recognize that the cases that do NOT require a grandparent to prove substantial past contact are those cases interpreting the older version of the statute.

The premier case for the rule that grandparents do not have to prove substantial past contact is out of the Beaumont Court of Appeals. In re M.A.M., 35 S.W.3d 788, 790 (Tex.App.-Beaumont 2001, no pet.) In M.A.M., non-relative prospective adoptive parents sought a private termination of both parent’s parental rights to a young minor child. Id at 790. However, the maternal grandmother filed an intervention seeking termination/ adoption or custody of the young minor child. Id at 789. The trial court terminated parental rights of the mother, but not the father, and granted the maternal grandmother custody. Id at 790. The non-relatives appealed arguing that the maternal grandmother did not have standing due to lack of substantial past contact. Id. The Beaumont Court of Appeals disagreed and affirmed the trial court’s ruling because the maternal grandmother was not required to prove substantial past contact. Id. The Beaumont Court reasoned that the qualifying phrase “deemed to have had substantial past contact with the child” modifies “other person” not “grandparent”. Id. Thus, a grandparent was exempt from this qualifying provision.

Six years later, the Houston 1st District Court of Appeals issued a rigorously contested forty page opinion allowing a grandmother to intervene without establishing substantial past contact. Whitmore v. Whitmore, 222 S.W.3d 474 (Tex.App.-Texarkana 2009, no pet.). The majority emphatically stated that as a matter of law, grandparents have a justiciable interest in their grandchildren; thus, grandparents have a standing to intervention based solely on their status as grandparents and do NOT have to prove substantial past contact. Id at 621. In a scathing dissent, Justice Evelyn V. Keyes disagreed with this interpretation of 102.004(b). Justice Keyes believed the legislature intended to restrict the circumstances in which a grandparent could intervene by requiring they prove substantial past contact and overcoming the parental presumption by showing significant impairment, when they amended the statute – which was done during the pendency of this case. Id. at 644-645. Notwithstanding the stricter standard, Justice Keyes asserted that grandparents must prove substantial past contact under both versions of the statute. Id. The grandmother in this case had only seen the child once and admitted she was a complete stranger to the child. Id. at 646. Based on these facts, she did not have substantial past contact.

Since the 2005 amendment, cases interpreting 102.004(b) are convoluted in their analysis and focus
more on significant impairment, rather than substantial past contact.

The Fort Worth Court of Appeals has contradicted itself on the issue of grandparents and substantial past contact. In one case, they required that a grandmother show substantial past conduct to have standing to intervene. In re K.N.M., No. 2-08-308-CV, 2009 WL 219125, (Tex.App.-Fort Worth July 23, 2009, no pet.)(memo.op.). Mom had filed an SAPCR against dad. Id. at *2. After temporary orders were entered, maternal grandmother filed an intervention. Id. She attached an affidavit to her petition setting forth the facts supporting her standing. Id. The parties testified that they had reached an agreement which was approved by the court. Id. at *3. Before the order was entered, the mother filed a Notice of Withdraw of Consent to Oral Agreement because she was mad at her mother, felt pressured into the agreement and she understood Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.49(2000). Id. No one filed a Motion to Strike. Ultimately, the trial court entered an order based on the agreement. Id. at *4. The mother appealed alleging the grandmother did not have standing to intervene. Id. The Fort Worth Court affirmed and in their opinion stated, “Under 102.004(b), a grandparent may intervene…if the grandparent has had substantial past contact with the child and appointment of one or both of the parents as managing conservators would significantly impair the child’s physical health or emotional development.” Id. The court did not provide any substantive analysis of the substantial past contact provision but simply stated that a grandparent is required to show substantial past contact under § 102.004(b). Id. The Fort Worth court cited a prior case out of their district, In re M.J.G., 248 S.W.3d 753, 757 (Tex.App.-Fort Worth 2008, no pet.), to support their analysis. Id at *4. A quick reference check to the pinpoint cite given will cause the reader great bewilderment.

Amazingly, at the pinpoint cite, M.J.G.\(^9\) clearly states, “a grandparent who does not have standing to file an original suit may still be granted leave to intervene in a pending suit if the trial court determines that appointment of one or both of the parents as managing conservators would significantly impair the child’s physical or emotional development.” In re M.J.G., at 757. A literal reading of this sentence would indicate that a grandparent does NOT need to show substantive past contact. Amazingly, M.J.G. does not even include the phrase substantial past contact; the case’s analysis focuses on significant impairment. Id. However, seventeen months later, Fort Worth changes their mind and requires substantial past contact, incredibly, using M.J.G. as authority. In re K.N.M., No. 2-08-308-CV, 2009 WL 219125, at *4 (Tex.App.-Fort Worth July 23, 2009, no pet.)(memo.op.).

The courts need to remove this landmine of grandparents and substantial past contact with some clear concise analysis because some questions still remain. Are the standing requirements for grandparents the same as any other third party under Texas Family Code § 102.004(b), or do grandparents have a justiciable interest greater than a third party to intervene and therefore are not required to show substantial past contact?

2. Other Persons

Under § 102.004, non-grandparent relatives, foster parents or other third party MUST allege and prove substantial past contact to intervene in an ongoing CPS case. Substantial past contact is not defined by the statute and courts have refused to set out standards or a particular test to determine what constitutes substantial past contact. Substantial past contact is a fact driven analysis and must be determined on a case by case basis and is designed to be flexible. See In re M.A.M., 35 S.W, 3d 788, 790 (Tex.App.-Beaumont 2001, no pet.).

Before the Texas legislature added §102.004, the right to intervene for foster parents parties did not exist. In 1982, the Texas Supreme Court wrote an opinion which was the death sentence for foster parent intervention. Mendez v. Brewer, 626 S.W.2d 498, 499 (Tex.1982). In Mendez, foster parents tried to intervene in a CPS termination case. Id. at 499. The trial court struck the intervention. Id. Then, the foster parents filed their own petition to terminate and requested that the court consolidate the two cases. After the trial court refused, the foster parents appealed alleging that the judge abused his discretion by striking their intervention. Id. Agreeing with the foster parents, the court of appeals reversed and remanded for new trial. Id. The Supreme Court overturned the ruling of the court of appeals and affirmed the judgment of the trial court. Interpreting section 11.03 of the Texas Family Code\(^10\), the Supreme Court held that foster parents do not have a strong enough justiciable interest to sustain an

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\(^9\) In this case, the maternal grandparents intervened into their daughter and son-in-law’s divorce. In re M.J.G., 248 S.W.3d 753, 757 (Tex.App.-Fort Worth 2008, no pet.) After hearing testimony at temporary orders, the trial judge set a hearing to determine the standing of the interveners. Id. at 756. Only the interveners were represented by counsel at the temporary orders hearing. Id. At the special hearing, the trial judge struck the interveners from the suit. No one had filed a motion to strike. Id.

\(^10\) A suit affecting the parent-child relationship may be brought by any person with an interest in the child. Texas Family Code § 11.03 (Vernon 1980).
intervention because their interest in adopting is contingent on the outcome of the termination. *Id.* at 500. Thus, the interest was too weak to be justiciable. *Id.*

The Fort Worth Court of Appeals determined *Mendez* had been repealed and replaced by the legislature when they added § 102.004. In *re N.L.G.*, 238 S.W.3d 828, 831 (Tex.App.-Fort Worth, 2007, no pet.). In this case, CPS was notified by a hospital that a mom had tested positive for methamphetamine after the birth of her daughter. CPS took custody when the child was two days old and placed the child with foster parents five days later. CPS sought termination of the mom’s parental rights and the foster parents intervened. Mom filed a motion to strike the foster parent’s intervention which the trial court denied. Ultimately, a jury terminated the parental rights of the mother and she appealed complaining the trial court abused its discretion by denying her motion to strike. The Fort Worth Court Appeals affirmed the trial court’s ruling because the foster parents had substantial past contact with the child. The child had resided in their home her entire life, except for the time she was in the hospital after her birth.

One case where a non-relative third party was found to not have sufficient substantial past contact involved a step-maternal grandmother who tried to intervene in a private suit affecting parent relationship case. *In re M.T.C.*, 299 S.W.3d 474 (Tex.App.-Texarkana 2009, no pet.). The maternal grandfather along with his wife, the step grandmother, intervened seeking joint managing conservatorship and possession, and access of the children. The trial court held that the step-grandmother did not have standing. *Id.* at 479. The Texarkana Court of Appeals affirmed the trial court’s ruling that the step-grandmother did not have substantial past contact because she only saw the children twice a year and sent cards and letter. *Id.*

B. Significant Impairment

The next requirement of § 102.004(b) is the intervener must show “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.” This is the exact language used in Texas Family Code § 153.131 (A), also known as parental presumption. *O’Connor’s Family Code Plus* (2010-11). Thus, in order to have standing under § 102.004(b), the intervener must rebut the parental presumption. This portion of the paper is useful to all cases where a party must rebut the parental presumption to prevail on the merits.\(^\text{11}\)

Just like the substantial past contact provision, the type of evidence necessary to rebut the parental presumption is an unsettled area of law with a deep division between the Texas Court of Appeals. According the Supreme Court of Texas, the general rule for rebutting the parental presumption is that a non-parent must offer evidence of specific acts or omissions by the parent(s) that have or will cause harm to the child. *Lewelling v. Lewelling*, 790 S.W.2d 164, 167 (Tex. 1990). Therefore, to have standing, the intervener must offer evidence of specific acts or omissions by the parent or parents supporting a logical inference that some specific, identifiable behavior or conduct of the parent or parents will probably result in harm to the child. *May v. May*, 829 S.W.2d 373, 376 (Tex.App-Corpus Christi 1992, writ denied). The inference may not be based on evidence which raises a merely speculative harm. *Id.* It must be ascertainable. *Id.* at 377. Evidence that the intervener would be a better custodian is inadequate to meet this burden. *In re S.D.M.*, 329 S.W.3d 8, 16 (Tex.App.-San Antonio, no pet.). Additionally, if a parent is currently a suitable conservator, then evidence of past harmful behavior is not sufficient to prove significant impairment. *Id.*

This rule appears to be extremely straightforward; however, courts struggle applying it to situations where a child has resided with a non-parent from birth. Is the fact that a child would be removed from the only home he knows be sufficient to rebut the parental presumption when a parent has not engaged in any wrongful conduct? Some Courts of Appeal have held that this potential harm does rebut the parental presumption despite a parent’s lack of culpable behavior.

In a case decided seven years after *Lewelling*, the San Antonio Court of Appeals held that the potential harm to a child from being removed from the non-parent’s home is sufficient to rebut the parental presumption, even though the father of the child had not committed any wrongful acts. *In re Rodriguez*, 940 S.W.2d 265 (Tex.App.-San Antonio 1997, writ denied). In the *Rodriguez* case, an adoption agency sought to terminate the parental rights of the mother. *Id.* at 267. The mother had lied to the adoption agency about the identity of the biological father of the child. *Id.* However, the biological father learned of the termination/adoption proceeding and intervened requesting managing conservatorship. *Id.* at 267. The child had been placed with the prospective adoptive parents since birth. *Id.* at 266. Although the biological father had not committed any culpable acts which would have resulted in significant impairment

\(^{11}\) When determining the meaning of a particular phrase, the court should consider the meaning assigned to the same term used elsewhere in a piece of legislation. Courts should give the two phrases the same meaning. *In re S.D.M.*, 329 S.W.3d 8, 16 (Tex.App.-San Antonio, no pet.).
of the child, the San Antonio Court of Appeals determined that the removal of the child from the only home that she had ever known was sufficient to rebut the parental presumption. *Id.* at 274. Writing for the majority, Justice Duncan wrote, “I do not believe that the evidence established that [the father] by any act or omission on his part created an environment which would “significantly impair” [the child’s] physical health or emotional development.”

The Dallas Court of Appeals had the opportunity to decide a similar case, where a mother placed a child with an adoption agency and the biological father later intervened requesting managing conservatorship of the child. In *In re B.B.M.*, 291 S.W.3d 463 (Tex.App.-Dallas 2009, no pet.). The non-relatives won at the trial level. However, the Court Appeals reversed and remanded due to the non-relative interveners lack of standing. *Id.* at 472. Despite the similar facts, the Dallas Court refused to follow *Rodriguez* and held that the possible negative effects of being removed from the non-parents was NOT enough to deny the natural parent his right to custody of the child when a parent had not engaged in any wrongful conduct. *Id.* at 468.

A petition for review has been filed on a case from the Corpus Christi Court of Appeals which may answer this question. *Gray v. Shook*, 329 S.W.3d 186 (Tex.App.-Corpus Christi 2010) (pet. filed March 2, 2011 (11-0155). The father filed a suit affecting parent child relationship against the mother requesting to be appointed joint managing conservatorship with the mother having the right to designate the primary residence. *Id.* at 187. The maternal grandmother intervened requesting joint managing conservatorship with her daughter. *Id.* The intervener wanted the right to designate the primary residence. *Id.* The father amended his pleading asking for the right to designate. *Id.* A bench hearing was held and the trial court appointed the intervener sole managing conservator and the parents possessory conservators. *Id.* The father appealed claiming that the grandmother did not rebut the parental presumption. *Id.* With a dissent by Justice Yanez, the Corpus Christi Court of Appeals agreed with the father by reversing and remanding the case. *Id.* at 199. The grandmother has filed a petition for review with the Texas Supreme Court. Hopefully, the petition will be granted so the Supreme Court will show us how to dance around this particular landmine.

In direct conflict with their opinion in *Rodriguez*, the San Antonio issued an opinion in February 2010, which states a non-parent must offer specific acts or omissions by the parent which would result in significant impairment. *In re S.M.D.*, 329 S.W.3d 8, 16 (Tex.App.-San Antonio 2010, no pet.). The Court chastises the non-parent for relying on several cases in her brief which state that removal from a non-parent is sufficient to show significant impairment. *Id.* at 21. The Court claims that all cases which hold removal from the caregiver is enough to show significant impairment also have finding of culpable conduct. *Id.* However, the Court does not distinguish or discuss *Rodriguez*, which did NOT have a find of culpable conduct. The only factual difference between the two cases is *Rodriguez* deals with the rebuttal of the parental presumption under § 153.131 and *S.M.D.* is a non-parent standing case, § 102.004(b). Ironically, this Court states that this factual difference is inconsequential. When the legislature uses the same phrase, it MUST be given the same meaning. *S.M.D.* at 15-16.

Accordingly, the question of whether a parent must commit harmful acts that lead to the significant impairment is still undecided, some courts require specific acts, others don’t and some courts can’t make up their minds. This is another landmine that the courts need to detonate by providing consistent interpretation.

After an intervener has proven significant impairment, they are not done. They still must prove up their requested relief to prevail on the merits of their petition. For example, an intervener who is seeking termination of parental rights must prove of the termination grounds by clear and convincing evidence. However, rebutting the parental presumption is only proven by a preponderance of the evidence. Thus, an intervener could rebut the parental presumption but fail to prove termination of parental rights. See, *J.A.J.*, 243 S.W.3d 611 (Tex.2007).

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12 Some cases which require a non-parent to prove that the parent has committed specific act of wrongful conduct to rebut the parental presumption are *Gary v. Shook*, 329 S.W.3d 186 (Tex.App.-Corpus Christi 2010, no pet.), *In re M.H.*, 312 S.W.3d 137 (Tex.App.-Waco 2010, no pet.), *In re B.B.M.*, 291 S.W.3d 463 (Tex.App.-Dallas 2009, no pet.).


15 Texas Family Code 161.001(1) lists twenty statutory grounds for involuntary termination of parental rights. The statute requires that a petitioner prove by clear and convincing evidence at least one ground and that termination of parental rights is in the best interest of the child. (Vernon 2008).
C. **Satisfactory Proof**

An intervener is required to show the court they have standing with *satisfactory proof* under Texas Family Code 102.004(b). *O’Connor’s Family Code Plus* (2010-11). The evidentiary standard of *satisfactory proof* is a preponderance of the evidence. *In re A.M.S.*, 277 S.W.3d 92, 96 (Tex.App.-San Antonio 1990, writ denied). The evidence establishing the satisfactory proof of standing must exist at the time the petition is filed. *In re S.M.D.* at 13.

D. **Leave of Court**


IV. **MOTION TO STRIKE**

When a party contests the standing of a third party to intervene, they need to file a motion to strike the petition in intervention. *Tex.R.Civ.P. 60*. Once a motion to strike has been filed, the burden shifts to the intervener to establish standing to remain in the lawsuit by a preponderance of the evidence. *DFPS v. Alternatives in Motion*, 210 S.W.3d 794 (Tex.App.-Houston[1st Dist.] 2006, no pet.).

A trial court should not strike a petition if (1) the intervener could bring the same action, or any part thereof, in their own name, (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. The trial court has wide discretion in ruling on a motion to strike. *Seale* at *4.

An interesting point regarding a motion to strike is that the court of appeals will review this ruling under an abuse of discretion standard. *In re N. L.G.*, 238 S.W.3d 828, 829 (Tex.App.-Fort Worth 2007, no pet.). However, a party’s standing to seek relief is a question of law and should be reviewed de novo. *In re S.M.D.*, 329 S.W.3d 8, 13 (Tex.App.-San Antonio 2010, no pet.). Moreover, courts have consistently held that standing is a component of subject matter jurisdiction. *In re M.T.C.*, 299 S.W.3d 474, 479 (Tex.App.-Texarkana 2009, no pet.). Whether a court has subject-matter jurisdiction is an issue of law, which is subject to de novo review. *In re C.M.C.*, 192 S.W.3d 866, 870 (Tex.App-Texarkana 2006, no pet.) citing *Tex. Dept of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex.2004). Even though it is possible to appeal a motion to strike which was not based on standing, the courts have been inconsistent in using a standard of review when deciding intervention case where a motion to strike was filed. For example, the Fort Worth Court of Appeals used an abuse of discretion standard when deciding whether the trial court erred by not striking a foster parent’s intervention because they lacked standing where the appellant had filed a motion to strike. *In re N.L.G.*, 238 S.W.3d 828, 829 (Tex.App.-Forth Worth 2007, no pet.). It does not make any sense that a party loses the higher standard of appellate review by complying with Texas Rules of Civil Procedure. Accordingly, the lawyer dealing with an intervention should be mindful of this landmine of contradictory standards of review.

V. **CONCLUSION**

Unfortunately, this paper ends without any definite answers about intervention. CPS cases are emotionally difficult cases for all parties. Unfortunately, the legislature and the courts have made a difficult situation worse by the not providing clear and concise rules for interventions. When you are dealing with an intervention, you are two stepping in a mine field of indecision and inconsistency. One wrong step and your case is destroyed.