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Child Welfare  
Conference

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Domain  
Austin, TX



# *Tips for Properly Addressing Interventions in CPS Cases*

Tuesday, August 18 (2:30 p.m. – 3:30 p.m.)

**Faculty:**  
Hon. Melissa DeGerolami

# Interventions

TIPS FOR PROPERLY ADDRESSING INTERVENTIONS IN CPS CASES

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## Goals of the presentation:

- ❖ Address standing requirements for non-parties to intervene in CPS legal cases and in cases with other stages of CPS involvement
- ❖ Address practical considerations in responding to interventions filed in your court
- ❖ Provide guidance on best practices when addressing an intervention in a CPS case

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## Standing

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## Standing Fundamentals

- ❖ Standing is a component of subject matter jurisdiction and is the threshold issue in a child custody proceeding.
- ❖ Standing in a SAPCR is conferred by statute
- ❖ Standing must exist at the time a suit is filed
- ❖ If a party fails to establish standing, the trial court must dismiss the suit
- ❖ There is no equitable component to standing

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## Two avenues for non-parent parties to establish standing in a SAPCR

- ❖ Standing to file an Original Suit
- ❖ Standing to Intervene in a Pending Suit

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## Standing to File an Original Suit

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### § 102.003 General Standing to file Suit

- (a) An original suit may be filed at any time by:
  - (1) a parent of the child;
  - (2) the child through a representative authorized by the court;
  - (3) a custodian or person having the right of visitation with or access to the child appointed by an order of a court of another state or country;
  - (4) a guardian of the person or of the estate of the child;
  - (5) a governmental entity;
  - (6) an authorized agency;
  - (7) a licensed child placing agency;

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### § 102.003 (continued)

- (8) a man alleging himself to be the father of a child filing in accordance with Chapter 160, subject to the limitations of that chapter, but not otherwise;
- (9) a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- (10) a person designated as the managing conservator in a revoked or unrevoked affidavit of relinquishment under Chapter 161 or to whom consent to adoption has been given in writing under Chapter 162;
- (11) a person with whom the child and the child's guardian, managing conservator, or parent have resided for at least six months ending not more than 90 days preceding the date of the filing of the petition;
- (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition;

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### Actual Care, Control, & Possession § 102.003(a)(9)

Section 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."

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### § 102.003(a)(9) is very time-specific in its applicability

A person, other than a foster parent, must have 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.

- ❖ No standing when child in home for only 5 ½ months at time of filing  
*In the Interest of E.C., No. 02-13-00413-CV (Tex. App. – Fort Worth [2nd District] August 7, 2014)*
- ❖ No standing when child in home for only 3 months at time of filing  
*In re C.M.J., No. 02-12-0036-CV (Tex App. – Fort Worth, December 2012, no pet.)*

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### Actual Care, Custody, and Control under § 102.003(a)(9)

102.003(b)

In computing the time necessary for standing under Subsections (a) (9), (11), and (12), the court may not require that the time be continuous and uninterrupted but shall consider the child's principal residence during the relevant time preceding the date of commencement of the suit.

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### "Actual control" does not mean legal control

*Jasek v. Texas Department of Family & Protective Services, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)*

The children were placed with the Jaseks, who were fictive kin, from April 2007 until October 2009 when Mr. Jasek tested positive for marijuana. Less than 90 days later, the Jaseks filed an intervention under both 102.004(b) and 102.003(a)(9). The intervention was struck by the trial court because the Jaseks did not have "control" of the children. The appellate court reversed and remanded finding that the Jasek's had standing under 102.003(a)(9). The Court found that "actual control" does not require the authority to make legal decisions for the children. The court looked to the composite elements of care, control, and possession in reaching its decision.

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## Elements of "actual care, control, and possession"

Generally the individual asserting standing under 102.003(a)(9) will have:

- (1) Lived in a home where the child consistently and frequently stayed overnight;
- (2) Financially supported the child;
- (3) Participated in the child's education; and
- (4) Fed, clothed, and provided health care to the child

*Jasek v. Texas Department of Family & Protective Services, 348 S.W.3d 523 (Tex. App. – Austin 2011, no pet.)*

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## § 102.005 Standing to Request Termination and Adoption

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

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

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## Cases of note involving § 102.005

❖ *In re J.C., 399 S.W.3d 235 (Tex. App. – San Antonio 2012, no pet.)*

A premature infant was placed with foster parents directly from the hospital. Following termination of J.C.'s parents' parental rights, competing petitions for adoption were filed by foster parents and J.C.'s grandparents. The dismissal of the grandparents suit was upheld on appeal because they had not established the requisite substantial past contact under 102.005(5) to adopt the child.

❖ *In the Interest of D.A., No. 02-14-00265-CV (Tex. App. – Fort Worth, February 5, 2015)(mem. op.)*

After father's parental rights were terminated, grandmother filed to terminate the rights of the mother and to adopt the child. Court of Appeals reversed the trial court's dismissal of her suit finding that she had established substantial past contact under 102.005(5) to have standing in her suit.

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### § 102.004 Standing for a Grandparent or Other Person

(a) In addition to the general standing to file suit provided by Section 102.003, a grandparent, or other relative of the child related within the third degree by consanguinity, may file an original suit requesting managing conservatorship if there is satisfactory proof that: (1) the order requested is necessary because the child's present circumstances would significantly impair the child's physical health or emotional development; or (2) both parents, the surviving parent, or the managing conservator or custodian either filed the petition or consented to the suit.

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### Limits of § 102.004(a)

Standing under 102.004(a) is limited to grandparents or another relative of the child within the third degree by consanguinity. Relatives who are within the third degree of consanguinity are:

- (1) A parent or child (relatives of the 1<sup>st</sup> degree)
- (2) A brother, sister, grandparent, or grandchild (relatives in the 2<sup>nd</sup> degree)
- (3) A great-grandparent, great-grandchild, aunt who is a sister of a parent of the child, an uncle who is a brother of a parent of the child, a nephew who is a 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)

Texas Government Code Ann. § 573.023(c)

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### Limits of § 102.004(a) Standing

You will not have standing under this provision if:

- ❖ You are a step-relative of any kind.  
Step-grandfather excluded  
*In the Interest of E.C., No. 02-13-00413-CV (Tex. App. – Fort Worth [2<sup>nd</sup> District] August 7, 2014)*  
Step-uncle excluded  
*In re A.M.S., 277 S.W.3d 92 (Tex. App. – Texarkana 2009, no pet.)*
- ❖ You are a great-aunt or great-uncle  
*In re N.L.D., 412 S.W.3d 810 (Tex. App. – Texarkana 2013, no pet.)*

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## Proving Significant Impairment under § 102.004(a)

*In re K.D.H., No. 14-13-00006-CV (Tex. App. – Houston [14<sup>th</sup> Dist.] April 3, 2014, no pet.*

Grandmother who had served as placement during FBSS case filed petition for conservatorship the day the child was returned to the mother. An affidavit and testimony presented to the court outlined that Mom had tested positive for marijuana at the birth of the child, had prior DWI and child endangerment convictions, that the father was incarcerated at the time grandmother's petition was filed and also had a history of drug and alcohol abuse. Court found evidence would enable reasonable and fair-minded people to find circumstances that would significantly impair the child's physical health and emotional development.

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## Additional Cases addressing Significant Impairment under § 102.004(a)

❖ *In re McDaniel, 408 S.W.3d 389 (Tex App. – Houston [1<sup>st</sup> Dist.] 2011)*

Court found maternal grandparents had standing to request managing conservatorship of the children in a case involving physical and emotional abuse of the children even though the last alleged incident of abuse occurred 9 months before the filing of the petition. The Court found that evidence showed that the father's ideas regarding discipline had not changed during that period and he had not received any counseling or other services during that time to mitigate the risk of continued abuse.

❖ *Maudlin v. Clements, 428 S.W.3d 247, (Tex. App. – Houston 2014)*

Court found significant impairment of emotional development in a case where the mother failed to send her children to school on a regular basis, where she failed to provide her children with counseling and other necessary psychological treatment, and where the children had poor school performance and behavioral issues. The mother's involvement of the children in the litigation was also found to be detrimental to their emotional well-being.

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## Applicability & Implications of § 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 FBSS stage of a CPS case.
- ❖ An original action for conservatorship under 102.004(a) does not have the rehabilitative and service requirements of a CPS case or the same strict timelines.

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Standing to Intervene in a Pending Suit

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§ 102.004(b)

An original suit requesting possessory conservatorship may not be filed by a grandparent or other person. However, the court may grant a grandparent or other person deemed 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 sole managing conservator or both parents as joint managing conservators would significantly impair the child's physical health or emotional development.

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§ 102.004(b) applies only to Pending Suits

- ❖ A grandparent or other person can only utilize 102.004(b) in suits where managing conservatorship is already an issue in dispute.
- ❖ In the context of CPS cases, the suit is no longer pending once the Department is appointed PMC of the child.

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### § 102.004(b) involves a 2-part Analysis

1. The Grandparent or other person must establish that they have had substantial past contact with the child AND
2. The Grandparent or other person must present satisfactory proof to the court that the appointment of the parent or parents as sole or managing conservators would significantly impair the child's physical health and emotional development.

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### What is Substantial Past Contact?

- ❖ Fact-Intensive Inquiry
- ❖ Flexible Standard
- ❖ Not Statutorily Defined
- ❖ Case law does not establish a clear factual framework
- ❖ Deference given to trial court's assessment

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### Is there substantial past contact?

Maternal grandparents who lived out of state filed for adoption of the children and alleged substantial past contact. They had engaged in monthly telephone calls with the mother and the children, and sent correspondence including gifts and cards for special occasions and holidays. These grandparents had physically met the oldest child 2 times and had never visited with the youngest child in person.

Substantial Past Contact?

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### No Substantial Past Contact.

*In re C.M.C., 192 S.W.3d 866 (Tex. App. – Texarkana 2006, no pet.)*

The Court focused its evaluation on the amount of actual contact and not the difficulties of the grandparents maintaining contact. The Court applied the standard definition of "substantial" from the Random House Dictionary as "of ample or considerable amount, quantity, size, etc." and found the contact between the grandparents and the children did not amount to substantial past contact.

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### Is there substantial past contact?

Both maternal grandmother and maternal uncle filed intervention under 102.004(b) requesting appointment as possessory conservators of the children. Facts established that maternal grandmother "frequently cared for the children, lived nearby, and spent a great deal of time with the family." Maternal uncle testified that he had "seen them regularly during their lives."

Substantial Past Contact?

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### Yes and No.

*Blackwell v. Humble, 241 S.W.3d 707 (Tex. App. – Austin 2007, no pet.)*

Court found that the maternal grandmother had established substantial past contact but that the "meager" facts regarding the uncle's relationship with the children did not amount to substantial past contact.

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### Is there substantial past contact?

Child had been placed with the paternal grandparents following removal but then placed with maternal great aunt and uncle following an incident in which the grandparents allowed unauthorized contact with the parents. The maternal great aunt and uncle intervened after the child was placed with them for 7 weeks.

Substantial Past Contact?

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### Yes. 7 weeks of placement = Substantial past contact

*In re A.L.W., No. 02-11-00480-CV (Tex. App. – Fort Worth Nov. 8, 2012, pet. denied)(mem. op.)*

Court notes that the analysis of what amounts to substantial past contact includes consideration of where the child has resided and admits "While the length of time is shorter than in many cases, it is not so short that it could not be seen as substantial."

The Court also states "We believe section 102.004(b) gives the trial judge the discretion to determine whether those who undertake the day-to-day supervision of a child, her activities, and most of the functions ordinarily associate with legal custody have substantial past contact to confer standing to intervene."

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### Is there substantial past contact?

Step-grandmother who lived in Kansas filed for conservatorship and access to children who she saw routinely twice a year. In addition, she and the grandfather of the children would speak with the children on the phone about once a week and would mail cards and gifts on holidays.

Substantial Past Contact?

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## No substantial past contact.

*In re M.T.C., 299 S.W.3d 474 (Tex. App. – Texarkana 2009, no pet.)*

Court found the level of interaction between the step-grandmother and the children too minimal to create a fact issue concerning substantial past contact.

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## What is satisfactory proof that the appointment of parent(s) as MC would significantly impair the child's physical health and emotional development?

- ❖ Evidentiary Standard is Preponderance of the Evidence
- ❖ The non-parent intervenor must offer evidence of specific acts or omissions of the parent that demonstrate that an award of custody to the parents would cause physical or emotional harm to the child.
- ❖ Intervenor must do more than show he/she would be a better caretaker for the child
- ❖ It is not enough to focus on past acts

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## Practical Considerations:

- ❖ Even in CPS cases, specific facts should be alleged to support the finding of significant harm.
- ❖ Given the rehabilitative nature of CPS proceedings, an intervenor's standing may be impacted by a parent's substantial progress with their service plan and the reunification process.
- ❖ Intervenor's can't be allies with parents in CPS proceedings.

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### Case law regarding § 102.004(b) and Significant Impairment

- ❖ *In re S.M.D., 329 S.W.3d 8 (Tex. App. – San Antonio, 2010, pet. dismissed)*  
Grandparent with substantial past contact did not have standing to seek conservatorship when facts showed only speculation of potential harm if father had been appointed conservator.
- ❖ *In re H.R.L., No. 8-14-00053-CV (Tex. App. – El Paso, August 29, 2014)*  
Great-aunt filed for possession and access to the child under 102.004(b) and established substantial past contact. However, testimony that the mother had periods of sporadic visitation with the child while in school and other allegations of neglect were not proven to show a significant impairment to the child's physical health or emotional development.
- ❖ *In the Interest of A.T., No 14-14-00071-CV (Tex. App. – Houston, July 1, 2014)*  
Court found no abuse of discretion when Court denied leave to intervene because significant impairment not proven. Court found standing on another general standing provision.

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### Challenges of proving "Significant Impairment" during the reunification phase of a CPS case

*L.J. v. Texas Department of Family & Protective Services, No. 03-11-00435-CV (Tex. App. – Austin, August 1, 2012, pet. denied) (mem. op.).*

Alleged father who had independently raised the child for 2 ½ 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.

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### Foster Parent Interventions

- Two Avenues are available for Foster Parents seeking to intervene in CPS proceedings.
- (1) General Standing provision § 102.003 (a)(12)  
An original suit may be filed at any time by a person who is a foster parent of a child placed by the Department of Family and Protective Services in the persons home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition.
  - (2) Standing also can be established through § 102.004(b) and a showing of substantial past contact and there is satisfactory proof to the court that the appointment of a parent as Sole managing conservator or both parents as joint managing conservator would significantly impair the child's physical health or emotional development.

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