



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00244-CV

IN RE Sandra SANDOVAL

Original Mandamus Proceeding¹

Opinion by: Jason Pulliam, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

PETITION FOR WRIT OF MANDAMUS CONDITIONALLY GRANTED

On April 23, 2015, relator Sandra Sandoval filed a petition for writ of mandamus, complaining of the trial court's order denying her plea to the jurisdiction in the underlying suit to adjudicate parentage. The panel issued an opinion conditionally granting mandamus relief on August 12, 2015. The real party in interest filed a motion for en banc reconsideration on August 26, 2015. By separate order, the court has voted to deny the motion for en banc reconsideration; however, we withdraw our prior opinion and substitute this opinion in its stead to clarify the panel's reasoning. We conclude the challenged order in this instance constitutes a clear abuse of the trial court's discretion which is appropriate for mandamus review because of the extraordinary circumstances presented. *See In re Prudential Ins. Co. of Am.*, 148 S.W.2d 124, 136 (Tex. 2007)

¹ This proceeding arises out of Cause No. 2015-CI-04420, styled *In the Interest of N.I.V.S. and M.C.V.S., Minor Children*, pending in the 224th Judicial District Court, Bexar County, Texas, the Honorable Gloria Saldaña presiding.

(mandamus review available to correct significant rulings in exceptional cases). Therefore, we conditionally grant mandamus relief.

BACKGROUND

In 2002, Sandra Sandoval adopted a baby, N.I.V.S., shortly after birth. Two years later, she adopted a second baby, M.C.V.S. The parental rights of the children's biological parents were terminated and Sandoval adopted both children by herself. At the time of both adoptions, Sandoval was in a romantic relationship with Dino Villarreal, the real party in interest in this original proceeding.

Dino was born a female, named Diana, but was raised as a boy and has self-identified as a male for all of his adult life. Dino moved in with Sandoval in 1994 and lived with her, and later the two children, until January 2011 when Dino and Sandoval separated.

In December 2013, Dino filed a petition to adjudicate parentage and a motion for temporary orders after Sandoval allegedly refused to allow any further contact between Dino and the children.² On January 3, 2014, in a separate cause of action, Dino obtained an Order Granting Change of Identity, which acknowledged his name change from Diana to Dino³, and included the following finding: "3. Petitioner's sex is male." Following the trial court's findings, the order concluded, "IT IS ORDERED that Petitioner's identity is changed from female to male."⁴

Sandoval filed a plea to the jurisdiction in Dino's suit to adjudicate parentage, challenging Dino's standing to maintain the suit. The trial court granted Sandoval's plea to the jurisdiction, finding that Dino lacked standing to bring a suit to adjudicate parentage and lacked standing to

² This suit was filed on December 9, 2013, in Cause No. 2013-CI-20008, styled *In the Interest of N.I.V.S. and M.C.V.S., Minor Children*, in the 57th Judicial District Court, Bexar County, Texas.

³ Dino had previously obtained an order granting his name change in November 2013.

⁴ The Order Granting Change of Identity was signed in Cause No. 2013-CI-20403, styled *In the Interest of Dino Villarreal, An Adult*, filed in the 407th Judicial District Court, Bexar County, Texas.

seek conservatorship, possession and access to the children. Dino appealed and this court affirmed the trial court's judgment granting Sandoval's plea to the jurisdiction on March 11, 2015. *In the Interest of N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913, at *1 (Tex. App.—Mar. 11, 2015, no pet.).

Five days after this court issued its opinion, Dino filed a second suit to adjudicate parentage. In his petition, Dino asserts that he has statutory standing to bring suit as, "a man alleging himself to be the father of the minor children." *See* TEX. FAM. CODE ANN. § 102.003(a)(8) (West 2014). Dino requested, among other things, temporary orders appointing him joint managing conservator of the two minor children, and equal periods of possession and access with Sandoval.

Sandoval again filed a plea to the jurisdiction challenging Dino's standing to bring suit. The trial court signed an order on April 17, 2015, denying Sandoval's plea to the jurisdiction, as well as her request for genetic testing and motion for sanctions. The trial court then proceeded to a hearing on temporary orders, eventually allowing Dino possession and access to the minor children, appointing an amicus attorney, and enjoining the parties from initiating any proceedings for the adoption of the children by any party.

Sandoval filed this original proceeding challenging the trial court's order denying her plea to the jurisdiction.

ANALYSIS

The improper denial of a plea to the jurisdiction is generally not reviewable by mandamus because it involves a question of law which can be addressed by ordinary appeal. *See In re State Bar of Tex.*, 113 S.W.3d 730, 734 (Tex. 2003) (orig. proceeding). "There are nevertheless several exceptions to this general prohibition against mandamus review of a trial court's order denying a plea to the jurisdiction. In short, a remedy by appeal may be an inadequate remedy when there are extraordinary circumstances present." *In re First Mercury Ins. Co.*, 437 S.W.3d 34, 38 (Tex.

App.—Corpus Christi 2014, orig. proceeding). The Texas Supreme Court has held that mandamus review is appropriate when the trial court’s jurisdiction is challenged in a proceeding involving child custody issues. *See Geary v. Peavy*, 878 S.W.2d 602, 603 (Tex. 1994) (orig. proceeding); *see also In re Green*, 352 S.W.3d 772, 774 (Tex. App.—San Antonio 2011, orig. proceeding). This is due to the unique and compelling circumstances presented when the trial court decides issues pertaining to child custody. *See Geary*, 878 S.W.2d at 603; *see also In re Derzopf*, 219 S.W.3d 327, 334 (Tex. 2007) (exceptional circumstances presented by challenge to temporary orders in suit for access to children support availability of mandamus review). We conclude that eventual review of the jurisdictional question on appeal from a final judgment would be inadequate in this instance. Mandamus review is therefore appropriate. *See Derzopf*, 219 S.W.3d at 335.

The Texas Legislature has established a comprehensive statutory framework for determining standing in suits affecting the parent-child relationship. *See* TEX. FAM. CODE ANN. §§ 102.003-.006 (West 2014). Standing to file suit under the Texas Family Code is limited. A suit to establish a parent-child relationship may only be brought by certain individuals falling within identified categories. *See In re Sullivan*, 157 S.W.3d 911, 915 (Tex. App.—Houston [14th Dist.] 2005, orig. proceeding). In statutory standing cases, “the analysis is a straight statutory construction of the relevant statute to determine upon whom the Texas Legislature conferred standing and whether the claimant in question falls in that category.” *Id.*

In his second petition to adjudicate parentage, Dino asserts that he has statutory standing to maintain his suit under section 102.003(a)(8) of the Texas Family Code, which provides:

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

...

(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;. . . .

TEX. FAM. CODE ANN. § 102.003(a)(8).

Standing to file a suit to adjudicate parentage under Chapter 160 of the Family Code is also expressly limited. Such a suit may only be maintained by:

- (1) the child;
- (2) the child's mother;
- (3) "***a man whose paternity of the child is to be adjudicated;***"
- (4) an authorized governmental agency;
- (5) an adoption or child-placing agency;
- (6) a legal representative of an authorized individual who is incapacitated;
- (7) a relative of the mother if the mother is deceased; or
- (8) an intended parent under a gestational agreement.

TEX. FAM. CODE ANN. § 160.602(a)(3) (West 2014) (emphasis added).

As this court stated in affirming the trial court's dismissal of Dino's first suit on the basis of standing:

"Standing must exist at the time a plaintiff files suit and must continue to exist between the parties at every stage of the legal proceedings, including the appeal; if the plaintiff lacks standing at the time suit is filed, the case must be dismissed, even if the plaintiff later acquires an interest sufficient to support standing." *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.) (citing, in part, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 n.9 (Tex. 1993)); *Martin v. Clinical Pathology Labs., Inc.*, 343 S.W.3d 885, 888 (Tex. App.—Dallas 2011, pet. denied).

In the Interest of N.I.V.S., 2015 WL 1120913, at *2.

This court concluded that Dino did not have standing to bring his first suit under subsection 102.003(a)(8) because he was not a man at the time he filed his suit. *Id.* at *5.

Dino contends in this mandamus proceeding, as he did in the trial court when opposing Sandoval's plea to the jurisdiction, that because the Order Granting Change of Identity, signed on January 3, 2014, was in place prior to his filing the second suit to adjudicate parentage, he now has standing to maintain suit. Dino contends that his Order Granting Change of Identity is legally sufficient to confer statutory standing to adjudicate his legal paternity to Sandoval's adopted children under subsection 160.602(a)(3). We disagree.

The Legislature amended the Family Code in 2009 to add a provision which allows a court order relating to an individual's sex change as an acceptable form of identification to establish a person's identity and age for the purpose of obtaining a marriage license. *See* TEX. FAM. CODE ANN. § 2.005(b)(8) (West Supp. 2014). The family code contains no further provision defining the terms used in this subsection, and offers no rules or standards with respect to its application. *See In re Estate of Araguz*, 443 S.W.3d 233, 245 (Tex. App.—Corpus Christi 2014, pet. filed).

The Order Granting Change of Identity was not challenged in the proceeding in which it was obtained. While the clear language of the Family Code recognizes such an order as sufficient to provide proof of Dino's identity and age for the purpose of obtaining a marriage license, we conclude that it is not sufficient to confer statutory standing to maintain a suit to adjudicate parentage under subsection 160.602(a)(3). The Order Granting Change of Identity is a recognized form of proof of Dino's identity and age for the purpose of obtaining a marriage license. It may also be sufficient to acknowledge Dino's legal status as a man. However, we need not reach such a conclusion in this case because, even if considered a man from birth for legal purposes, Dino's status as a man is not sufficient to confer statutory standing as, "a man whose paternity of the child is to be adjudicated." TEX. FAM. CODE ANN. § 160.602(a)(3). If all that was required for standing was to be a man, then any man could maintain a suit to adjudicate parentage to any child. We do not believe that to be what the Texas Legislature intended.

For a man to maintain a suit to adjudicate parentage, he must fall into one of the categories established by the statutory framework. Dino has alleged standing as "a man whose paternity of the child is to be adjudicated." In this case, Sandoval's children are adopted and there is no contention that Dino is the biological father. A man alleging "paternity" is a man asserting standing as the biological father of the subject children. *See* TEX. FAM. CODE ANN. § 160.102(12), (14) (defining "paternity index" and "probability of paternity" in relation to the determination the

likelihood that a man is the biological father of a child). Dino does not contend that he is the biological father of the children because all parties recognize that the parental rights of the children's biological parents were terminated in order for Sandoval to adopt. Nor does Dino qualify for statutory standing as a presumed father, or meet the requirements to be an acknowledged father. *See* TEX. FAM. CODE ANN. §§ 160.102(13), 160.204(a) (West 2014) (presumed father); TEX. FAM. CODE ANN. §§ 101.0010, 160.301 (West 2014) (acknowledged father). The only basis under which Dino attempts to assert that he has statutory standing as "a man whose paternity of the child is to be adjudicated," is that he acted as a parent to the children and provided actual daily care for them from the time of their adoption until his relationship with Sandoval ended in 2011. Dino's status as a person with actual care, control and possession of the children may have conferred standing to file suit had he done so within ninety days of the date on which his actual care, control and possession of the children terminated. *See* TEX. FAM. CODE ANN. § 102.003(a)(9) (West Supp. 2015). However, that is not the basis on which Dino has asserted standing and he does not argue that his suit was timely under this provision.

Dino's history as a caregiver to the children and the fact that he may have developed a close relationship to them while he resided with them is not sufficient to confer statutory standing. The Texas Legislature has conferred standing to maintain this type of case by statute. When such a comprehensive statutory framework exists, that is the sole means of establishing standing to maintain suit. *See Sullivan*, 157 S.W.3d at 915 (*citing Tex. Dep't of Protective and Regulatory Servs. v. Sherry*, 46 S.W.3d 857, 859-61 (Tex. 2001)).

CONCLUSION

Under the unique set of facts present in the case underlying this mandamus proceeding, we conclude that the trial court abused its discretion in denying Sandoval's plea to the jurisdiction and that any available remedy by appeal would be inadequate given the nature of the issues involved.

See Geary, 878 S.W.2d at 603. Accordingly, we conditionally grant the petition for writ of mandamus and direct the trial court to set aside its April 17, 2015 order denying the plea to the jurisdiction and enter an order granting the plea to the jurisdiction and dismissing the lawsuit for lack of subject matter jurisdiction. The writ will issue only if we are advised the trial court has failed to act in accordance with this opinion.

Jason Pulliam, Justice