



Fourth Court of Appeals
San Antonio, Texas

CONCURRING OPINION

No. 04-15-00244-CV

IN RE Sandra SANDOVAL,

Original Proceeding¹

CONCURRENCE WITH DENIAL OF MOTION FOR EN BANC RECONSIDERATION

Concurring Opinion by: Patricia O. Alvarez, Justice

Sitting en banc: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebecca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

Although I agree with the en banc court's denial of the real party in interest's motion for reconsideration, I write separately for the following reasons: (1) to acknowledge our limitations as an appellate court bound by the law and not our emotions; and (2) to ask the Texas Legislature to remedy the unfair situation in which people like Dino Villarreal find themselves.

A. Role of the Appellate Courts

“As an intermediate appellate court, we are not free to mold Texas law as we see fit but must instead follow the precedents of the Texas Supreme Court unless and until the high court

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.

overrules them or the Texas Legislature supersedes them by statute.” *Petco Animal Supplies, Inc. v. Schuster*, 144 S.W.3d 554, 565 (Tex. App.—Austin 2004, no pet.). As this court stated in its March 11, 2015 opinion disposing of Villarreal’s original appeal, “[w]hile we do not take lightly the evidence of Villarreal’s significant involvement in the children’s lives, we are once again constrained by the Family Code.” *In the Interest of N.I.V.S.*, No. 04-14-00108-CV, 2015 WL 1120913, at *5 (Tex. App.—San Antonio Mar. 11, 2015, no pet.) (mem. op.) (citing TEX. FAM. CODE ANN. § 102.003(a)(9)). That statement was correct on March 11, 2015, and is still correct today. Villarreal did not have standing then and does not have standing now.

B. Standing

“Standing focuses on who is entitled to bring an action and is determined at the time suit is filed in the trial court.” *In re M.P.B.*, 257 S.W.3d 804, 808 (Tex. App.—Dallas 2009, no pet.) (citing *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001)).

1. Texas Family Code section 160.602

In the mandamus pending before this court, Villarreal attempted to assert standing pursuant to Texas Family Code section 160.602(a)(3) as “a man whose paternity of the child is to be adjudicated.” See *In re Sandoval*, No. 04-15-00244-CV, 2015 WL 4759972, at *2 (Tex. App.—San Antonio Aug. 12, 2015, no pet. h.) (citing TEX. FAM. CODE ANN. § 160.602(a)(3) (West 2014)). Villarreal relied on the trial court’s order “that [Villarreal]’s identity [be] changed from female to male.” However, that order does not mention the Texas Family Code or address its effect under the Texas Family Code.

The Texas Family Code defines “man” as “a male individual of any age.” *In the Interest of N.I.V.S.*, 2015 WL 1120913, at *3 (citing TEX. FAM. CODE ANN. § 160.102(10)). The Texas Family Code does not, however, define the term “male.” “When the legislature fails to define a

word or term, we will apply its ordinary meaning.” *Id.* In this court’s March 11, 2015 opinion, we cited Webster’s Dictionary which defines ‘male’ as ‘an individual that produces small usually motile gametes . . . which fertilize the eggs of a female.’” *Id.* That definition has not changed and is controlling in this mandamus. Therefore, regardless of his possession of a court order changing his identity, Villarreal still does not meet the statutory definition of “man” under the Texas Family Code.

Although I agree that the Texas Family Code’s definition of man results in an incredibly unfair situation for Villarreal, this court is bound by the language of the statute and not by what we think is fair. *See Petco Animal Supplies, Inc.*, 144 S.W.3d at 565. In my opinion, this is an issue that should be addressed by the Legislature, and I would implore the Texas Legislature to do so.

2. *Texas Family Code section 102.003(a)(9)*

I also write to reiterate that Villarreal previously possessed an avenue to establish standing, at the time of the parties’ separation, and he failed to do so. *See In the Interest of N.I.V.S.*, 2015 WL 1120913, at *4–5. There is no question that at the time of the parties’ separation in January of 2011, Villarreal possessed standing to file regardless of gender. Under section 102.003(a)(9), any person “who has had actual care, control, and possession of [a] child for at least six months ending not more than 90 days preceding the date of the filing of the petition” has standing to file an original suit affecting the parent-child relationship. TEX. FAM. CODE ANN. § 102.003(a)(9); *see also In the Interest of N.I.V.S.*, 2015 WL 1120913, at *5. Villarreal either failed or chose not to act at that time. By waiting until November of 2013 to file, Villarreal missed his opportunity because he could no longer meet the statutory requirement of having had care, control, and custody of the children for at least six months ending not more than 90 days before he filed his petition.

C. Conclusion

Although Villarreal's inability to legally establish standing to assert his parental rights over these children is heart-wrenching and sad, an appellate court is bound by the law and not emotions. I, therefore, agree with the majority's conclusion denying Villarreal's motion for en banc reconsideration.

Patricia O. Alvarez, Justice