



Standing of Foster Parents to Intervene

Testimony before the House Committee on Juvenile Justice & Family Issues

by Brandon Logan, J.D., CWLS

Chairman Dutton and Members of the Committee:

My name is Brandon Logan. I am a licensed attorney and the director of the Center for Families and Children at Texas Public Policy Foundation, a non-profit, non-partisan think tank based in Austin. Prior to my current position with the Foundation, I practiced family law, with an emphasis in child welfare law. I am a certified Child Welfare Law Specialist through the National Association of Counsel for Children. I have represented children, biological parents, and intervening foster parents in child welfare proceedings throughout the state.

I am familiar with the confusion and potential for abuse regarding the standing of foster parents under Section [102.004\(b\)](#). Therefore, I am here to thank Representative Ortega for bringing [HB 1410](#) and to testify in support of the bill.

Standing of Foster Parents

Standing is a threshold issue in many family law cases, bearing on the authority of a court to hear a case, generally, and the right of a party to be heard in court, specifically. Subject matter jurisdiction—which is never presumed and cannot be waived—depends upon standing ([Tex. Ass'n of Business v. Air Control Bd.](#), 852 S.W.2d 440, 443-48 (Tex. 1993)).\

Foster parents may gain standing through Sections [102.003\(a\)\(12\)](#), [102.003\(c\)](#), and [102.004\(b\)](#) of the Texas Family Code. [HB 1410](#) seeks to clarify standing for foster parents under Section [102.004\(b\)](#).

General Standing

Section [102.003\(a\)\(12\)](#), Texas Family Code, provides the general provision for foster parent standing. 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 (DFPS) 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.

Notwithstanding the time requirements of Subsection (a)(12), a foster parent 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. Standing to file suit under this subsection applies only to the adoption of a child who is eligible to be adopted ([Tex. Fam. Code §102.003\(c\)](#)).

Substantial Past Contact

In cases where foster parents lack standing to file an original suit, as defined above, they have relied on the limited standing to intervene, found in Section [102.004\(b\)](#). Unfortunately, the case law interpreting this statute is contradictory and convoluted, leading to confusion about whether foster parents have standing to intervene independent of the requirements of Section [102.003\(a\)\(12\)](#).

The most significant question raised by this confusion is whether, by proving substantial past contact under [102.004\(b\)](#), foster parents gain standing to intervene before the 12-month time frame in [102.003\(a\)\(12\)](#).

Section [102.004\(b\)](#), Texas Family Code states in relevant part:

... 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 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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Section [102.004\(b\)](#) provides two classes of people who may intervene in an on-going lawsuit where conservatorship is at issue: grandparents and other persons. Foster parents have sought to be included as "other persons" for the purpose of the standing granted by the statute.

Under Section [102.004](#), "other persons" must allege and prove substantial past contact to intervene in an on-going case. Substantial past contact is not defined by the statute and courts have been hesitant to set forth 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 \(Tex.App.-Beaumont 2001, no pet.\)](#)).

History of Standing for Foster Parents

Before the Legislature added Section [102.004](#), foster parents had no right to intervene in suits affecting children in their care.

In 1982, the Texas Supreme Court issued an opinion that barred foster parent intervention ([Mendez v. Brewer, 626 S.W.2d 498, 499 \(Tex.1982\)](#)). In [Mendez](#), foster parents sought to intervene in a termination case brought by DFPS. The trial court struck the intervention. The foster parents then brought their own petition to terminate and requested that the court consolidate the two cases. The trial court refused.

The foster parents filed a writ of mandamus alleging that the trial judge abused his discretion by striking their intervention. The Court of Appeals agreed with the foster parents and reversed and remanded for new trial. The Supreme Court overturned the ruling of the court of appeals and affirmed the judgment of the trial court—holding that foster parents do not have a strong enough justiciable interest to sustain an intervention because their interest in adopting is contingent on the outcome of the termination ([Id. at 500](#)).

In 1995, the Legislature enacted Section [102.004](#), Texas Family Code. Subsequently, the Fort Worth Court of Appeals determined that the Legislature superseded [Mendez](#) when it enacted Section 102.004 ([In re N.L.G., 238 S.W.3d 828, 831 \(Tex.App.-Fort Worth, 2007, no pet.\)](#)). In that case, DFPS was notified by a hospital that a mother had tested positive for methamphetamine at the birth of her daughter. DFPS took custody when the child was two days old and placed the child with foster parents five days later. DFPS sought termination of the mother's parental rights and the foster parents intervened. The respondent mother filed a motion to strike the foster parent's intervention, which the trial court denied.

After trial, the jury terminated the parental rights of the mother who appealed, complaining the trial court abused its discretion by denying her motion to strike ([In re N.L.G., 238 S.W.3d at 831](#)). The Court of Appeals affirmed the lower 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.

Need for Clarification

The application of Section [102.004\(b\)](#) to foster parents is problematic for a couple of important reasons. First, substantial past contact has been considered a shortcut to standing for foster parents—giving them grounds to intervene before the child has been placed in their care for 12 months. Furthermore, in determining substantial past contact, courts have considered contact occurring while foster parents are providing state-paid care. Therefore, any substantial contacts occurring by virtue of DFPS involvement potentially gives rise to third-party intervention.

For these reasons, Section [102.004\(b\)](#) can be abused by foster parents seeking intervention before the rights of a child's parents are terminated, before the child has been placed in the foster home for 12 months, and even when the permanency goal in the case is still family reunification.

The initial permanency goal in almost all DFPS cases is family reunification. Parents are offered rehabilitative services to address their shortcomings and help them regain possession of their children. Due to the nature and availability of services,

parents who are fully engaging in court-ordered services may still be working toward successful completion for many months.

Absent extraordinary circumstances, DFPS cases must be finalized within one year from the order granting DFPS temporary conservatorship. Prior to this deadline, the court will schedule a final hearing, at which the parents seek to prove that dismissal of the suit and reunification is in the best interest of the child. The presence of foster parents as parties significantly undermines the opportunity to achieve reunification and denies biological parents substantive due process.

[HB 1410](#) clarifies the application of Section [102.004\(b\)](#) to foster parents. Specifically, the time frames in [102.003\(a\)\(12\)](#) would clearly apply to foster parents seeking to intervene. The compromise proposed by the bill balances the best interests of the child with the rights of parents seeking reunification. It also recognizes that foster parents gain justiciable interests in suits affecting children in their care but properly subordinates those interests to the primary goal of family reunification and to permanency.

Thank you for your time and consideration. It would be my pleasure to address the Committee's questions and concerns. ☆

Brandon Logan, J.D., CWLS, is the Director of the Center for Families and Children at the Texas Public Policy Foundation. Before joining the Foundation, Brandon represented hundreds of children as attorney and guardian in child welfare courts throughout Texas. He is certified as a Child Welfare Law Specialist by the National Association of Counsel for Children. Brandon has also represented parents, grandparents, and foster families in custody and adoption cases across the state.

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