Fifteenth Court of Appeals
Texahoma, Texas

No. 15-16-0001-CV

IN THE INTEREST OF L.P.D., a Child

On Appeal from the 901st District Court, Texahoma County, Texas
Trial Court No. 50031
Honorable Shivali Sharma, Judge Presiding

Majority Opinion by: K. Rowland, Justice, joined by M. Williams, Justice
Dissenting Opinion by: B. Knowles, Chief Justice

Delivered and Filed: December 1, 2017

MAJORITY OPINION

Phil, the father of L.P.D., appeals the trial court's order appointing Mitchell, L.P.D.'s mother's cousin, a joint managing conservator of L.P.D.[1] In this appeal, we must address three issues: (1) whether a trial court must expressly rule on an objection to evidence offered in response to a plea to the jurisdiction for the complaint to be preserved on appeal; (2) whether to adopt the sham affidavit doctrine; and (3) how to construe the term "actual care, control, and possession," as that term is used in section 102.003(a)(9) of the Texas Family Code. We hold Mitchell lacked standing to sue, and the trial court therefore erred by denying Phil's plea to the jurisdiction. We reverse the trial court's order and render an order dismissing Mitchell's suit.

[1] To protect the privacy of the minor child, we refer to the child by his initials and to the parties by their first names. *See* TEX. R. APP. P. 9.9.

FACTUAL BACKGROUND

Most of the facts of this case are undisputed. Phil met Claire, L.P.D.'s mother,[2] in high school. According to Phil, when he was in high school, Claire's older cousin, Mitchell, sold him drugs and caused him to become addicted to methamphetamines. Claire was unaware of Phil's addiction when Phil proposed to her. Phil and Claire were married after they graduated from college. In November 2009, Claire gave birth to L.P.D.

Although Phil had been the sole breadwinner for his family for years working as a realtor, Phil continued to suffer from an addiction to methamphetamines. The effects of Phil's addiction amplified after L.P.D. was born. For the first couple years after L.P.D.'s birth, Phil would use methamphetamines so minimally that Claire remained unaware of Phil's drug use. But after L.P.D. turned four years old, Phil started using methamphetamines more frequently and was no longer able to hide his addiction from Claire.

When Claire discovered Phil was using methamphetamines, Phil explained his history of drug abuse. Claire, however, did not believe that her cousin, who had graduated from law school and became a solo appellate lawyer, would have ever sold drugs to high school students. Claire ultimately gave Phil an ultimatum: either he would attend the best drug rehabilitation program in Texas or she would leave him and seek full custody of L.P.D. Phil agreed to the former.

Phil started a ninety-day in-patient drug rehabilitation program in January 2014, and Claire asked Mitchell to take care of L.P.D. so she could look for a job and could work because Mitchell primarily worked out of his home. Claire took most of L.P.D.'s clothes, some of his toys, and his bed to Mitchell's home and asked Mitchell to care for L.P.D. Claire visited L.P.D. every day at

[2] Although Claire participated in the proceedings in the trial court below, the record suggests that she was not opposed to Mitchell being named a joint managing conservator of L.P.D.

Mitchell's house, and sometimes, Claire spent the night there. During that time, Claire found a job working as a waitress at a Tex-Mex restaurant and worked double shifts most days of the week.

After Phil successfully completed his drug rehabilitation program, he, Claire, and L.P.D. returned home. Phil started working again, and Claire quit her waitressing job to take care of L.P.D. But Phil's sobriety was short-lived, and he resumed using methamphetamines in June 2014. Claire discovered Phil had relapsed, and she sent L.P.D. back to live with Mitchell in August 2014. Believing ninety days was insufficient to cure a long-term drug addiction, Claire gave Phil another ultimatum: either he would find the longest drug rehabilitation program in Texas or she would leave him and seek full custody of L.P.D. Phil again agreed to the former and enrolled in an intensive eighteen-month in-patient drug rehabilitation program at the end of August 2014.

Three months later, Phil left rehab to see L.P.D. on his fifth birthday and did not immediately return to his rehab program. Unfortunately, Phil used methamphetamines again within a month of leaving the rehab program. He decided to return to rehab and re-enrolled in the program in December 2014. Claire sent L.P.D. to live with Mitchell again, researched job opportunities, and continued visiting L.P.D. at Mitchell's home as she did when Phil first went to rehab. Claire obtained a Commercial Driver's License and started a job as a truck driver in January 2015. With her new work schedule, Claire saw L.P.D. Friday through Sunday for most weeks and one full week every six weeks when she had the whole week off.

In August 2015, Phil again left the rehab facility before completing the rehabilitation program. Unwilling to give Phil another chance, Claire decided to keep her job as a truck driver and Phil, believing it would help him remain sober, decided to pursue his "life-long passion" by becoming a professional cheerleader. In September 2015, within a few weeks of returning home, Phil brought L.P.D. back to his home and told Mitchell he was no longer allowed to see L.P.D.

PROCEDURAL HISTORY

The following month, Mitchell filed an original petition seeking to be named joint managing conservator of L.P.D. under section 153.005 of the Texas Family Code. Mitchell alleged he had standing to bring suit under section 102.003(a)(9) of the Texas Family Code. Phil filed an answer, generally denying Mitchell's allegations and specifically denying that Mitchell had "actual care, control, and possession" of L.P.D.

After taking Mitchell's deposition, Phil filed an evidence-based plea to the jurisdiction in which he argued the trial court lacked subject-matter jurisdiction because Mitchell did not have standing to file an original suit under section 102.003(a)(9). The only evidence attached to Phil's plea to the jurisdiction consisted of verified excerpts from Mitchell's deposition. During his deposition, Mitchell testified Claire told him to "take care of" L.P.D., but she provided no specific instructions. According to Mitchell's deposition testimony, Claire did not specify the length of time he was to care for L.P.D., but she did say the arrangement was "only temporary."

Mitchell further testified during his deposition that he enrolled L.P.D. in school in August 2014 without either parent's consent,[3] and that Phil had also signed a medical consent form for emergencies. Mitchell stated during his deposition that he once sought medical treatment for L.P.D. when he sprained his wrist on the playground and that he and Claire took L.P.D. to a routine doctor's visit once sometime after January 2015. Otherwise, only Phil or Claire took L.P.D. to the doctor for non-emergency visits, and Phil had scheduled those visits while he was caring for L.P.D. before January 2015. Mitchell also stated that he decided to keep L.P.D. on some weekends on which L.P.D. was supposed to stay with Claire, but Claire said "ok" and did not oppose L.P.D. staying with Mitchell on those weekends.

[3] Mitchell explained that Phil and Claire were considering enrolling L.P.D. in pre-kindergarten, but they did not timely decide whether to enroll him because Phil went to rehab.

The deposition excerpts attached to Phil's plea to the jurisdiction also contained Mitchell's testimony about his relationship with L.P.D. For example, Mitchell stated he cared for L.P.D. on a daily basis, and he bought L.P.D. clothes, provided food for him, and played with him. Mitchell took L.P.D. to school and helped teach him the alphabet and basic numbers. According to Mitchell, L.P.D. knows Mitchell is not his father, but they undeniably have a strong bond. Mitchell also testified during his deposition that Phil paid for all other expenses related to L.P.D.'s childcare and reimbursed Mitchell for non-food necessaries.

Mitchell filed a response to Phil's plea to the jurisdiction. Mitchell argued he had "actual care, control, and possession" of L.P.D. for at least six months, as required for standing to file suit under section 102.003(a)(9). Mitchell attached an affidavit to his response. Despite his prior deposition testimony, Mitchell swore in the affidavit to the following: "Phil paid for no other expenses related to L.P.D.'s childcare, L.P.D.'s food, or other necessaries." In his affidavit, Mitchell did not give further details or explain why he changed his testimony. In fact, nothing in the record explains Mitchell's contradictory testimony in his affidavit.

In addition to the affidavit, Mitchell attached what purports to be a type-written letter from Phil to Mitchell. Mitchell produced nothing to authenticate this purported letter. The following shows the unauthenticated letter in its entirety:

7/4/15

Mitchell,

I'm so grateful you are taking care of [L.P.D.] I'm so sorry for all the pain and inconvenience I've caused to you. I'm so sorry for lying to Claire about you being a drug dealer. I'm so sorry for essentially forcing you to take over as [L.P.D.'s] parent. I've totally abdicated my parental responsibilities to you! I'm so sorry I haven't paid for anything for [L.P.D.] When I get out of here, which will be soon, I'm going to be the best cheerleader this town has ever seen. I'm going to stay sober, and finally pay you back for the money you've spent on caring for [L.P.D.] I promise!

-Phil

After Mitchell filed his response, Phil filed a reply and a motion to strike Mitchell's affidavit. In his reply, Phil also objected to the trial court considering the July 4, 2015 letter because it was not authenticated. In his motion to strike Mitchell's affidavit, Phil argued the affidavit was a sham that was executed and filed solely to create a fact issue. However, Phil did not set either his plea to the jurisdiction or the motion to strike for a hearing prior to trial. Consequently, the trial court heard the plea and the motion to strike at a pre-trial hearing just before the trial on the merits of Mitchell's suit for joint managing conservatorship of L.P.D. The trial court denied Phil's plea to the jurisdiction and his motion to strike, stating nothing more than a concern about Phil's increasingly severe use of methamphetamines. Phil did not re-assert his objection to the unauthenticated letter, and the trial court did not expressly rule on Phil's written objection to the letter not being authenticated.

The trial court then heard evidence on the merits of Mitchell's petition.[4] During closing arguments, Phil asked the trial court to reconsider the denial of his plea to the jurisdiction and his motion to strike but did not seek a ruling on his objection to the letter not being authenticated. The

[4] No additional evidence relevant to the issue of Mitchell's standing was offered or admitted during the trial on Mitchell's original petition.

trial court took the case under advisement and the following day signed a final order appointing Mitchell, Phil, and Claire as joint managing conservators of L.P.D. Phil filed a timely notice of appeal.

ISSUES ON APPEAL

On appeal, Phil does not directly challenge the trial court's decision on the merits. Instead, Phil argues the trial court erred by denying his plea to the jurisdiction and lacked subject-matter jurisdiction to render the order appointing Mitchell as a joint managing conservator. Phil raises three issues. The first two issues relate to what evidence was properly before the trial court when it ruled on the plea to the jurisdiction. In his third issue, Phil argues the trial court erred by too liberally construing "actual care, control, and possession" in section 102.003(a)(9). In sum, we conclude all of Phil's issues are meritorious. The trial court should not have considered either the unauthenticated letter or Mitchell's sham affidavit. The excerpts from Mitchell's deposition conclusively establish Mitchell did not have standing to sue under section 102.003(a)(9), and that the trial court therefore lacked subject-matter jurisdiction.

A. Standard of Review

Standing is a component of a trial court's subject-matter jurisdiction, the absence of which is properly raised by a plea to the jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex. 2000). We review a trial court's ruling on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). When the plea challenges jurisdictional facts, the trial court must examine the evidence presented and determine if a fact issue exists. *Id.* at 227. The procedure and our review generally mirror that of summary judgment practice. *See id.* at 228. As in the summary judgment context, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

B. The Unauthenticated Letter

In his first issue, Phil argues the trial court erred by considering the July 4, 2015 letter because it was not properly authenticated. Agreeing the July 4, 2015 letter was not properly authenticated, Mitchell argues Phil failed to preserve this issue for appeal because the trial court did not expressly rule on the objection. We have reviewed the record and determined that, clearly, the letter is not authenticated, and the trial court erred by considering it. As a result, we merely need to decide whether Phil preserved the issue for appeal.

Generally, to preserve a complaint for appellate review, the appellant must have raised a timely and specific objection in the trial court. TEX. R. APP. P. 33.1. Although a trial court ordinarily must make a ruling on the objection for the complaint to be preserved, the ruling may be implied if it is clear from the context. *See id.* In the context of motions for summary judgment, a trial court's order on such a motion is an implicit ruling on the objections to attached evidence. *See Frazier v. Yu*, 987 S.W.2d 607, 609-10 (Tex. App.—Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App.—Fort Worth 1998, no pet.). Generally speaking, we apply the same summary judgment rules when considering evidence-based pleas to the jurisdiction that challenge the existence of jurisdictional facts. *See Miranda*, 133 S.W.3d at 228.

Citing to *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017), the Chief Justice, in her dissent, argues the Supreme Court of Texas has required an express ruling on objections to summary judgment evidence to preserve the complaint for appeal. However, we believe the supreme court's decision in *Exxon Mobil* is limited to objections to late-filed evidence in the summary-judgment context. The court in *Exxon Mobil* did not address a substantive objection under the Texas Rules of Evidence, such as lack of proper authentication, that relates to the reliability of the evidence. *See id.* The *Exxon Mobil* court addressed a summary-judgment-specific procedural objection regarding the timeliness of the filed evidence. Although we ordinarily apply

the same summary judgment rules when reviewing the evidence, we do not impose the timeliness requirement in Rule 166a, which governs only summary judgment procedures, to pleas to the jurisdiction. *See Miranda*, 133 S.W.3d at 228; *see also* TEX. R. CIV. P. 166a(c) (providing a timeline specific to summary judgment motions). Therefore, *Exxon Mobil* is distinguishable and not binding in this case. We hold that the trial court's order on Phil's plea to the jurisdiction implicitly ruled on Phil's objection to the July 4, 2015 letter. In conclusion, Phil preserved his complaint that the letter was not properly authenticated and that the unauthenticated letter was not properly before the trial court. We sustain Phil's first issue.

C. Motion to Strike Mitchell's Sham Affidavit

In his second issue, Phil complains that the trial court erred by denying his motion to strike Mitchell's affidavit and asks us to adopt the "sham affidavit doctrine." We review a trial court's ruling on a motion to strike or exclude evidence for an abuse of discretion. *See Fred Loya Ins. Agency, Inc. v. Cohen*, 446 S.W.3d 913, 926–27 (Tex. App.—El Paso 2014, pet. denied). A trial court abuses its discretion by failing to follow applicable legal principles. *See id.* at 927. Under the "sham affidavit doctrine," a party may not, in response to a dispositive motion, file an affidavit merely to contradict prior, unmistakably clear testimony to raise a fact issue and preclude the trial court from granting a dispositive motion. *Lujan v. Navistar, Inc.*, 503 S.W.3d 424, 434–35 (Tex. App.—Houston [14th Dist.] 2016, no pet.). While some courts of appeals have adopted the sham affidavit doctrine, others have not. *See id.* at 434 & n.5. This court has not yet had the occasion to address this issue.

We believe the courts adopting the sham affidavit doctrine have the better reasoning. A party who perjures himself should not be rewarded by being able to avoid dismissal of, or summary judgment on, his baseless suit and thereby force the opposing party into either settling or sustaining the expense of a costly trial. We adopt the sham affidavit doctrine and hold the trial court should

have either struck or disregarded Mitchell's affidavit because it raised a sham fact issue merely to avoid dismissal. *See Farroux v. Denny's Restaurants, Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Accordingly, we sustain Phil's second issue.

D. "Actual Care, Control, and Possession"

In his final issue, Phil argues the trial court erred by too liberally construing the term "actual care, control, and possession" in section 102.003(a)(9). In light of our holdings regarding the unauthenticated letter and Mitchell's sham affidavit, the only evidence properly before the trial court was Mitchell's deposition testimony, which establishes the undisputed facts, including that Phil had paid for all other expenses related to L.P.D.'s childcare and reimbursed Mitchell for non-food necessaries. Because section 102.003(a)(9) is the only possible basis for Mitchell's standing to sue, we must determine whether, considering the undisputed facts established by the exercpts from Mitchell's deposition, Mitchell had standing under that provision.

Section 102.003(a)(9) provides a party has standing to file a suit, such as one for managing conservatorship of a child, if the party is "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." TEX. FAM. CODE ANN. § 102.003(a)(9) (West Supp. 2017). The record establishes Mitchell satisfies all requirements of this provision except for the "actual care, control, and possession" requirement.

"Actual care" by a nonparent requires abdication by the parent of his or her parental responsibilities to the nonparent. *In re C.T.H.S.*, 311 S.W.3d 204, 209 (Tex. App.—Beaumont 2010, pet denied). Merely residing with a child for six months and providing some care for the child is insufficient to show "actual care, control, and possession." *See id.* Also, mere possession of a child with the parents' consent is insufficient to satisfy section 102.003(a)(9)'s requirements. *In re Kelso*, 266 S.W.3d 586, 590–91 (Tex. App.— Fort Worth 2008, orig. proceeding). As used

in section 102.003(a)(9), "control" requires the plaintiff to have exercised authority and have made decisions of legal significance for the child. *In re K.K.C.*, 292 S.W.3d 788, 792–93 (Tex. App.—Beaumont 2009, orig. proceeding).

Although this is a close case, we hold the undisputed facts clearly place this case outside of section 102.003(a)(9)'s purview. Both Phil and Claire consented to Mitchell caring for L.P.D., and Claire expressly told Mitchell the arrangement was only temporary. While Mitchell enrolled L.P.D. in school without Phil's or Claire's express consent, the evidence establishes Phil and Claire had already contemplated enrolling L.P.D. in school. Phil scheduled medical appointments for L.P.D. and took care of L.P.D. when he was not in rehab. Certainly, Phil was not a model parent, but the undisputed evidence shows Phil continually made efforts to address his drug addiction to be in L.P.D.'s life and, despite Phil's drug addiction, Phil did not completely abdicate his parental responsibilities to Mitchell.

Although Chief Justice Knowles argues that we too narrowly construe section 102.003(a)(9), we believe that our construction of section 102.003(a)(9) is consistent with the actual language of the statute. *See Osterberg v. Peca*, 12 S.W.3d 31, 38 (Tex. 2000). We also believe a party should not be able to sue to acquire joint managing conservatorship of a child and interfere with a parent's fundamental right to raise his or her child unless the parent has, without any doubt, entirely abdicated his or her parental responsibilities. *See generally Troxel v. Granville*, 530 U.S. 57 (2000) (discussing a parent's fundamental liberty interest in raising children). We therefore decline to adopt the liberal standard taken by the trial court and proposed by the Chief Justice. We sustain Phil's third issue.

CONCLUSION

Having concluded Mitchell's sham affidavit and the unauthenticated letter were not properly before the trial court, we hold the only evidence properly before the trial court were the

excerpts from Mitchell's deposition. Those deposition excerpts conclusively establish as a matter of law that Mitchell lacked standing to file suit under section 102.003(a)(9). Because Mitchell lacked standing to file suit, the trial court lacked subject-matter jurisdiction and had no discretion but to dismiss Mitchell's suit for lack of jurisdiction. Accordingly, we reverse the trial court's order appointing Mitchell a joint managing conservator and render an order dismissing Mitchell's suit. *See* TEX. R. APP. P. 43.3.

-K. Rowland, Justice

DISSENTING OPINION

After reviewing the record, it is beyond me why the Texas Department of Family and Protective Services has not become involved in this case. Thankfully, however, L.P.D. had a family member who was willing to disrupt his entire life to care for this child, although it was just a short time. The trial on the merits explores the best interest of this child, and I am seriously concerned whether Phil can provide for L.P.D.'s best interest while Claire is out of the house most of the time. Unfortunately, those issues are not before this Court on appeal. What we were tasked with determining was whether Phil preserved error by not re-urging his objections or obtaining an explicit ruling on his objections to Mitchell's evidence in response to Phil's plea to the jurisdiction; whether to adopt the sham affidavit doctrine and, if so, whether Mitchell's affidavit is a sham affidavit; and whether Mitchell had standing to bring this suit. Because I believe that Phil did not preserve error; that the sham affidavit doctrine is fundamentally flawed; and that Mitchell had standing, even if we sustain Phil's first two points; I respectfully dissent from the majority's opinion.

Preservation of Error

I agree with the majority's discussion of the general requirements to preserve error. I also agree that our review of an order on a plea to the jurisdiction mirrors that of a summary judgment. I do not, however, agree with the majority's reading of *Exxon Mobil*. Although the complaint on appeal in *Exxon Mobil* concerned late-filed summary-judgment evidence, the supreme court explained, "[e]ven objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.'" *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017) (quoting *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin 2003, no pet.)). The Austin Court of Appeals' holding in

Mitchell, to which the supreme court cites, concerned the admissibility of expert testimony under *Robinson* in the summary-judgment context. *Mitchell*, 109 S.W.3d at 842 (citing *E.I. du Pont Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995)). I presume that the supreme court of Texas reviews the cases to which it cites, and therefore, I believe that the supreme court's holding in *Exxon Mobil* stands for the proposition that the trial court must explicitly rule on objections to evidence, whether substantive or summary-judgment-timeline based. I further disagree with our sister courts that have held otherwise. *See, e.g.*, *Slagle v. Prickett*, 345 S.W.3d 693, 702 (Tex. App.—El Paso 2011, no pet.) ("When a trial court grants a summary judgment on the motion to which the special exceptions pertain, the trial court has implicitly overruled the special exceptions."); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 100–01 (Tex. App.—Dallas 2010, pet. denied) (burden of obtaining ruling satisfied if record affirmatively indicates ruling or if "the grounds for summary judgment and the objections to the summary judgment evidence are of such a nature that the granting of summary judgment necessarily implies a ruling on the objections"); *Marx v. Elec. Data Sys. Corp.*, 418 S.W.3d 626, 638 (Tex. App.—Amarillo 2009, no pet.) ("[W]e find the trial court's statements in its amended order that it considered [appellee's] motion to strike, coupled with its grant of [appellee's] motion for summary judgment, constituted an implicit granting of the motion to strike as well.").

Accordingly, I believe the letter was properly before the trial court and would hold that Phil failed to preserve error for our review.

Sham Affidavit Doctrine

I agree with the majority's statement of the standard of review regarding the admission or exclusion of evidence. A sham affidavit contains statements that contradict the affiant's prior sworn testimony for the purpose of creating a fact issue. *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.). However, if conflicting

inferences may be drawn from the deposition and from the affidavit, a fact issue is presented. *Randall v. Dall. Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988). Moreover, I believe that the definition of a sham affidavit itself calls for further inquiry into the affiant's intent to create a fact issue.

Although some of our sister courts have adopted this doctrine, I believe that the sham affidavit doctrine is fundamentally flawed as it pertains to standing issues in a plea to the jurisdiction. Specifically, I think that the abuse of discretion standard of review that comes with the sham affidavit doctrine is in direct conflict with the de novo standard of review that we must utilize when we review a ruling on a plea to the jurisdiction. While contradictory testimony can certainly be used to impeach a witness, we must nevertheless indulge *every* reasonable inference in favor of the nonmovant in a plea to the jurisdiction, as the majority explains. So should we adopt the sham affidavit doctrine and completely exclude evidence that creates a reasonable inference? I do not believe we should because, if we do adopt it and exclude that evidence, we are necessarily excluding any inferences that evidence may bring. I do not think credibility of the witness, however, plays a role in making those inferences; we need only determine whether the inference itself is too attenuated to be reasonable. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (discussing reviewing all evidence and not making credibility determinations in context of judgment as a matter of law under FRCP 50); *Gladden-Green v. Freescale Semiconductor, Inc.*, No. 03-11-00468-CV, 2013 WL 6175622, at *10 (Tex. App.—Austin Nov. 20, 2013, no pet.) (mem. op.) (discussing attenuation); *see also Butler v. State*, 459 S.W.3d 595, 605 (Tex. Crim. App. 2015) (holding that credibility of witness, who was impeached, made no difference as to authentication of evidence).

Accordingly, I believe that the sham affidavit doctrine is fundamentally flawed and that we should not adopt it. I would hold that the trial court properly reviewed the affidavit that Mitchell submitted in his response to Phil's plea to the jurisdiction.

Standing

Standing is a party's justiciable interest in the suit and means that a party has some interest peculiar to the person individually and not as a member of the general public. *Roman Forest Pub. Util. Dist. No. 4 v. McCorkle*, 999 S.W.2d 931, 932 (Tex. App.—Beaumont 1999, pet. denied). Standing deals with whether a litigant is the proper person to initiate a court action, which is a threshold issue, not whether that party can ultimately prevail on his claims, which considers the merits of the case. *Dresser Indus., Inc. v. Snell*, 847 S.W.2d 367, 376 (Tex. App.—El Paso 1993, no writ). While a plea to the jurisdiction, such as in this case, delves into the facts of the case, I believe that standing remains distinguishable from the merits of the case, which is why we must indulge in every reasonable inference in favor of the nonmovant, as the majority declares. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). But the majority seems to conveniently overlook several reasonable inferences to reach its conclusion.

There is a split among our sister courts of appeals in interpreting Section 102.003(a)(9). An underlying theme among them, however, is that actual care, control, and possession requires actions equivalent to the exercise of parental rights. *In re H.S.*, No. 02-15-00303-CV, 2016 WL 4040497, at *5 (Tex. App.—Fort Worth July 28, 2016, pet. granted) (mem. op.); *Jasek v. Tex. Dep't of Family & Protective Servs.*, 348 S.W.3d 523, 532–33 (Tex. App.—Austin 2011, no pet.) (finding common threads among standing cases: (1) living in the same household or frequent visits; (2) financially contributing to the child's benefit; (3) being involved in the child's education; and (4) being involved in the child's general upbringing).

The Fort Worth Court of Appeals, which seems to be aligned with the more restrictive interpretation, has defined "actual care" to mean that the person who is caring for the child is doing so because the parent either has relinquished his parental duties and responsibilities to the person or the parent did not care for the child. *In re M.J.G.*, 248 S.W.3d 753, 758–59 (Tex. App.—Fort Worth 2008, no pet.). If both the person and the parent were caring for the child during the applicable six months, such as by living in the same household, standing is not conferred. *Id.* Obviously, relinquishing parental duties and responsibilities is an abdication of parental rights, but not caring for a child seems just as much of an abdication to me; for a parent who does not, or cannot, care for his children cannot be deemed a parent. *See In re C.T.H.S.*, 311 S.W.3d 204, 209 (Tex. App.—Beaumont 2010, pet denied).

The Austin and Dallas Courts of Appeals have defined "actual control" to mean a general authority to guide, manage, direct, and restrict the child, without having authority to make decisions of legal significance. *See Jasek*, 348 S.W.3d at 532–33; *In re M.K.S.-V.*, 301 S.W.3d 460, 465 (Tex. App.—Dallas 2009, pet. denied). The Beaumont and Fort Worth Courts of Appeals, however, have held that making decisions of legal significance is required. *In re Wells*, 373 S.W.3d 147, 177–78 (Tex. App.—Beaumont 2012, orig. proceeding); *In re M.J.G.*, 248 S.W.3d at 758–59. The *Wells* court also held that consent to emergency medical treatment does not relinquish "actual control." *In re Wells*, 373 S.W.3d at 177–78. Actual control, however, does not mean exclusive control. *In re Fountain*, No. 01-11-00198-CV, 2011 WL 1755550, at *4 (Tex. App.—Houston [1st Dist.] May 2, 2011, orig. proceeding) (mem. op. on reh'g).

Some courts have defined "actual possession" as lawful possession, even if it is without the parents' consent. *In re S.S.G.*, 208 S.W.3d 1, 3–4 (Tex. App.—Amarillo 2006, pet. denied); *Perez v. Williamson*, 726 S.W.2d 634, 636 (Tex. App.—Houston [14th Dist.] 1987, no writ). The Fort Worth court has denied standing in situations where a nonparent has possession of the child

with consent of the parent and the parent controls how much time the nonparent spends with the child. *In re Kelso*, 266 S.W.3d 586, 590–91 (Tex. App.—Fort Worth 2008, orig. proceeding). The court in *Kelso* also explained certain factors a court should consider, which include "whether the child has a fixed place of abode within the possession of the party," which the child "occupied or intended to . . . occup[y] consistently over a substantial period of time," "which is permanent rather than temporary." *Id.* at 590 (citing *In re M.P.B.*, 257 S.W.3d 804, 809 (Tex. App.—Dallas 2008, no pet.); *Doncer v. Dickerson*, 81 S.W.3d 349, 361 (Tex. App.—El Paso 2002, no pet.)). I believe that intending to occupy a home for a substantial period of time contradicts the requirement that the home be a permanent abode. A substantial period of time may be six months, as the statute requires; but six months certainly is not permanent. Moreover, this location need not be continuous and uninterrupted. TEX. FAM. CODE ANN. § 102.003(b).

Although some of our sister courts have taken a narrower approach to interpreting Section 102.003(a)(9), such as the majority has done here, I believe that, for purposes of standing, a more liberal approach is necessary, especially in light of the facts of this case. It is undeniable that L.P.D. and Mitchell have a strong bond. And Mitchell has a peculiar interest in this case because of that bond. *See McCorkle*, 999 S.W.2d at 932. But because of our statutory scheme, and because Mitchell has claimed standing under Section 102.003(a)(9), he must meet those requirements. I believe he meets those requirements under either the restrictive or liberal construction of Section 102.003(a)(9), if the trial court were to review Phil's letter and Mitchell's affidavit. But even if the majority is correct in sustaining those two issues, I believe Mitchell has still met his burden.

Mitchell had had L.P.D. in his home for nearly a fifth of L.P.D.'s entire life when he filed his petition, with nine of those months being nearly completely on his own. Claire would have visits similar to the standard possession schedule. And Phil was in rehab, so he had no visits except when he would leave rehab, which appears to have consistently resulted in his relapse. The record

is devoid of any communication between Phil and L.P.D. during Phil's stay in rehab. Mitchell's deposition testimony is clear that he cared for L.P.D. day-in and day-out. He taught him in the home; he enrolled him in school; he took him to the doctor for an emergency; he attended another doctor's visit along with Claire; he fed L.P.D.; he bathed L.P.D.; he acted as a parent to L.P.D. when L.P.D.'s parents were not caring for him. *See In re M.J.G.*, 248 S.W.3d at 758–59. During the nine months while Phil was in his third stint of rehab and Claire was working as a truck driver, neither of them were caring for L.P.D. Although Claire initially told Mitchell that this arrangement was temporary, I believe a reasonable inference is that the temporary arrangement changed when Claire found a permanent trucking position and Phil returned to rehab for the third time. I would, therefore, hold that Mitchell had actual care of L.P.D. *See id.*

I would also hold that Mitchell had actual control of L.P.D. He guided, managed, directed, and restricted L.P.D. on a daily basis while neither of L.P.D.'s parents were caring for him. *See Jasek*, 348 S.W.3d at 532–33. Furthermore, Mitchell enrolled him in school, a decision of legal consequence, without the consent of either of his parents. *See In re Wells*, 373 S.W.3d at 177–78. Although the majority seems to equivocate "contemplating" enrolling L.P.D. in school with giving Mitchell permission, I respectfully disagree. Furthermore, the majority fails to consider that the record shows that Mitchell used his own home address in determining which school L.P.D. would attend. While Mitchell may not have had the legal authority to perform this action, he still performed it, and it was a decision of legal consequence. I think we should also consider the fact that Mitchell brought this suit, which is certainly of legal consequence to L.P.D.

As for possession, L.P.D. was in Mitchell's possession for almost the entire time between January 2015 to August 2015, and he was in Mitchell's possession for several months in 2014, although Claire made frequent, almost daily, visits during those months. L.P.D. was never solely in Phil's possession until Phil took him from Mitchell in August 2015. And L.P.D. was only in

Claire's possession for less than a third of those eight months in 2015. Actual possession does not have to be uninterrupted, and I think Mitchell meets this element as well. While his possession started by consent, the majority recognizes that Mitchell withheld L.P.D. from Claire during some of her scheduled weekend possession periods. Claire ultimately acquiesced to Mitchell's actions, but I see a difference between acquiescence and consent. Furthermore, because L.P.D. was staying with Mitchell for an indefinite period because of Phil's continued relapses, I believe Mitchell's home became a fixed residence for him. At the very least, it was intended as an abode for a substantial period of time. *See In re Kelso*, 266 S.W.3d at 590. Accordingly, I would hold that Mitchell met this element.

With Phil's letter and Mitchell's affidavit properly before the trial court, I believe there is ample evidence to raise a fact issue that would defeat Phil's plea to the jurisdiction. Even if we were to sustain Phil's first two issues, however, which I would not, I would hold that a fact issue exists to defeat Phil's plea to the jurisdiction. Although the evidence that Mitchell provided may not be properly before the trial court, that should not restrict the trial court's ability, or ours, to make every reasonable inference in Mitchell's favor. Accordingly, I would affirm the trial court's actions.

-B. Knowles, Chief Justice

The Supreme Court of Texas

No. 18-0005

IN THE INTEREST OF L.P.D., a Child

On Appeal from the Fifteenth Court of Appeals, Texahoma, and
901st District Court, Texahoma County, Texas
Trial Court No. 50031
Honorable Shivali Sharma, Judge Presiding

ORDER

Mitchell's petition for review is granted. We order the brief is limited to the following issues, as the parties may fairly reframe them:

1. Did the Court of Appeals err by concluding none of the responsive evidence was admissible to prove the strict standard?

    a. Did the father waive his issue on appeal regarding the objection to the unauthenticated July 4, 2015 letter by not obtaining a ruling?

    b. Did the Court of Appeals err by adopting the sham affidavit rule?

2. Did the Court of Appeals properly construe section 102.003(a)(9) of the Texas Family Code?

IT IS SO ORDERED