In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00036-CV

IN RE KAREN BLUDAU

Original Proceeding

MEMORANDUM OPINION

Karen Bludau filed a petition for writ of mandamus and a motion for temporary relief. She alleges that the judge presiding over the divorce and suit affecting parent-child relationship ("SAPCR") filed by the real party in interest, Clay Edward Bludau, is interfering with the exercise of jurisdiction of another court. We hold that the respondent is not presently interfering with a court of dominant jurisdiction. Accordingly, we deny mandamus relief.

The Bludaus resided with their children in Montgomery County. Karen filed a divorce and custody suit in Travis County on December 10, 2009. Karen's petition alleges the parties separated on December 1, 2009. Although the petition alleges that Karen has resided in Travis County for the 90-day period preceding the filing of the suit, that allegation was incorrect and Karen had resided in Travis County no more than five days when she filed her suit. Clay filed a suit for divorce and custody in Montgomery

County, then filed a plea in abatement in the Travis County suit and moved to transfer the suit to Montgomery County. The Travis County court granted the plea in abatement and entered an order abating the suit until March 5, 2010, but denied the motion to transfer. Karen filed a plea in abatement in Montgomery County and moved for dismissal of the Montgomery County suit. The Montgomery County court denied the plea in abatement. Karen filed this mandamus petition and requested a stay of all proceedings in the Montgomery County court, including a hearing on temporary orders scheduled for February 8, 2010.

Karen's first issue contends that the Montgomery County court has no discretion other than to grant the plea in abatement because the Travis County court accepted dominant jurisdiction. Her second issue contends the Montgomery County court abused its discretion in setting the case for the purpose of entering temporary orders when the Montgomery County court is the second-filed suit for divorce. Her third issue contends the Montgomery County court abused its discretion by setting the case for a hearing on temporary orders after the Travis County court abated its case.

In her mandamus petition, Karen concedes that she moved with her children to Travis County and filed suit in Travis County "prior to obtaining the jurisdictional requirements of section 6.301 of the Texas Family Code." *See* TEX. FAM. CODE ANN. § 6.301 (Vernon 2006). The right to maintain a suit for divorce pursuant to Section 6.301 is determined as of the date the petition is filed. *Id.* ("A suit for divorce may not be maintained in this state unless *at the time the suit is filed* either the petitioner or the

respondent has been . . . a resident of the county in which the suit is filed for the preceding 90-day period.") (emphasis added). "Section 6.301, although not itself jurisdictional, is akin to a jurisdictional provision in that it controls a party's right to maintain a suit for divorce and is a mandatory requirement that the parties cannot waive." *Reynolds v. Reynolds*, 86 S.W.3d 272, 276 (Tex. App.--Austin 2002, no pet.). Venue for a SAPCR is controlled by the venue for the divorce. *See* TEX. FAM. CODE ANN. § 103.001(a) (Vernon Supp. 2009). Transfer to a court of proper jurisdiction is mandatory. *See* TEX. FAM. CODE ANN. § 103.002(a) (Vernon Supp. 2009).

In the Travis County proceedings, Karen argued that as the county in which the first suit was filed, the Travis County court is the court of dominant jurisdiction. The concept of dominant jurisdiction arises only when venue is proper in more than one county. *Gonzalez v. Reliant Energy, Inc.*, 159 S.W.3d 615, 622 (Tex. 2005); *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). In *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001), the Court stated:

> The first-filed rule admits of exceptions when its justifications fail, as when the first court does not have the full matter before it, or when conferring dominant jurisdiction on the first court will delay or even prevent a prompt and full adjudication, or when the race to the courthouse was unfairly run.

Perry, 66 S.W.3d at 252. In circumstances where a party files suit prematurely but in good faith, the party may re-file or amend but for the purposes of determining dominant jurisdiction the amended pleading does not relate back to the original date of filing. *Id.* at 253. In this case, Karen admits that she did not meet the residency requirement on the

date she filed suit in Travis County; thus, Travis County is not the proper county of venue and the concept of dominant jurisdiction does not apply.

Karen argues that the Travis County court retains jurisdiction by virtue of its order abating the case and that the Montgomery County court is bound by that order until the order of the Travis County court is reversed on appeal. A wrongful venue determination is an incidental ruling for which mandamus relief is generally not available. *See In re Rowe*, 182 S.W.3d 424, 426-27 (Tex. App.--Eastland 2005, orig. proceeding). An exception generally applies to a SAPCR, however, because of the need to expeditiously resolve custody and support issues. *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987). A trial court's mandatory duty to transfer a SAPCR to the court of proper venue may be enforced through mandamus proceedings. *Id.* Such a proceeding may only be brought in the court of appeals where that trial judge's court is located. *See* TEX. GOV'T CODE ANN. § 22.221(b)(1) (Vernon 2004). Thus, any proceeding to compel the Travis County court to transfer the case to Montgomery County must be filed in the Third Court of Appeals. *See id.* § 22.201(d) (Vernon Supp. 2009).

Only the action of the Montgomery County court is before us for mandamus review. Therefore, we must examine that action to determine whether the Montgomery County court has clearly abused its discretion. Karen argues that the order of the Montgomery County court conflicts with the exercise of jurisdiction by the Travis County court. The Travis County court did not abate the Montgomery County case; rather, the Travis County court abated the case filed in its court because Karen cannot presently maintain a suit for

divorce in Travis County. Thus, there is at present no active case in Travis County involving the Bludaus with which the Montgomery County court might interfere if it were to consider entering temporary orders. Furthermore, the mandamus record does not show that the Travis County court entered temporary orders with which the Montgomery County court might conflict.[1]

The relator has not shown that the Montgomery County court is interfering with the exercise of jurisdiction by the Travis County court. We overrule issues one through three.

In issue four, Karen contends the Montgomery County court abused its discretion "in granting Clay's claims of estoppel" in the absence of proof of egregious conduct by Karen after the suit was filed. Issue five contends the Montgomery County court abused its discretion by denying Karen's plea in abatement without conducting an evidentiary hearing.

From our review of the mandamus record, it does not appear that the Montgomery County court determined whether Karen engaged in egregious conduct that would estop her from challenging the jurisdiction of the Montgomery County court. Rather, the Montgomery County court denied Karen's plea in abatement. The party asserting the plea

[1] During the hearing before the Travis County court, Karen's counsel informed the court that the parties had entered into a Rule 11 agreement regarding possession of the children. Clay's counsel explained that Karen appeared for a temporary orders hearing in the Montgomery County court and the Montgomery County court sent the parties to mediation and reset the temporary orders hearing for February 8, 2010. Thus, it appears the parties' Rule 11 agreement was entered in the Montgomery County case, not the Travis County case. Both Montgomery County and Travis County have standing orders that apply to all divorce cases properly filed in their respective counties.

in abatement bears the burden of establishing that a case is pending in another court. *Munson, Munson & Porter, P.C. v. Robinson,* 634 S.W.2d 32, 34 (Tex. App.--Tyler 1982, no writ). Karen's plea in abatement was based upon alleged dominant jurisdiction of the Travis County court. At the time the Montgomery County court denied the plea in abatement filed by Karen in Montgomery County, the Travis County court had abated the case filed in its court. Whether Karen may maintain her suit in Travis County after March 5, 2010, is an issue to be resolved in the Travis County proceeding. The Montgomery County court merely determined that Karen failed to sustain her plea in abatement in the Montgomery County proceeding. We overrule issues four and five.

The relator has not shown that the Montgomery County court is interfering with the exercise of jurisdiction by the Travis County court, either by setting the case for a hearing on temporary orders or by denying the relator's plea in abatement. Accordingly, we deny both the petition for writ of mandamus and the motion for temporary relief.

PETITION DENIED.

PER CURIAM

Opinion Delivered February 4, 2010

Before McKeithen, C.J., Kreger and Horton, JJ.