

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-17-00042-CV**

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**IN RE MICHAEL DAVID BELLOW JR.**

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**Original Proceeding**  
**317th District Court of Jefferson County, Texas**  
**Trial Cause No. C-227217**

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**MEMORANDUM OPINION**

In a mandamus petition, Michael David Bellow Jr. contends the trial court abused its discretion by denying his motion to dismiss for lack of jurisdiction and exercising jurisdiction over a suit to modify an order affecting the parent-child relationship while the appeal of his divorce was abated due to bankruptcy.

A suit for modification is an original suit. *See* Tex. Fam. Code Ann. § 156.004 (West 2014); *Blank v. Nuszen*, No. 01-13-01061-CV, 2015 WL 4747022, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 11, 2015, no pet.) (mem. op.). Furthermore, the appeal was suspended when the trial court denied Bellow’s plea to the jurisdiction.

*See* Tex. R. App. P. 8.2; *see also Dickinson v. Dickinson*, 324 S.W.3d 653, 656 (Tex. App.—Fort Worth 2010, no pet.), *abrogated in part on other grounds by In re A.E.A.*, 406 S.W.3d 404, 411 n.3 (Tex. App.—Fort Worth 2013, no pet.). We conclude the trial court did not abuse its discretion by denying Bellow’s motion to dismiss.

In an amended petition, Bellow complains that the trial court abused its discretion by denying Bellow’s timely request for a jury trial. We ordered a stay of the bench trial pending our resolution of this mandamus proceeding. *See generally* Tex. R. App. P. 52.10(b). The real party in interest, Courtney Hudson, contends that the trial court properly exercised its discretion to retain the modification hearing on the docket for trial by the court because Bellow requested a jury trial less than thirty days before the date set for the trial. *See generally* Tex. R. Civ. P. 216(a).

Bellow filed a jury demand on January 20, 2017. On February 2, 2017, Hudson amended her pleadings, abandoning her request for sole managing conservatorship of the child, and the trial court removed the case from the jury docket and scheduled a bench trial for March 8, 2017. On February 23, 2017, Bellow filed a counter-petition for sole managing conservatorship of the child, requested a jury trial, and paid the jury fee. *See generally* Tex. Fam. Code Ann. § 105.002(a), (c) (West 2014). The following day, Hudson amended her petition to again request

that she be appointed as the child's sole managing conservator. Bellow contends the trial court abused its discretion by denying Bellow's request for a jury trial.

Bellow initially requested a jury trial more than thirty days before the trial date, but the mandamus record does not establish that he paid the fee at that time. The failure to make a timely payment of the jury fee does not forfeit the right to have a jury trial when the failure does not operate to the prejudice of the opposing party. *Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997). However, considering that there was no issue to be tried by a jury when Bellow filed his initial counter-petition thirteen days before the date set for the bench trial, Bellow has not shown there was no prejudice to Hudson. If Bellow timely paid the jury fee, he may be able to establish on appeal that the trial court erred in depriving him of his right to a jury on the issue of managing conservatorship. On the limited mandamus record that is before this Court, Bellow has not established that the trial court abused its discretion. We lift our stay order and deny the petition for a writ of mandamus.

PETITION DENIED.

PER CURIAM

Submitted on March 2, 2017  
Opinion Delivered March 30, 2017

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