Deny in part; Conditionally Grant in part and Opinion Filed April 10, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00086-CV

IN RE THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS, Relator

Original Proceeding from the 303rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-06-11238

MEMORANDUM OPINION

Before Justices Francis, Evans, and Schenck
Opinion by Justice Francis

In this original proceeding, the Office of the Attorney General complains of an order issued in an ongoing suit affecting the parent child relationship requiring the OAG to disclose the custodial parent's address to the trial court in camera and to hold child support disbursements to the custodial parent pending further order of the court. This Court requested responses from respondent and the real party in interest, but no responses were filed. After reviewing the OAG's brief, the mandamus record, and applicable law, we conclude the trial court did not abuse its discretion in ordering the OAG to provide Father's address in camera. But, we conclude the OAG is entitled to the requested relief regarding the withholding of child support.

The following facts are based on the limited record before us. Mother and Father were divorced in 2006 and, in an agreed final decree, Mother was obligated to pay child support for the couple's two children, one of whom is permanently disabled. In 2013, Mother and Father agreed to a protective order. Under the order, Mother's visitation with the children was changed to

supervised and Mother was prohibited from being within 500 feet of Father, Father's residence, or the children's school or child-care facilities. The order expired on March 22, 2015.

Seven months later, in October 2015, the trial court signed an agreed judgment finding Mother owed $5,337.76 in child support arrearage after the OAG filed a motion for enforcement. That judgment also contained the trial court's finding that disclosure of certain information required by section 105.006(a), including the current address and telephone numbers of the parties, was likely to cause Father, Mother, or the children harassment, abuse, serious harm or injury.

Over the next two years, both parties filed petitions and counter-petitions regarding modifications to possession and child support. Mother sought a standard possession order with unsupervised visitation, while Father alleged Mother had a history or pattern of committing family violence and sought to deny her access to the children altogether but in no event more than supervised visitation. The trial court apparently made some temporary rulings, but the dispositive issues remained pending. Then, in October 2017, Mother filed a motion to compel Father to comply with prior orders regarding her access to the children, the resulting order of which is the subject of this mandamus.

In her motion, Mother alleged she had not been allowed to see or visit with the children since October 2015. Mother said although the trial court had verbally instructed Father to arrange for a home health care aide to assist with the needs of one of the children and to train Mother to care for the child so visitation could begin, Father had failed to do so. Further, she alleged Father had failed to engage a counselor for their son as previously ordered and refused to (1) agree to modify the periods of telephone access to the children, (2) complete a social study as ordered, and (3) attend mediations recommended and scheduled by his prior attorney. Mother asserted she had no address for her children.

An associate judge heard the motion and issued an order requiring the OAG to release Father's address and telephone number to the amicus attorney and Mother's attorney. The order also provided that "child support shall be placed on hold until next hearing," which was set for almost three months later. We do not have a record of that hearing.

The OAG requested a de novo hearing before the district judge. At that hearing, Mother's attorney explained that about two years earlier, an incident occurred at a restaurant where Father alleged Mother assaulted him with the children present. According to Mother's attorney, a witness reportedly denied any assault occurred and the trial court denied a second protective order as a result of the incident. But, "in an effort to protect everybody," the trial court prohibited Mother from visiting with the children until "certain issues had been resolved." Those issues required Father to obtain (1) a home-health aide to teach Mother to care for her disabled daughter, and (2) therapy for their son because Father had alleged son "was suicidal and did not want to see his mom." According to Mother, Father has failed to engage a counselor for son, has refused to modify telephone access to accommodate Mother's work schedule, has failed to arrange a home-health aide as twice ordered by the trial court, has refused to complete the social study ordered by the trial court, and has failed to attend two scheduled mediations that he had previously agreed to attend. Mother's attorney said he filed the motion to compel because of two years of noncompliance on Father's part. He further explained the associate judge withheld the child support disbursements as a way to get Father to appear in court to explain why he was failing to follow the court's orders.

In response, the OAG argued the associate judge erred because both parts of the order violated the family code. Specifically, the OAG asserted the father's address and phone number were privileged information under section 231.108 of the family code. As for the withholding of child support, the OAG argued a court may not render an order that conditions payment of child

support on whether a managing conservator allows a possessory conservator to have possession or access to a child. *See* TEX. FAM. CODE ANN. § 154.011. Mother's attorney responded that the child support was not being withheld because of possession, but because of the litany of violations included in the motion to compel and the need to force Father to appear and explain himself.

The trial judge adopted the associate judge's recommendation with respect to withholding child support from Father. But, rather than requiring the OAG to turn over information regarding Father's location to the amicus attorney and to Mother's attorney, she ordered the OAG to produce Father's address and phone number to her in camera. The OAG then filed a motion to reconsider claiming, in part, that because Mother had not sought to discover Father's whereabouts, "the apparent purpose of the order is to enable the Court to release information to the non-custodial parent so that she may communicate more easily with the children."

At the hearing on the motion to reconsider, the OAG again argued the statute precluded release of Father's information, even to the trial court, particularly since there had been a prior protective order and a prior finding that the information should not be released. As for the child support withholding, the OAG asserted the order violated the separation of powers doctrine by ordering the OAG, a member of the executive branch, to violate its federal mandate to collect and disburse child support. The OAG also reiterated its argument that the court could not condition payment on a parent allowing visitation with or access to a child.

Mother's attorney again argued the order was necessary because Father had failed to appear or comply with the court's orders for over a year and briefly identified the various orders that had been ignored. Additionally, counsel told the trial court he understood Father had improperly left the State with the children. At that point, the trial judge asked if anyone knew where the children were. Mother's attorney answered neither he nor the amicus attorney were aware of the children's location. The OAG was likewise unaware of the children's location. After hearing additional

argument, the judge asked when Father last appeared in court, and Mother's counsel said it had been "months and maybe over a year." The judge then asked when anyone last knew the whereabouts of the children, and neither Mother's counsel nor the OAG knew the answer. The judge explained she had a dilemma in that she was being asked to continue a child support obligation for someone who had "disappeared" and "where we don't even know where the children are or they're alive." As the trial court noted, the "last thing we heard" was one child was suicidal and was ordered to undergo a psychological evaluation.

After an off-the-record discussion, the court noted Mother requested a decrease in child support in a motion to modify and asked if Father had been "defaulted" in any of the hearings where he failed to appear. Mother's counsel said he had not. Although default was an option, the court expressed concern "about handing the child over – the children over on a default action because [Father] won't appear in court to a parent who has already been given supervised visitation. But [Father] won't come to court to at least try these issues to figure out what needs to be done for the child, won't give access of the children to the amicus." The trial judge then explained that she had, despite the OAG's "false statements," tried "to tailor an order that would protect the privilege of the OAG from opposing sides, and to give limited information to an amicus who represents the best interest of the children to see if these children are even still alive." The judge further stated she was "going to try and continue to narrowly tailor the orders so that we can at least get to the safety and welfare of the children while protecting the interest of everybody involved, including the privilege of the Attorney General."

Following the hearing, the trial court stayed the portion of her order to produce Father's address and phone number for in camera inspection for thirty days but denied the OAG's request to stay the child support order. After the OAG filed its petition for writ of mandamus, we stayed the trial court's order.

To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). A trial court has no discretion in determining what the law is or in applying the law to the facts, and a clear failure to analyze or apply the law correctly will constitute an abuse of discretion. *Walker*, 827 S.W.2d at 840.

We begin with the portion of the trial court's order requiring the OAG to produce Father's address and phone number in camera. The OAG asserts that section 231.108 of the family code prohibits the OAG, a Title IV-D agency, from releasing Father's contact information. Section 231.108(a) provides that certain information is confidential:

> (a) Except as provided by Subsection (c), all files and records of services provided by the Title IV-D agency under this chapter, including information concerning a custodial parent, noncustodial parent, child, and an alleged or presumed father, are confidential.

TEX. FAM. CODE ANN. § 231.108(a) (West Supp. 2017).

Subsection (c) provides that the agency "may" release the privileged or confidential information "for purposes directly connected with the administration of the child support, paternity determination, parent locator, or aid to families with dependent children programs" and "may release information from the files and records to a consumer reporting agency in accordance with Section 231.114." *Id.* § 231.108(c).

Section 231.108(e), however, prohibits a Title IV-D agency from releasing information of a person's physical location if (1) a protective order has been entered with respect to the person; or (2) there is reason to believe that the release of information may result in physical or emotional harm to the person. TEX. FAM. CODE ANN. § 231.108(e). The father's address and phone number are confidential under section 231.108(a). *See id.* § 231.108(a); *Jackson v. State Office of Admin.*

Hearings, 351 S.W.3d 290, 295 (Tex. 2011) (stating that "information obtained during [the] provision of services under Chapter 231 is confidential").

There is no dispute that the above statutory provisions generally render the information at issue confidential such that the complained-of information should not be turned over to Mother. The OAG argues the information should not be given to the trial court because the "only conceivable purpose of the order is to give the trial court the ability to release the information to [Mother] at some point so that she may communicate more easily with the children." But nothing in the record supports this claim. Rather, the record reasonably demonstrates the trial court's concern about the health and safety of the children, including child support issues, given that no one before the trial court knew the children's location or welfare. Contrary to the OAG's assertion, the question in this case is not about releasing the information to Mother. The question we must decide is whether the trial judge is entitled to Father's information in camera. We conclude she is.

Subchapter IV, Part D of the Social Security Act creates a child-support enforcement program through which the federal government provides matching funds to encourage and enable states and U.S. territories to locate noncustodial parents, establish paternity, enforce child-support obligations, recover and distribute child-support payments, and ensure "that assistance in obtaining support will be available under this part to all children . . . for whom such assistance is requested." 42 U.S.C. § 651. The program is designed to "help strengthen families by securing financial support for children from their noncustodial parent on a consistent and continuing basis, and by helping some families to remain self-sufficient and off public assistance by providing the requisite [child-support-enforcement] services." *Office of the Atty. Gen. v. C.W.H.*, 531 S.W.3d 178, 181 (Tex. 2017) (quoting Carmen Solomon-Fears, *Child Support: An Overview of Census Bureau Data on Recipients 1* (Congressional Research Service, 2016)).

The federal statute requires each participating state to adopt a "state plan" and designate an agency responsible for administering the plan. 42 U.S.C. § 654. The Texas Legislature designated the OAG as the Texas Title IV-D agency and required the OAG to "develop and implement a statewide integrated system" for child-support enforcement. TEX. FAM. CODE ANN. §§ 231.001, .0011(a) (West 2014). The family code defines a "Title IV-D case" as any case in which the OAG provides Title IV-D services "relating to the location of an absent parent, determination of parentage, or establishment, modification, or enforcement of a child support . . . obligation." TEX. FAM. CODE ANN. § 101.034 (West Supp. 2017). Therefore, the Texas plan provides for parent locator services.

The parent locator service conducted by the OAG is used to obtain information for: (1) child support establishment and enforcement purposes regarding the identity, social security number, location, employer and employment benefits, income, and assets or debts of any individual under an obligation to pay child or medical support or to whom a support obligation is owed; and (2) the establishment of paternity. TEX. FAM. CODE ANN. § 231.301(a) (West Supp. 2017). The family code provides that, "[a]s authorized by federal law," among other persons or entities, "a court, or an agent of the court, having jurisdiction to render or enforce an order for possession of or access to a child" may receive information from the parent locator service. *See id*. § 231.301(b); *see also C.W.H.*, 531 S.W.3d at 184–85 (Title IV-D "requires state agencies to 'establish a service to locate parents' and authorizes them to obtain information about a parent's location not only for 'the purpose of' establishing and 'setting the amount of' a new child-support obligation, *id*. §§ 653(a)(2), 653a(h)(1), but also for the purpose of 'making or enforcing a *child custody* or visitation determination,' *id*. § 654(8) (emphasis added); *see also id*. § 663(d)(1) (defining 'custody or visitation determination' to mean a court judgment, decree, or order 'providing for the custody or visitation of a child,' including 'initial orders and modifications')."))..

Additionally, consistent with the federal mandates, the Texas plan contains section 231.108, which is designed to protect the privacy rights of the parties. Under the federal statute, the Texas plan must be designed to protect the privacy rights of the parties and must, among other things, include:

> (A) safeguards against unauthorized use or disclosure of information relating to proceedings or actions to establish paternity, or to establish, modify, or enforce support, or to make or enforce a child custody determination;
>
> (B) prohibitions against the release of information on the whereabouts of 1 party or the child to another party against whom a protective order with respect to the former party or the child has been entered;
>
> (C) prohibitions against the release of information on the whereabouts of 1 party or the child to another person if the State has reason to believe that the release of the information to that person may result in physical or emotional harm to the party or the child;

42 U.S.C.A. 654(26)(A–C).

Here, section 231.301(b) allowed the trial court to obtain information regarding Father's location. Consistent with this provision, the trial issued an order to the OAG to provide in camera the address and telephone number for Father, a person to whom a support obligation is owed and who had been absent from proceedings for several months. Although the OAG argues the expired protective order and the finding of likely harm now operate to statutorily preclude the OAG from giving the information to the trial court who issued both, we disagree. As mandated by the federal statute, the purpose of section 231.108(e) is to protect the children and Father from the release of Father's information to Mother. The statute is not intended to protect children and Father from release of the information in camera to the trial court with continuing jurisdiction over the parties.

We conclude that providing Father's address and telephone number to the trial court in camera is not a "release" of information prohibited by section 231.108(e). Consequently, the trial court did not abuse its discretion in ordering the production of such information in camera.

We reach a different result, however, with respect to the OAG's second issue, in which it argues in part that the order to cease child support distributions is void because the trial court lacked jurisdiction to issue an injunction against the OAG. We agree.

Section 22.002(c) of the government code provides that only the Supreme Court of Texas may issue a "writ of mandamus or injunction, or any other mandatory or compulsory writ or process" to a constitutionally designated executive officer to "compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform." TEX. GOV'T CODE ANN. § 22.002(c) (West Supp. 2017). The OAG is such a constitutionally designated executive officer and is authorized to enforce, collect, and distribute child support. *In re A.B., Jr.*, 267 S.W.3d 564, 565 (Tex. App.—Dallas 2008, no pet.) (citing TEX. CONST. art. IV, § 1 and TEX. FAM. CODE ANN. §§ 102.007, 231.101, 231.104 (Vernon 2002 & Supp.2008)); *In Interest of C.D.E.*, 533 S.W.3d 367, 371–72 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing TEX. CONST. art. IV, § 1).

Here, the portion of the trial court's order prohibiting the OAG from distributing child support payments to Father forbids particular conduct and may be properly characterized as a type of injunction. *See Qwest Commc'ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000) (per curiam) (holding that order restricting party's conduct and requiring it to provide notice and perform monitoring during certain construction activities was an injunction); *see also In Interest of C.D.E.*, 533 S.W.3d at 371–72 (order conditionally enjoining the OAG from instituting any further child support liens against father constituted a prohibitive injunction and was void under section 22.002(c)). The trial court's command that the OAG withhold child support distributions is direct and mandatory and constitutes "a writ of mandamus or injunction, or any other mandatory or compulsory writ or process" as defined in government code section 22.002(c). *See, e.g., In re A.B.*, 267 S.W.3d at 565 (holding that TEX. GOV'T CODE § 22.002(c) deprived the trial court of

jurisdiction to order the OAG and the Child Support Distribution Unit to disburse child support payments to a private company appointed by the court); *see also In re C.J.M.S.*, 269 S.W.3d 206, 208 (Tex. App.—Dallas 2008, pet. denied) (order requiring OAG to remit all child support payments to private company is void).

Accordingly, that portion of the trial court's order requiring the OAG to withhold child support distributions is void. *See In re A.B.*, 267 S.W.3d at 565 (holding that TEX. GOV'T CODE § 22.002(c) deprived the trial court of jurisdiction to order the OAG and the Child Support Distribution Unit to disburse child support payments to a private company appointed by the court); *see also In re C.J.M.S.*, 269 S.W.3d at 208 (same). Mandamus relief is appropriate to vacate a void order. *In re Office of Atty. Gen.*, 264 S.W.3d 800, 805 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (orig. proceeding). When an order is void, relator is not required to show the lack of an adequate appellate remedy, and mandamus relief is appropriate. *In re Vaishangi, Inc.*, 442 S.W.3d 256, 261 (Tex. 2014) (orig. proceeding).

We conclude the OAG is entitled to mandamus relief on the trial court's order withholding child support disbursements to Father. Accordingly, we conditionally grant the petition for writ of mandamus and direct the trial court to vacate that portion of its November 28, 2017 order. We are confident the trial court will comply, and the writ will issue only if it fails to do so.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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