

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00019-CV

IN RE THOMAS MICHAEL FLANAGAN

Original Proceeding

MEMORANDUM OPINION

In this original proceeding, Thomas Michael Flanagan challenges an interlocutory order to pay attorney's fees to counsel for the real party in interest, Gina Flanagan. We conditionally grant the petition for writ of mandamus.

As the court of continuing jurisdiction following the parties' divorce, the trial court is presiding over a suit for modification of conservatorship filed by Thomas in May 2009. On December 21, 2009, the trial court issued temporary orders for the safety and welfare of the children. That order temporarily transferred primary custody from Gina to Thomas "because the children's present circumstances would significantly impair the children's physical health and emotional development." Gina filed a motion in which she alleged that Thomas "is using his vast wealth to try to economically mash Gina Flanagan

into submission” and requested that Thomas be ordered to pay Gina’s attorneys \$100,000 “to level the playing field.”

At the hearing on Gina’s motion for attorney’s fees, Thomas’s counsel argued that Gina is not entitled to interim attorney’s fees because neither her pleadings nor her offer of proof raised an issue regarding the safety and welfare of the children. In fact, Gina’s counsel represented to the trial court that he was not seeking to establish fees pursuant to section 105.001 of the Texas Family Code but instead, he argued the fees were authorized by section 106.002 of the code. Section 105.001 provides that a trial court may make an order, including an order for payment for reasonable attorney’s fees, for the safety and welfare of the children. *See* TEX. FAM. CODE ANN. § 105.001(a) (5) (Vernon Supp. 2009). Section 106.002 allows the trial court to render judgment for reasonable attorney’s fees. *See* TEX. FAM. CODE ANN. § 106.002 (Vernon 2008).

Gina did not offer any evidence regarding the safety and welfare of the children at the hearing. Although counsel asked the trial court to take judicial notice of the earlier hearings in the case, he did not supply the trial court with the particular facts to be noticed and the trial court did not state that judicial notice was being taken of any particular facts adduced at a prior hearing. *See* TEX. R. EVID. 201(d). Thus, it appears that counsel was only asking the trial court to consider the amount of time that expended in earlier hearings and was not relying on any testimony from those hearings to establish that interim fees were necessary for the safety and welfare of the children.

The order recites that the award of interim fees is made for the safety and welfare of the children. During the hearing, the trial court remarked that Thomas had alleged that “these children would be harmed tremendously if they were allowed to remain in the custody of the mother.” Reasoning that ordering Thomas to pay Gina’s attorney’s fees “allows her attorneys to remain her attorneys,” the trial court stated that “I do believe that she doesn’t have the ability to maintain this lawsuit on an even playing field for the best interest of the children unless she gets some help.”

Mandamus is a proper remedy to attack issuance of a temporary order issued in a custody case because such orders are not subject to interlocutory appeal. *See Dancy v. Daggett*, 815 S.W.2d 548, 549 (Tex. 1991). Thomas relies on two cases in which the appellate court granted mandamus relief from an order for interim attorney’s fees. *See In re Sartain*, No. 01-07-00920-CV, 2008 WL 920664, at *1 (Tex. App.--Houston [1st Dist.] 2008, orig. proceeding.); *Saxton v. Daggett*, 864 S.W.2d 729, 736 (Tex. App.--Houston [1st Dist.] 1993, orig. proceeding). In *Saxton*, the appellate court granted mandamus relief to a petitioner who had been ordered to pay the respondent’s attorney for fees to “level the playing field.” *See Saxton*, 864 S.W.2d at 736. Although the court recognized there was some relation between past discovery and the safety and welfare of the children, the appellate court concluded that the trial court was not justified in retroactively shifting the cost of discovery to Saxton. *Id.* Counsel’s testimony about past discovery could not support the interim award for future discovery. *Id.* In *Sartain*, the trial court awarded fees in the amount of \$20,000 to conduct discovery and prepare for

trial. *Sartain*, 2008 WL 920664, at *1. The real party in interest offered no evidence that the fees were needed for the safety and welfare of the children. *Id.* at *2. The appellate court granted mandamus relief because the order did not comport with section 105.001(a)(5) of the Family Code. *Id.*

This case is very similar to *Saxton* and *Sartain*. Although the order recites that the \$50,000 fee previously paid by Gina and the \$100,000 fee to be incurred by her in the future were “for the safety and welfare of the children,” the only evidence in the record is that the fees were being sought solely to address the disparity in the relative wealth of the parties. Gina did not supply detailed information regarding her finances, but she was represented by lawyers from three law firms and evidently was able to retain counsel. Furthermore, any immediate threat to the health and safety of the children had been met by the temporary orders that found that the children would be harmed if they remained with Gina while Thomas’s motion to modify conservatorship proceeded. Further, as a result of the temporary orders, Gina no longer had primary responsibility for the children. The motion for fees that Gina filed sought to accomplish nothing more than to require that Thomas finance Gina’s defense of Thomas’s allegations that the SAPCR should be modified.

Although the trial of the petition to modify the SAPCR may involve issues relating to the safety and welfare of the children, Gina did not show that payment of \$50,000 for interim attorney’s fees was necessary for the safety and welfare of the children. Counsel’s fee affidavit described \$49,037.50 from billable hours incurred between

November 2, 2009, and January 8, 2010. The affidavit also describes three potential depositions to occur in the future. There was no evidence offered that Gina was in breach of her agreement to pay for legal services of the firms of the three lawyers she has retained. Gina did not testify regarding her financial ability to pay attorney's fees that might be incurred in the future and Gina made no attempt to otherwise segregate those legal services that will be related to the safety and welfare of the children.

At the hearing, counsel relied solely upon section 106.002 to impose liability on Thomas for Gina's attorney's fees. Section 106.002 does not authorize the trial court to order payment of the opposing party's attorney's fees before judgment. *See* TEX. FAM. CODE ANN. § 106.002.

The party requesting payment failed to establish grounds for awarding interim attorney's fees for the safety and welfare of the children. *See* TEX. FAM. CODE ANN. § 105.001(a) (5). We hold that the trial court abused its discretion by ordering interim attorney's fees. We conditionally grant the petition for writ of mandamus. We are confident that the trial court will vacate its order of January 15, 2010, on interim attorney's fees. The writ shall issue only if the trial court fails to comply.

PETITION GRANTED.

PER CURIAM

Submitted on January 25, 2010
Opinion Delivered March 18, 2010
Before Gaultney, Kreger, and Horton, JJ.