TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-13-00369-CV

Gary W. Gates, Jr., Appellant

v.

Texas Department of Family and Protective Services; and Henry "Hank" Whitman, Jr., Commissioner, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT NO. D-1-GN-11-002300, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

PER CURIAM

Gary W. Gates Jr. appeals the trial court's final judgment granting the plea to the jurisdiction of appellees the Texas Department of Family and Protective Services and the Department's Commissioner.[1] For the reasons that follow, we will affirm the trial court's judgment.

BACKGROUND

This case is among a series of cases brought by Gary and Melissa Gates against the Department concerning past child-abuse investigations and subsequent Department determinations against the Gateses. Because the relevant facts that form the basis of Gates's allegations have been detailed in opinions previously issued by this Court, the First District Court of Appeals, and the

[1] Henry "Hank" Whitman Jr. has been substituted for John Specia, the former commissioner of the Texas Department of Family and Protective Services. *See* Tex. R. App. P. 7.2.

Fifth Circuit,[2] we do not repeat them here except to the extent necessary to describe the relevant procedural background.

Gates filed the present suit against the Department and the Commissioner in 2011. In his amended petition, Gates challenged (and, as in prior proceedings, revealed publicly) the investigation, placement, and maintenance of his name on the Department's central registry of reported child-abuse cases, primarily focusing on delay in holding the Administrative Review of Investigation Findings (ARIF), the procedure of the ARIF when it was held in 2008, and the reviewer's findings.[3] Gates complained of delay in holding the ARIF and alleged that the reviewer used an "incomplete and/or corrupted" file, failed to consider exculpatory evidence, and improperly made a new finding of physical abuse. Gates sought declaratory, injunctive, and mandamus relief against appellees based on the following: (i) alleged violations of Texas constitutional protections

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[2] *See* Tex. R. App. P. 47.1, 47.4; *see generally Gary & Melissa Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008); *Melissa Gates v. Texas Dep't of Family & Protective Servs.*, No. 03-11-00363-CV, 2013 Tex. App. LEXIS 10152 (Tex. App.—Austin Aug. 15, 2013, pet. denied) (mem. op.); *Melissa Gates v. Texas Dep't of Family & Protective Servs*., 252 S.W.3d 90 (Tex. App.—Austin 2008, no pet.); *In re T.G.*, 68 S.W.3d 171 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *see also* Report & Recommendation, *Gary Gates v. Texas Dep't of Family & Protective Servs.*, No. 1-09-CV-018-LV (W.D. Tex. Feb. 24, 2011), ECF No. 108; *Gary Gates v. Fort Bend Cty. Child Advocates, Inc.*, No. 01-03-01298-CV, 2005 Tex. App. LEXIS 4141 (Tex. App.—Houston [1st Dist.] May 26, 2005, pet. denied) (mem. op.).

[3] *See* 40 Tex. Admin. Code §§ 700.104 (Dep't of Family & Protective Servs., Child Abuse and Neglect Central Registry) (stating that Department maintains central registry of reported cases of child abuse and neglect as required under Texas Family Code), .512(b) (Dep't of Family & Protective Servs., Conclusions about Roles) (stating generally that, at end of investigation, role of person involved may be identified as "designated perpetrator" if, based on a preponderance of the evidence, staff concludes that individual is responsible for abuse or neglect of child), .516 (Dep't of Family and Protective Servs., Administrative Review of Investigation Findings). All subsequent cites to the Texas Administrative Code are to the Department's rules.

of due course of law, equal protection, open courts, reputation, the right to petition, freedom of speech, and privacy;[4] (ii) alleged violations of the Texas Family Code, including the unlawful release of confidential information and the failure to conduct a "thorough investigation";[5] and (iii) alleged violations of administrative rules, including rules governing ARIFs.[6]

In December 2012, appellees filed a plea to the jurisdiction, contending that the trial court did not have jurisdiction over any of Gates's claims. They argued, among other grounds, that the trial court lacked jurisdiction over Gates's claims brought under the Uniform Declaratory Judgments Act (UDJA) because the Department was not a proper party to a claim for declaratory relief and Gates sought "to control what is otherwise discretionary state action and has, thus, failed to establish a waiver of the state's immunity under the [UDJA]." Appellees also argued that Gates had failed to state a valid claim for declaratory relief under the rule-challenge provision of the Administrative Procedure Act (APA).[7]

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[4] *See* Tex. Const. art. I, §§ 3 (equal rights), 8 (freedom of speech), 13 (open courts, due course of law), 27 (right to petition for redress of grievances); *Texas State Emps. Union v. Texas Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987) ("While the Texas Constitution contains no express guarantee of a right of privacy, it contains several provisions similar to those in the United States Constitution that have been recognized as implicitly creating protected 'zones of privacy.'").

[5] *See* Tex. Fam. Code §§ 261.201 (addressing confidentiality and disclosure of information), .301(a) (requiring Department to "make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child's care, custody, or welfare").

[6] *See* 40 Tex. Admin. Code §§ 700.511 (Disposition of the Allegations of Abuse or Neglect), .512 , .516.

[7] *See* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011 (UDJA); Tex. Gov't Code § 2001.038 (authorizing courts to enter declaratory judgments on "validity or applicability of a rule").

Gates filed a supplement to his amended petition in February 2013 that addressed a subsequent investigation by the Department in 2011 that, according to his pleaded facts, had been closed with a ruled-out disposition. Gates also provided more factual details on some of his claims, including a claim that the Department failed to follow its own rules as to the "new" finding in the 2008 ARIF. Gates also filed a response to the Department's plea to the jurisdiction. The trial court thereafter granted appellees' plea, dismissing Gates's claims for lack of subject matter jurisdiction. This appeal followed.

DISCUSSION

Gates raises two issues on appeal. He argues that: (i) the trial court erred in concluding that it did not have subject matter jurisdiction over his claims that were based on his Texas constitutional rights to due course of law, equal protection, preservation of his reputation, redress of grievances, free speech, and privacy; and (ii) it erred in concluding that it did not have subject matter jurisdiction over his claims that were based on statutory and rule violations.[8]

Claims Based on the Texas Constitution

In his first issue, Gates argues that the trial court erred in concluding that it did not have jurisdiction over his claims that seek to invoke Texas constitutional protections. The vast majority of these claims are foreclosed by precedent from this Court in *Melissa Gates v. Texas Department of Family & Protective Services*, No. 03-11-00363-CV, 2013 Tex. App. LEXIS 10152

[8] We will assume the reader's familiarity with the analytical framework and standard of review prescribed in *Texas Department of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–29 (Tex. 2004). *See* Tex. R. App. P. 47.1.

(Tex. App.—Austin Aug. 15, 2013, pet. denied) (mem. op.), and *L.C. v. Texas Department of Family & Protective Services*, No. 03-07-00055-CV, 2009 Tex. App. LEXIS 8778 (Tex. App.—Austin Nov. 13, 2009, no pet.) (mem. op.). Although Gates's Texas constitutional claims here are not identical with the claims raised in those prior cases, they substantially overlap and, at their core, seek judicial review of the ARIF and the placement of Gates's name in the registry—which this Court determined did not invoke the trial court's jurisdiction.[9]

For example, Gates asserts a claim based on his constitutional right to petition for redress of grievances.[10] Similar to his claims that overlap with claims raised in *L.C.* or *Melissa Gates*, however, the crux of this claim challenges the administrative process and merits of the findings in the 2008 ARIF—i.e., Gates seeks judicial review of the administrative decision—and, thus, it follows from the analysis in *L.C.* and *Melissa Gates* that the trial court did not have jurisdiction over this claim.

In his remaining constitutional claim, Gates asserts that his free speech rights were violated, but he has failed to plead an injury stemming from any protected speech that would invoke

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[9] *See Melissa Gates*, 2013 Tex. App. LEXIS 10152, at *11 (listing claims that were based on ARIF and placement of name in central registry of reported child-abuse cases, including constitutional violations of freedom of religion, due process and equal protection, freedom of worship, open courts, and due course of law); *L.C. v. Texas Dep't of Family & Protective Servs.*, No. 03-07-00055-CV, 2009 Tex. App. LEXIS 8778, at *4, *7–8 (Tex. App.—Austin Nov. 13, 2009, no pet.) (mem. op.) (listing claims including that Department had violated L.C.'s due process rights and concluding that no right to judicial review under Administrative Procedure Act of Department's administrative decision to place name in child-abuse registry); *see also Texas Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 172 (Tex. 2004) ("In Texas, a person may obtain judicial review of an administrative action only if a statute provides a right to judicial review, or the action adversely affects a vested property right or otherwise violates a constitutional right.").

[10] *See* Tex. Const. art. I, § 27.

the trial court's jurisdiction.[11] Bound by these precedents, we conclude that the trial court did not err in granting appellees' plea to the jurisdiction as to Gates's claims founded on Texas constitutional protections. Thus, we overrule Gates's first issue.

Claims based on Statutory or Rule Violations

In his second issue, Gates argues that the trial court erred in concluding that it did not have jurisdiction over his claims that are based on alleged violations of Texas statutes and administrative rules. Gates alleges that appellees violated statutes or administrative rules by failing to hold a timely ARIF on the 2000 findings, failing to properly conduct the 2008 ARIF on the 2000 findings, failing to hold an informal review or an ARIF on the "new" finding in the 2008 ARIF, and unlawfully releasing confidential information.[12] He argues that the Department was required to conduct a "thorough investigation" but failed to do so, that its findings had to be supported by a preponderance of the evidence but were not, and that it unlawfully disclosed information to a state representative, the media, and the governor's office. Among other jurisdictional barriers, these claims are in substance ultra vires claims that are barred by sovereign immunity to the extent they are asserted against the Department.[13]

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[11] *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147, 150–51 (Tex. 2012) (addressing standing doctrine and noting limit on "access to the courts to those individuals who have suffered an actual, concrete injury"); *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (addressing standing doctrine); *see also Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002) (listing elements of First Amendment retaliation claim).

[12] *See* Tex. Fam. Code §§ 261.201, .301; 40 Tex. Admin. Code §§ 700.511, .512 , .516.

[13] *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 372–73, 375–76 (Tex. 2009) (noting that "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity" but "must be brought against the state actors in their official

We also observe that, although the Department's sovereign immunity would be waived under section 2001.038 of the APA for rule challenges, Gates does not raise an issue on appeal addressing a rule challenge.[14] Further, even if he had, he has not pleaded facts that would invoke the trial court's jurisdiction under section 2001.038.[15] We further observe that, to the extent Gates argues that the Department's immunity was waived based on section 261.309(e) of the Texas Family Code[16] or the UDJA, these arguments are precluded by well-established precedent.[17]

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capacity"); *see also Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161–64 (Tex. 2016) (describing and clarifying ultra vires doctrine).

[14] *See* Tex. Gov't Code § 2001.038(a) ("The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff."), (c) ("The state agency must be made a party to the action.").

[15] *See State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 362 (Tex. App.—Austin 2009, pet. denied) (concluding trial court lacked jurisdiction over claim brought under section 2001.038); *Texas Dep't of Transp. v. City of Sunset Valley*, 92 S.W.3d 540, 549 (Tex. App.—Austin 2002) (noting that section 2001.038 does not confer jurisdiction to determine whether agency complied with rule), *rev'd on other grounds*, 146 S.W.3d 637 (Tex. 2004).

[16] *See* Tex. Fam. Code § 261.309(e) ("A person is not required to exhaust the remedies provided by this section before pursuing a judicial remedy provided by law.").

[17] Tex. Gov't Code § 311.034 (requiring "clear and unambiguous language" in statute to waive sovereign immunity); *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 620–21 (Tex. 2011) (per curiam) (noting that Texas Supreme Court necessarily concluded in *Heinrich* "that the UDJA does not waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law" and that Texas Supreme Court has consistently stated that UDJA does not enlarge the trial court's jurisdiction); *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 177 (Tex. App.—Austin 2013, no pet.) (explaining established principle that "statute that merely permits state to 'sue or be sued'" was not sufficient to waive sovereign immunity as waiver must be clear and unambiguous); *Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 114 (Tex. App.—Austin 2007, no pet.) ("The UDJA does not create or augment a trial court's subject-matter jurisdiction—it merely provides a remedy where subject-matter jurisdiction already exists.").

Thus, Gates's pleadings did not invoke the trial court's jurisdiction over his claims against the Department that are based on alleged statutory or rule violations.

We turn then to our analysis of whether Gates pleaded ultra vires claims against the Commissioner—i.e, whether he alleged facts that would amount to ultra vires conduct by the Commissioner—based on alleged statutory or rule violations.[18] As to Gates's claims that are directed at the 2008 ARIF and the Department's release of confidential information, those claims seek retrospective relief—to undo prior agency actions on the ground that the Commissioner incorrectly or wrongly acted—and, thus, are barred by sovereign immunity.[19] To the extent that Gates complains that the Department is foreclosed from releasing confidential information, we also observe that the Department is statutorily authorized to release information made confidential by section 261.201 of the Texas Family Code "for purposes consistent with this code and applicable

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[18] *See Houston Belt,* 487 S.W.3d at 161–64 (explaining that "the principle arising out of *Heinrich* and its progeny is that governmental immunity bars suits complaining of an exercise of absolute discretion but not suits complaining of either an officer's failure to perform a ministerial act or an officer's exercise of judgment or limited discretion without reference to or in conflict with the constraints of the law authorizing the official to act"); *Heinrich*, 284 S.W.3d at 372 ("To fall within this ultra vires exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.").

[19] *See Heinrich*, 284 S.W.3d at 375–76 (holding that generally ultra vires claimant is entitled to prospective relief only); *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 517–18 (Tex. App.—Austin 2010, no pet.) (contrasting "allegations that TCEQ reached an incorrect or wrong result when exercising its delegated authority" with "facts that would demonstrate TCEQ exceeded that authority" and concluding that trial court did not have jurisdiction over claims that TCEQ reached incorrect or wrong result); *see also Texas Logos, L.P.*, 241 S.W.3d at 119–20 (holding that sovereign immunity barred ultra vires claim seeking to invalidate previously executed state contract because that remedy was retrospective in nature).

federal or state law or under rules adopted by an investigating agency"[20] and that the Department is authorized by rule to release information to a member of the state legislature and a state government official.[21] We also observe that, because Gary and Melissa Gates have publicly disclosed the facts of the Department's investigations and his inclusion in the registry, any action by this Court on the merits of this claim would not have "any practical legal effect" on any controversy between the parties and, thus, this claim is moot.[22]

Gates's remaining claim is based on the alleged violation of rule 700.516 and is predicated on the reviewer's "new" finding in the 2008 ARIF of physical abuse stemming back to the 2000 investigation. As to this claim, he seeks prospective relief—an informal review and then, if necessary, an ARIF on the "new" finding. As we have concluded with respect to his other claims against the Commissioner, however, we conclude that he has failed to plead ultra vires conduct that

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[20] *See* Tex. Fam. Code § 261.201(a).

[21] *See* 40 Tex. Admin. Code § 700.203(a)(5), (10) (Access to Confidential Information Maintained by the Texas Department of Family and Protective Services (DFPS)) ("DFPS may release case record information made confidential under § 261.201(a) of the Texas Family Code to any person or entity authorized to receive confidential abuse or neglect information under state or federal law, including the following listed persons or entities: . . . (5) a local, state, or federal government official, to the extent permitted under federal law or when deemed necessary for the protection and care of a child; . . . (10) a member of the state legislature, to the extent permitted under federal law, when necessary to carry out that member's official duties.").

[22] *See Melissa Gates*, 2013 Tex. App. LEXIS 10152, at *17, n.7 (comparing Melissa Gates who "has continuously disclosed her placement on the central registry" with parent challenging placement on registry who was identified by pseudonym and had record sealed); *see also Heckman*, 369 S.W.3d at 162 (observing that "case is moot when the court's action on the merits cannot affect the parties' rights or interests"); *Texas Health Care Info. Council v. Seton Health Plan Inc.*, 94 S.W.3d 841, 846 (Tex. App.—Austin 2002, pet. denied) ("A case becomes moot when: (1) it appears that one seeks to obtain a judgment on some controversy, when in reality none exists; or (2) when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy.").

would invoke the trial court's jurisdiction.[23] We need go no further than to observe that (i) the plain language of section 261.309 of the Texas Family Code authorizes the Commissioner to adopt rules "to resolve complaints relating to and conduct reviews of child abuse or neglect investigations conducted by the department" and authorizes the reviewer in an ARIF to "alter . . . the department's original findings in [an] investigation" and (ii) the plain language of rule 700.516 authorizes the reviewer to consider "all allegations relating to the investigation" and "evidence gathered during the investigation and the ARIF process" and to "issue a written decision that upholds, reverses, or alters the original investigation findings."[24] Applying the plain language of section 261.309 and rule 700.516 to Gates's pleadings, the reviewer was authorized to add a finding to the 2008 ARIF based on his review of the evidence.[25] Further, even were we to conclude that the relevant language of section 261.309 or rule 700.516 was ambiguous, the Commissioner's interpretation of this

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[23] *See* Tex. Civ. Prac. & Rem. Code § 37.004(a); *Texas State Bd. of Veterinary Med. Exam'rs v. Giggleman*, 408 S.W.3d 696, 708 (Tex. App.—Austin 2013, no pet.) (concluding that claim seeking declarations of proper construction of agency rules, as opposed to statutes, "falls outside the UDJA altogether").

[24] *See* Tex. Fam. Code § 261.309(a) (requiring Commissioner "by rule [to] establish policies and procedures to resolve complaints relating to and conduct reviews of child abuse or neglect investigations conducted by the department"), (c) ("The review must sustain, alter, or reverse the department's original findings in the investigation."); 40 Tex. Admin. Code § 700.516(g), (h); *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010) ("We rely on the plain meaning of the text as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results."); *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999) (construing administrative rules in same manner as statutes because they have same force and effect).

[25] We also observe that Gates could have appealed the findings from the 2008 ARIF to the Department's Office of Consumer Affairs but chose not to do so. *See* 40 Tex. Admin. Code §§ 702.801–.849; *Gates*, 252 S.W.3d at 93–94 (describing different "tracks" for appealing administrative findings of child abuse or neglect).

language is not inconsistent with the text.[26] Gates's remaining claim then, at most, goes to the correctness of the 2008 ARIF and, thus, does not allege ultra vires conduct that would invoke the trial court's jurisdiction.[27]

Because we conclude that Gates has not pleaded facts that would amount to ultra vires conduct based on his alleged statutory or rule violations, we overrule his second issue.

CONCLUSION

For these reasons, we conclude that the trial court properly dismissed all of Gates's claims on jurisdictional grounds and affirm the trial court's final judgment.[28]

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: December 21, 2016

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[26] *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011) ("If there is vagueness, ambiguity, or room for policy determinations in a statute or regulation, as there is here, we normally defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule.").

[27] *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 517–18.

[28] On appeal, Gates alternatively requests that we remand the case to the trial court to allow him an opportunity to cure jurisdictional defects in his pleadings. We decline this request. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (declining to remand for opportunity to amend pleadings when pleading defects could not be cured and plaintiff "made no suggestion as to how to cure the jurisdictional defect"). After the Department filed its plea to the jurisdiction, Gates had the opportunity to file a supplemental petition, and he has failed to suggest how he would cure the jurisdictional defects by further amending his pleadings.