NUMBER 13-17-00204-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

IN RE ANTHONY P. TROIANI

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Justices Contreras, Benavides, and Longoria
Memorandum Opinion by Justice Longoria[1]

Through this original proceeding, relator Anthony P. Troiani seeks an order (1) compelling the respondent to withdraw from serving as an assigned judge in the underlying proceeding, and (2) setting aside all orders issued in the current proceeding as void.[2] Relator contends that he timely objected to the assignment of the respondent;

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[1] *See* TEX. R. APP. P. 52.8(d) ("When granting relief, the court must hand down an opinion as in any other case," but when "denying relief, the court may hand down an opinion but is not required to do so."); *id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number 2013-DCL-4275 in the 444th District Court of Cameron County. The respondent in this original proceeding is the Honorable Robert Pate. *See* TEX. R. APP. P. 52.2. The pleadings and orders underlying this matter reference two separate trial court

nevertheless, the respondent has failed to withdraw, and consequently all orders issued by the respondent are void. *See generally* TEX. GOV'T CODE ANN. § 74.056(a), (b) (West, Westlaw through Ch. 49, 2017 R.S.). We conditionally grant the petition for writ of mandamus as stated herein.

I. BACKGROUND

This case arises from a lawsuit involving the possession, custody, and support of minor children. On June 18, 2013, relator filed a "Petition for Enforcement of Mediated Settlement Agreement" in the 444th District Court of Cameron County, Texas against his former wife, Christine Yvette Troiani. In that petition, relator requested the trial court to enforce a mediated settlement agreement incorporated in the parties' May 3, 2013 final decree of divorce.

On August 21, 2013, the Presiding Judge of the Fifth Administrative Judicial Region issued an "Amended Order of Assignment" which assigned the Honorable Robert Pate, respondent herein, as a "Former Judge" to preside over the cause "until plenary jurisdiction has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first." The order of assignment further provided that "[i]n addition, whenever the assigned judge is present in the county of assignment for a hearing in this cause, the judge is also assigned and empowered to hear at that time any other matters that are presented for hearing in other cases."

The parties litigated the enforcement of the mediated settlement, and both Christine and the Office of the Attorney General (OAG) filed separate pleadings seeking affirmative relief. On August 1, 2014, the respondent rendered an order entitled "Findings

cause numbers: 2013-DCL-4275 and 2013-DCL-4275-H; however, these matters were consolidated below.

and Order," which addressed several of the pending issues, including child support, visitation, insurance coverage, medical expenses, and the disposition of the net proceeds of the sale of realty. On October 10, 2014, the respondent signed a final order disposing of the parties' remaining claims in its "Order on Christine Yvette Troiani's Motion for Enforcement and Modification of Division of Property and Motion for Temporary Restraining Order." This order denied Christine's requested relief. Relator ultimately appealed the trial court's rulings following rendition of the final judgment. We reversed and rendered in part and affirmed in part. *See Troiani v. Troiani*, No. 13-14-00630-CV, 2016 WL 4702685, at *1 (Tex. App.—Corpus Christi Sept. 8, 2016, no pet.) (mem. op.).

Almost two years later, on June 6, 2016, relator filed a "Motion for Enforcement by Contempt and Order to Appear and Modification" in the same court and trial court cause number. This pleading contains a preliminary section entitled "Objection to Appointment of Visiting Judge" which states that relator "objects to the appointment of Judge Robert C. Pate as visiting judge to preside over the present case." Through this pleading, relator sought enforcement of the divorce decree's provisions pertaining to custody and possession of the minor children and sought modification of the decree with regard to the award of child support. By order signed on August 30, 2016, the respondent denied relator's objection to his assignment:

> The Court received and reviewed the Motion for Enforcement by Contempt and Order to Appear an[d] Modification filed by Movant ANTHONY PAUL TROIANI which included, among its terms, [an] Objection to the Assignment of the undersigned to serve in this case. The Court then requested and received a copy of the most recent Order Appointing the undersigned dated August 21, 2013 in this particular case and noted that the appointing order specifically provides not only appointment to this specific case; but, also, continues "from this date (August 21, [2013]) until plenary jurisdiction has expired or the Presiding Judge has terminated this assignment in writing, whichever occurs first." At this date, no written termination of this

> assignment by the Presiding Judge has occurred; moreover, the undersigned has previously held a number of hearings in this case including the hearing granting the divorce, approving the terms of the parent-child relationship and which are at issue in the pending motion all of which occurred without objection to prior orders of appointment to the assigned judge at that time. Accordingly, the Movant's objection is not well taken under the terms of the current appointing order, is not timely made as dispositive orders in prior hearings, including a hearing or hearings after August 21, 2013 have been previously signed by the undersigned; and, is, therefore, in all ways, OVERRULED.
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> The Motion for Enforcement is set for hearing on September 30, 2016 at 10:00 o'clock a.m. in the Courtroom of the 444th District Court. All parties and counsel are ORDERED to attend, in person.

In this same cause, the OAG filed a "Suit for Modification of Support Order and Motion to Confirm Support Arrearage." On March 23, 2017, the respondent issued an order regarding the OAG's request for modification, which, inter alia, assessed child support arrearage and medical support against relator. On April 21, 2017, relator filed a motion for new trial.

On April 25, 2017, this original proceeding ensued. By three issues, relator contends: (1) the respondent abused his discretion by overruling relator's timely objection to his assignment as the judge in the current proceeding; (2) the respondent abused his discretion by continuing to preside over the case without a new assignment from the presiding judge; and (3) the orders entered by the respondent in this case after resolution of the appeal constitute void orders and therefore must be set aside.

This Court requested and received responses to the petition for writ of mandamus from the OAG and Christine. The OAG argues that the deadline for the filing of an objection to an assignment of a visiting judge under Texas Government Code section 74.053 is not contingent on the order of assignment; therefore, the relator's objection to the assignment of the respondent was untimely filed. *See* TEX. GOV'T CODE ANN. § 74.053

(West, Westlaw through Ch. 49, 2017 R.S.). The OAG also contends that the respondent's plenary jurisdiction had not expired; thus, the respondent had jurisdiction to hear all matters assigned to him pursuant to the terms of the order of assignment. Christine's arguments are similar. She contends that: (1) relator did not timely object to the assignment of the respondent according to section 74.053(c) of the Texas Government Code, and only objected to the assignment after dispositive orders in prior hearings had been made; (2) a new order of assignment was not required because the respondent retained plenary jurisdiction and there was no written termination of the assignment; and (3) the orders at issue were not void.

II. STANDARD OF REVIEW

Mandamus is an extraordinary remedy. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam). Mandamus relief is proper to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Christus Santa Rosa Health Sys.*, 492 S.W.3d 276, 279 (Tex. 2016) (orig. proceeding). The relator bears the burden of proving both of these requirements. *In re H.E.B. Grocery Co.*, 492 S.W.3d at 302; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

An abuse of discretion occurs when a trial court's ruling is arbitrary and unreasonable or is made without regard for guiding legal principles or supporting evidence. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against the detriments. *In re Essex Ins. Co*., 450 S.W.3d 524, 528 (Tex. 2014) (orig.

proceeding); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004)) (orig. proceeding).

In terms of review by mandamus, when an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void and the objecting party is entitled to mandamus relief. *In re Canales*, 52 S.W.3d 698, 701 (Tex. 2001) (orig. proceeding). The objecting party need not demonstrate that it lacks an adequate remedy by appeal. *Dunn v. Street*, 938 S.W.2d 33, 34 (Tex. 1997) (orig. proceeding); *Flores v. Banner*, 932 S.W.2d 500, 501 (Tex. 1996) (orig. proceeding); *In re Flores*, 53 S.W.3d 428, 430 (Tex. App.—San Antonio 2001, orig. proceeding).

III. APPLICABLE LAW

The presiding judge of an administrative judicial region is authorized to assign judges in the region to "try cases and dispose of accumulated business." TEX. GOV'T CODE ANN. § 74.056(a), (b). A judge sitting by order of assignment has "all the powers of the judge of the court to which he is assigned." *See id.* § 74.059(a) (West, Westlaw through Ch. 49, 2017 R.S.). Generally, visiting judges are assigned either to a particular case or for a period of time. *Hull v. S. Coast Catamarans, L.P.*, 365 S.W.3d 35, 41 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *In re Republic Parking Sys., Inc.*, 60 S.W.3d 877, 879 (Tex. App.—Houston [14th Dist.] 2001, orig. proceeding). The terms of the assignment order control the extent of the visiting judge's authority and when that authority terminates. *Ex parte Eastland*, 811 S.W.2d 571, 572 (Tex. 1991) (per curiam); *In re B.F.B.*, 241 S.W.3d 643, 645 (Tex. App.—Texarkana 2007, no pet.); *Davis v. Crist Indus., Inc*., 98 S.W.3d 338, 341 (Tex. App.—Fort Worth 2003, pet. denied).

Section 74.053 of the Texas Government Code governs objections to the assignment of trial judges. *See* TEX. GOV'T CODE ANN. § 74.053. Except as specifically provided, each party to the case is entitled to only one objection under the statute. *See id.* § 74.053(b). An objection to the assignment of a trial judge under Section 74.053 "must be filed not later than the seventh day after the date the party receives actual notice of the assignment or before the date the first hearing or trial, including pretrial hearings, commences, whichever date occurs earlier." *Id.* § 74.053(c). The deadline to file an objection may be extended by the presiding judge if the moving party demonstrates "good cause." *Id.* If a properly filed objection under this statute is timely, the assigned judge's disqualification is automatic. *Id.* § 74.053(b) (stating that "the judge shall not hear the case"); *Flores*, 932 S.W.2d at 501 ("When a party files a timely objection to an assigned judge under section 74.053 of the Texas Government Code, the assigned judge's disqualification is mandatory."); *see In re Canales*, 52 S.W.3d at 701; *In re Honea*, 415 S.W.3d 888, 890 (Tex. App.—Eastland 2013, orig. proceeding).

IV. ANALYSIS

In this case, relator contends that the respondent's plenary jurisdiction related to the earlier modification proceeding had expired and the respondent's assignment terminated in accordance with the terms of his appointment. Relator thus asserts that his objection to the respondent's service was timely because it was made before the first hearing and trial, including pretrial hearings, related to his 2016 motion for enforcement and modification. In contrast, the real parties argue that the respondent's plenary jurisdiction had not expired and that relator's objection was untimely because it was made after numerous proceedings in this case. Specifically, the OAG contends that the cause

number and style are both unchanged from the date of the August 21, 2013 order of assignment to the most recent pleading filed by relator, the timely filed April 21, 2017 motion for new trial. "Because [relator] timely filed the April 21, 2017 motion for new trial, the visiting judge's plenary jurisdiction continues until July 6, 2017, 105 days after the signing of the March 23, 2017 Order . . . ."

We conclude that relator's objection to the respondent's assignment was timely. The respondent was assigned in 2013 "until plenary jurisdiction has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first." It is undisputed that the presiding judge has not terminated the assignment in writing, so we examine the duration of the respondent's plenary power. All matters pending at the time of the assignment between relator, Christine, and the OAG were resolved through the rendition of a final judgment which was signed on October 14, 2014. The record does not indicate that any party filed a motion for new trial or other post-judgment motion seeking to alter the judgment. Thus, the trial court retained plenary jurisdiction for only thirty days after signing the final judgment. *See* TEX. R. CIV. P. 329b(d) ("[R]egardless of whether an appeal has been perfected," the trial court retains "plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed."); *In re Vaishangi, Inc.*, 442 S.W.3d 256, 259 (Tex. 2014) (orig. proceeding); *see also* TEX. FAM. CODE ANN. § 109.002 (West, Westlaw through Ch. 49, 2017 R.S.) ("An appeal from a final order rendered in a suit, when allowed under this section or under other provisions of law, shall be as in civil cases generally under the Texas Rules of Appellate Procedure."). In this regard, the trial court's continuing exclusive jurisdiction over the suit is not equivalent to, or coordinate with, its

plenary jurisdiction. *See, e.g., In re Reardon*, 514 S.W.3d 919, 923–30 (Tex. App.—Fort Worth 2017, orig. proceeding) (discussing the statutory scheme of the family code with regard to the trial court's jurisdiction to engage in post-judgment proceedings in suits affecting the parent-child relationship when an appeal is pending from the final order); *In re E.W.N.*, 482 S.W.3d 152–57 (Tex. App.—El Paso 2015, no pet.) (same). Further, this case does not include any post-judgment proceedings immediately following the rendition of the October 14, 2014 judgment which might arguably implicate an alleged extension of the trial court's plenary power. *See* TEX. R. CIV. P. 329b(h); *In re Reardon*, 514 S.W.3d at 923-30. Accordingly, the trial court's plenary jurisdiction had expired before relator filed his "Motion for Enforcement by Contempt and Order to Appear and Modification."[3]

Based on the foregoing law and analysis, and based on the specific facts presented to this Court, the respondent's assignment to this case expired, in accordance with the terms of the assignment order and the rules of civil procedure, thirty days following the rendition of the October 10, 2014 final judgment in this case. *See* TEX. R. CIV. P. 329b(d); *In re Vaishangi, Inc.*, 442 S.W.3d at 259. Consequently, relator's objection to the assignment of the respondent contained in relator's June 6, 2016 pleading was timely. *See* TEX. GOV'T CODE ANN. § 74.053(c). And therefore, the respondent

[3] Our conclusion here is reinforced by the fact that a petition or a motion to modify an order entered in a suit affecting the parent-child relationship is a new case or new cause of action under the Texas Family Code. *In re Honea*, 415 S.W.3d 888, 890–91 (Tex. App.—Eastland 2013, orig. proceeding); *Bilyeu v. Bilyeu*, 86 S.W.3d 278, 280 (Tex. App.—Austin 2002, no pet.); *Normand v. Fox*, 940 S.W.2d 401, 403 (Tex. App.—Waco 1997, no writ); *see also* TEX. FAM. CODE ANN. § 156.004 (Westlaw, Westlaw through Ch. 49, 2017 R.S.); *In re L.A.F.*, No. 05-12-00141-CV, 2015 WL 4099760, at *2 (Tex. App.—Dallas July 7, 2015, no pet.) (mem. op.). Further, in a suit affecting the parent-child relationship, "[t]here is no authority that an assignment order entered in a previous case between the parties governs a subsequent case." *In re Honea*, 415 S.W.3d at 891. Accordingly, relator's consent to the respondent serving as an assigned judge in the previous proceedings between the parties has no bearing on the new suit filed by relator in 2016 insofar as relator's pleading sought, inter alia, modification of an order previously rendered in that case. *See id.*

abused his discretion in overruling relator's timely objection to his assignment as the judge in the current proceeding and by continuing to preside over the case. *See id.* § 74.053(b); *In re Canales*, 52 S.W.3d at 701; *Flores*, 932 S.W.2d at 501. The orders entered by the respondent in this case following the relator's objection constitute void orders and therefore must be set aside. *See In re Canales*, 52 S.W.3d at 701.

V. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the responses filed by the OAG and Christine, relator's reply, and the applicable law, is of the opinion that the relator has met his burden to obtain mandamus relief. Relator's objection to the respondent was timely and the respondent had a mandatory obligation to withdraw from the case. Accordingly, we lift the stay previously imposed in this cause. *See* TEX. R. APP. P. 52.10(b) ("Unless vacated or modified, an order granting temporary relief is effective until the case is finally decided."). We CONDITIONALLY GRANT the petition for writ of mandamus and direct the respondent to vacate the orders that it has issued since June 6, 2016 and to withdraw from any further proceedings in this matter. Our writ will issue only if the respondent fails to comply. We DISMISS AS MOOT Christine's motion for emergency relief and request to expedite the disposition of this original proceeding.

NORA L. LONGORIA
Justice

Delivered and filed the
27th day of June, 2017.