NUMBER 13-19-00537-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

IN RE ALMA RODRIGUEZ MEDINA

On Petition for Writ of Mandamus.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Hinojosa and Tijerina
Memorandum Opinion by Justice Hinojosa[1]

Relator Alma Rodriguez Medina filed a petition for writ of mandamus seeking to compel the trial court[2] to vacate two orders signed on September 17, 2019 granting a special appearance in favor of real party in interest Levi Medina Sanchez (Levi). Because

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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."); *see also id.* R. 47.4 (distinguishing opinions and memorandum opinions).

[2] This original proceeding arises from trial court cause number 2017-DCL-07179 in the 445th District Court of Cameron County, Texas, and the respondent is the Honorable Gloria Rincones. *See id.* R. 52.2.

we conclude that Levi waived his special appearance, we conditionally grant the petition for writ of mandamus.

I. BACKGROUND

This original proceeding arises from divorce proceedings pending in Cameron County, Texas. In her "Second Amended Original Petition for Divorce With Temporary Restraining Order," relator alleged that: she was a domiciliary of Texas; she and Levi were married on or about February 2, 2006; and they ceased living together as spouses on or about October 1, 2017. Through this petition, relator sought a divorce from Levi, including the division of community property, and relator additionally included causes of action against Levi and his children, Levi Medina Sanchez Jr. (Levi Jr.), Judy Torres, Josafat Medina, Jennifer Medina, and Joshua Medina, for assault, intentional infliction of emotional distress, and breach of fiduciary duty. She sought actual and exemplary damages, a temporary restraining order, and injunctive relief. The petition alleged, in part, that Levi improperly transferred 1001 Marrs Street in Brownsville, Texas, to his son when the property was "100% community property, purchased during the marriage." This pleading recited that Levi "resides at 1720 Westminster Rd., Brownsville, Cameron County, Texas 78521" and stated that process should be served on Levi at that address "or wherever he may be found."

Relator was unable to obtain service of process on Levi at the Westminster address and filed an amended motion to obtain substitute service. She alleged that civil process server Rogerio Lopez attempted to serve Levi at the Westminster address on three different occasions. According to Lopez's affidavit, which was filed in support of relator's motion for substituted service, Lopez contacted Levi Jr. at that address "and was

advised that his father was not available and would return the following afternoon." Lopez made two further visits to the Westminster residence to no avail. The trial court granted relator's motion and allowed substitute service on Levi by leaving the citation at the Westminster address attached to the front entry of the residence.

On December 6, 2017, Levi's son Levi Jr. filed a "special appearance" in which he "object[ed] to the jurisdiction of the Court over the person of Alma Rodriguez Medina on the ground that such person is not amenable to process issued by the courts of this State as shown in the verification." *See* TEX. FAM. CODE ANN. § 6.301 (stating that a suit for divorce may not be maintained in this state unless, at the time of suit, either the petitioner or the respondent has been a domiciliary of this state for the proceeding six-month period and a resident of the county in which the suit is filed for the preceding ninety-day period). The record does not indicate that any further proceedings were held regarding this motion, and Levi's son was subsequently nonsuited from the case.

On April 5, 2018, Levi filed "Respondent's Third Special Appearance Under TRCP 120a With Notice of Newly Retained Counsel (All Subject to 120a)." This pleading apprised the parties that Levi had retained new counsel, who was entering his appearance "subject to all the 120a Special Appearances . . . previously filed in this case." This pleading states that "[a]t all times herein, Respondent has previously filed 120a Special Appearances in this cause." The pleading does not otherwise address Levi's special appearance or personal jurisdiction over his person or property. Although this pleading is entitled as the "Third" Special Appearance, the record before the Court does not contain any previous special appearance filed by Levi. The docket sheet, included in the mandamus record, indicates that no such document was ever filed. In this

proceeding, Levi explains that this pleading constituted "a second appearance filed by the litigants in the case, but it was mislabeled 'Third Special Appearance.'"

On April 5, 2018, Levi also filed "Respondent's Verified Plea in Abatement, Verified Plea to the [Jurisdiction]/Motion to Quash 106 Order Pending 'Hague-Compliant' Service of Process (All Subject to 120 Special Appearances)." This pleading again reiterated that "[a]t all times herein, Respondent has previously filed 120a Special Appearances in this cause." Levi alleged that he was not served in accordance with the dictates of the Hague Convention, which he alleges "apply in all civil and commercial matters where there are foreign Respondents that do not transact, nor maintain, a presence in Texas." Levi asserted that he did not transact business in Texas, maintain a business in Texas, or reside in Texas, therefore, relator was required to serve him in accordance with the Hague Convention. This pleading asserted that the trial court lacked personal jurisdiction over Levi, as a resident and citizen of Mexico, because he was not properly served under the Hague Convention, and argued that accordingly, the "temporary orders and/or temporary injunction" previously issued in the case were void.[3] Levi asserted that "[b]ecause [he] was not in Texas but rather was in Mexico at all relevant times, it was error for the trial court to deny the Special Appearances filed by [previous counsel] and to enter Temporary Orders, particularly since [relator] has failed to satisfy the Hague Convention and thus [Levi] was not amenable to service from Texas." In his prayer for relief, Levi "respectfully asks that this cause be abated, that the alleged citation and service of process thereon be quashed as being defective, and that service be perfected in accordance with [the] Hague Convention." This pleading was supported by Levi's "Declaration" that the

[3] The record before the Court does not contain these orders. *See id.* R. 52.7.

allegations in this pleading were true and correct. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 132.001. Levi's "Declaration" further stated:

> My date of birth is [February] 25, 1949, and I live in . . . Matamoros, Tamaulipas, Mexico.
>
> I was born in Matamoros, Mexico. I further declare under penalty of perjury that the foregoing is true and correct.
>
> I am a citizen of the Mexican Republic. I live in Mexico. I am not a US Citizen, nor a US Resident.
>
> I was deported from the United States of America on [February] 21, 2006, for not having any legal status in the country.
>
> I understand the Petitioner wants to get divorced and has made all kinds of incredible allegations concerning our marriage and the origins of some separate property.
>
> I have yet to see the divorce papers and have yet to be served in conformance with the Hague Convention.
>
> I have yet to receive the petition translated into Spanish, as well as the citation.
>
> I have not been explained whether the purported time to respond to the petition, once served, distinguishes between calendar days or business days.
>
> I have yet to see whether the translated documents were forwarded to the Texas Secretary of State, as required by the Hague Convention.
>
> I have yet to see where the Texas Secretary of State forwarded the translated [petition] and citation to Mexico's Central Authority, or MCA, which is my country's administering agency for the Hague Convention.
>
> I have yet to see the Hague Service Convention form, USM 94.
>
> I have yet to see the translated USM 94 form.
>
> I have yet to see the clerk's seal on the USM 94 form, nor have received any paperwork, including 'Exhortos or Cartas Rogatorias Internacionales,'
>
> . . . .

On May 7, 2018, relator filed "Petitioner's Response to Respondent's Plea to Jurisdiction." Relator asserted that Levi "is contesting this court's jurisdiction alleging that substituted service on Respondent is improper due to the fact that he is a resident of Mexico" and that Levi "contends that he must be served with citation according to the provisions of [t]he Hague Convention because he is a resident of Mexico." She further provided argument and factual allegations in support of the trial court's jurisdiction over Levi. She specifically argued that Levi's assertions that he does not transact business in Texas or maintain a business in Texas are false. She supported these allegations with an Affidavit of Business Records from the Brownsville Housing Authority, with attached records, which she alleged "proves quite clearly that [Levi] is engaged in business in Brownsville, Texas as an organized church and for the rental of residential property." Relator asserted that Levi was subject to special and general jurisdiction in Texas because he, inter alia: married a Texas citizen in Texas, maintains bank accounts in Texas and conducts business through these bank accounts, and was "continuously and systematically conducting his residential rental business" using four separate Texas properties. Relator explained that Levi was deported from the United States "with little or no possibility of return" after a jury trial in Cameron County resulted in his conviction for the felony charge of injury to a child. Relator supported these allegations with her verification, which further stated:

> [Levi] has consistently maintained an interest in . . . properties in Texas by which [he] conducts a residential real property rental business in Cameron County, Texas. Respondent sends his sons as his agents to the Cameron County residential real property rental properties to collect the rents, maintain the propert[ies], pay the taxes; and [Levi] has applied for and received Section 8 Housing benefits with the Brownsville Housing Authority. These records show that [Levi] has even written the BHA to redirect payments from me after learning of the Petition for Divorce filed in this

> Court. [Levi] has availed himself of the laws, rules and regulations of the State of Texas and the United States of America and has asserted falsely that he should not be responsible to the jurisdiction of this Court.

On March 4, 2019, relator filed "Petitioner Alma Rodriguez Medina's Objections to and Motion to Strike Respondent's Third Special Appearance and Verified Pleas, Response to Respondent's Third Special Appearance, and Amended Response to Respondent's Verified Pleas." This pleading noted that the parties had into entered a Rule 11 agreement on August 17, 2018, to pass the hearing on Levi's Third Special Appearance and Levi's verified pleas subject to mediation. Relator asserted that the parties had not mediated and requested that these matters be set for hearing. She further objected to the "form and substance" of the Third Special Appearance. She urged that Levi's unsworn declaration failed to meet the requirements of Rule 120 of the Texas Rules of Civil Procedure for a "sworn motion" and that "the evidentiary substance of . . . the unsworn declaration [was] immaterial to a special appearance because it solely addresses facts related to service of process." She moved to strike Levi's verified pleas. She stated that his verification was false because Levi "is engaged in business in Brownsville, Texas as an organized church and for the rental of residential property." She argued, inter alia, that Levi had waived his special appearance because (1) he filed a motion to quash attacking service instead of a special appearance contesting jurisdiction, and (2) he intentionally delayed securing a hearing and ruling on his Third Special Appearance. In addition to the foregoing matters, relator also briefed the facts and law pertaining to general and specific jurisdiction over Levi.

On August 6, 2019, the trial court held a hearing on these pending issues. At the hearing, counsel for Levi informed the trial court that "The only issue this morning is

whether or not proper service of process has been effectuate[d] on a Mexican National residing in Mexico since 2006." After further discussion, the trial court entertained testimony from Lopez, the process server who attempted service on Levi, and from relator. Lopez generally reiterated the allegations regarding service on Levi that he had previously made in his affidavit.

Relator testified that she married Levi, a Mexican national, in 2006 in Brownsville, Texas at Restauracion y Poder Church. She testified that Levi had previously lived in Brownsville, Texas. She testified they never resided in Cameron County or the United States as a couple because their residence was in Matamoros, Mexico. Relator testified that Levi was deported in 2006, and after deportation, he unsuccessfully attempted to return to the United States.

Relator testified that Levi's deportation in 2006 did not prevent him from continuing to do business in Brownsville, Texas. Relator testified that Levi maintained a bank account at Compass Bank in Brownsville, Texas and that both of their names were on that account. She further testified that Levi owned several properties in Brownsville, Texas, and the rental income from those properties were paid into the Compass account and the expenses and taxes for those properties were paid from that account. She testified that the Brownsville properties were owned jointly by herself and Levi. Relator testified that Levi continued to purchase property in the United States after his deportation. Relator testified that Levi owned other properties in Mexico, but those were his separate property, and income from those properties was not deposited into the Compass account.

At the conclusion of the hearing, the trial court took these matters under advisement and allowed the parties to file additional briefing.

On August 7, 2019, Levi filed "Respondent's Memorandum of Law in Support of Special Appearance, Motion to Abate and Motion to Quash 106 Service." In relevant part, Levi's memorandum states:

> The issue in this case is not whether there are sufficient minimum contacts to subject Levi Medina Sanchez to jurisdiction in Texas. There is!
>
> However, that's not the issue in front of the court, at this moment.
>
> The issue is the following:
>
> Has this Hon. Court obtained personal jurisdiction over Respondent? Has Levi Medina been properly served as required by the Hague Convention?
>
> Answer: No, he has not.
>
> The second issue is Can Levi Medina Sanchez waive service and his special appearance because he raised a Motion to Quash?
>
> Answer: No!

The memorandum asserted that Levi filed his challenges to the court's personal jurisdiction all subject to his 120a special appearance. This memorandum reiterated that Levi had been living in Mexico since early 2006, that he has never returned, that "the only way to subject him to litigation in Texas is to get him properly served," and that service on a defendant within the borders of Mexico must be sent directly to Mexico's Central Authority under the Hague Convention. Levi thus asserted that "[f]or these reasons, the Court must sustain Respondent's Special Appearance and quash the 106 service for violating the Hague Convention and further order Petitioner to properly serve Respondent and further order these matters abated until the Hague Convention has been complied with."

That same day, relator filed "Petitioner Alma Rodriguez Medina's Post Hearing Brief." According to this brief, relator alleged that Levi "filed a defective special appearance by virtue of [his] unsworn declaration, immaterial to the issue of personal jurisdiction and [in] direct violation of Rule 120a." Relator further argued that Levi waived his special appearance by taking actions "to prevent the Court from hearing and ruling on his Third Special Appearance." Finally, relator asserted that the trial court had jurisdiction over Levi as a result of his "substantial contacts with Texas" and that exercise of jurisdiction over Levi did not "offend traditional notions of fair play and substantial justice."

On September 17, 2019, the trial court signed (1) an order denying relator's objections to and motion to strike Levi's special appearance and granting Levi's "Third Special Appearance" and (2) a separate order granting Levi's special appearance.

This original proceeding ensued. By one issue, relator contends that the trial court erred by granting Levi's special appearance because: (a) Levi admitted that he has contacts with Texas sufficient to subject him to personal jurisdiction in Texas; (b) he made a general appearance in the case; (c) he did not negate relator's jurisdictional allegations; and (d) in addition to his "admission" of sufficient contacts with Texas, the "undisputed evidence makes clear that a Texas court has personal jurisdiction over him (he owns real property in Texas—property that is the subject of [relator's] Alma Rodriguez Medina's Divorce Action)."

This Court requested and received a response to the petition for writ of mandamus from Levi. He asserts that "[s]ince being deported 13 years ago back to Mexico, Levi Sanchez Medina, a Mexican National, has not set foot in the United States and has never waived his Special Appearance." Levi specifically argues that: (a) filing a motion to quash

does not waive a special appearance; (b) his special appearance was properly supported by his signed declaration as allowed by statute; (c) he "had no hand in delaying the hearing on his special appearance"; and (d) valid service of process must occur before engaging in a minimum contacts analysis. Levi further asserts that the trial court was correct in sustaining his special appearance because he has not been served with process pursuant to the Hague Convention.

Relator filed a reply to Levi's response. She asserts that because Levi's response to the petition for writ of mandamus does not controvert the fact that he has sufficient contacts with Texas for in jurisdiction in Texas, his response does not overcome her contention that the trial court erred when it granted his special appearance.

II. MANDAMUS

Mandamus is an extraordinary remedy issued at the discretion of the court. *In re Garza*, 544 S.W.3d 836, 840 (Tex. 2018) (orig. proceeding) (per curiam). To obtain relief by writ of mandamus, a relator must establish that an underlying order is void or is a clear abuse of discretion and there is no adequate appellate remedy. *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 712 (Tex. 2016) (orig. proceeding); *see In re Prudential Ins. Co. of Am.*, 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).

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 at 712; *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 at 136.

An order granting or denying a special appearance under Rule 120a is subject to interlocutory appeal "except in a suit brought under the Family Code." TEX. CIV. PRAC. & REM. CODE ANN. § 51.014. Texas courts have concluded that mandamus is available to review a trial court's ruling on a special appearance in family law contexts because there is no interlocutory review of such orders. *In re Swart*, 581 S.W.3d 844, 847–48 (Tex. App.—Dallas 2019, orig. proceeding) (concluding that mandamus was proper to review the domicile requirement in a divorce proceeding); *In re Milton*, 420 S.W.3d 245, 253 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (concluding that mandamus was proper to review the denial of a special appearance and a motion to dismiss in a divorce and SAPCR proceeding); *In re Green*, 385 S.W.3d 665, 671 (Tex. App.—San Antonio 2012, orig. proceeding) (concluding that mandamus relief was appropriate to review an order denying a motion to dismiss divorce proceedings based on the failure to establish the residency requirement); *see also In re Lee-Cole*, No. 12-17-00179-CV, 2017 WL 3048488, at *2 (Tex. App.—Tyler July 19, 2017, orig. proceeding) (mem. op.) (reviewing the denial of a plea in abatement as to the residency and domiciliary requirements in a divorce proceeding). Absent mandamus review, jurisdictional and other similar issues, including a party's claimed due process right to avoid the obligation of answering or appearing at trial, would be rendered effectively meaningless. *In re Swart*, 581 S.W.3d at 847–48; *see In re Prudential*, 148 S.W.3d at 136 (discussing the adequacy of an appeal from final judgment in connection with mandamus review of legal determinations).

Accordingly, we conclude that there is no adequate remedy by appeal and we proceed with our review of the substantive allegations made by relator.

III. SPECIAL APPEARANCE

Because it is a question of law, we perform a de novo review of a trial court's decision on a special appearance. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016); *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 805–06 (Tex. 2002). Courts have personal jurisdiction over a defendant when two criteria are satisfied: (1) the Texas long arm statute must grant jurisdiction; and (2) the exercise of jurisdiction must comport with federal and state constitutional guarantees of due process. *Searcy*, 496 S.W.3d at 66. The Texas long arm statute provides for personal jurisdiction that extends to the limits of the United States Constitution, and so federal due process requirements shape the contours of Texas courts' jurisdictional reach. *Id.* Whether a trial court's exercise of jurisdiction is consistent with due process requirements turns on two requirements: (1) the defendant must have established minimum contacts with the forum state; and (2) the assertion of jurisdiction cannot offend traditional notions of fair play and substantial justice. *Id.* Sufficient minimum contacts exist when the nonresident defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id* at 67. We determine whether a nonresident defendant's conduct in and connection with Texas are such that he could reasonably anticipate being haled into court here. *Id.*

A special appearance, properly entered, enables a non-resident defendant to object to personal jurisdiction in a Texas court. TEX. R. CIV. P. 120a. However, a non-resident defendant may be subject to personal jurisdiction in Texas courts if the defendant

enters a general appearance. *See id*. R. 120; *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex.1985) (per curiam); *Boyd v. Kobierowski*, 283 S.W.3d 19, 21 (Tex. App.—San Antonio 2009, no pet.). A general appearance entered before a special appearance waives the special appearance. *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 304–05 (Tex. 2004) (per curiam); *Boyd*, 238 S.W.3d at 21; *Seals v. Upper Trinity Reg'l Water Dist.*, 145 S.W.3d 291, 299 (Tex. App.—Fort Worth 2004, pet. dism'd); *see also* TEX. R. CIV. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with [the special appearance] rule is a general appearance.").

A non-resident defendant may enter a general appearance by seeking "the judgment of the court on any question other than the court's jurisdiction." *Exito Elecs. Co.*, 142 S.W.3d at 304; *Boyd*, 283 S.W.3d at 22. Nevertheless, parties may raise issues in the same instrument and subsequent matters subject to the special appearance without an express statement to that effect for each matter. *Dawson–Austin v. Austin*, 968 S.W.2d 319, 322 (Tex. 1998), *HMS Aviation v. Layale Enters., S.A.*, 149 S.W.3d 182, 188 (Tex. App.—Fort Worth 2004, no pet.).

Under the rules of civil procedure, a special appearance may be made by any party "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State." TEX. R. CIV. P. 120a. The phrase "not amenable to process issued by the courts of this state" is interpreted to mean that the special appearance is available only to establish that a Texas court cannot validly obtain jurisdiction over the person or the property of the defendant with regard to the cause of action pled. *Kawasaki Steel Corp.*, 699 S.W.2d at 202 (quoting E. Wayne Thode, *In Personam Jurisdiction:*

Article 2031(b), the Texas Longarm Statute; and the Appearance to Challenge Jurisdiction in Texas and Elsewhere, 42 TEX. L. REV. 279, 312–13 (1964)); *see HMS Aviation v. Layale Enterprises, S.A.*, 149 S.W.3d 182, 189 (Tex. App.—Fort Worth 2004, no pet.). "A curable defect in service of process does not affect a nonresident defendant's amenability to service of process." *Kawasaki Steel Corp.*, 699 S.W.2d at 202. A complaint that a defendant was not served in accordance with the Hague Convention is a complaint regarding a curable defect in service of process. *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 246 (Tex. App.—Houston [1st Dist.] 2004, pet. denied*); see also Vitro Packaging de Mexico, S.A. de C.V. v. Dubiel*, No. 05-17-00258-CV, 2017 WL 6349708, at *2–3 (Tex. App.—Dallas Dec. 13, 2017, pet. denied) (mem. op.). Complaints regarding defective service of process do not defeat a nonresident's amenability to the court's process and thus should be raised by a motion to quash and not by special appearance. *Kawasaki Steel Corp.*, 699 S.W.2d at 202–03; *see also Vitro Packaging de Mexico, S.A. de C.V.*, 2017 WL 6349708, at *2–3.

IV. ANALYSIS

Because we consider it dispositive, we begin our analysis with relator's assertion that Levi waived his special appearance by filing in substance a motion to quash wherein he complained about service rather than addressing his amenability to service. In this proceeding, Levi concedes that his son filed the first special appearance in this case and asserts that he "filed his own Special Appearance with 'Notice of Appearance of Counsel,' the undersigned," and provides citation to the "Respondent's Third Special Appearance under TRCP 120a With Notice of newly Retained Counsel (All Subject to 120a)." As stated previously, Levi asserts that this "would be a second appearance filed by the

litigants in the case, but it was mislabeled 'Third Special Appearance.'" We note that the special appearance filed by Levi Jr. does not address jurisdiction over Levi. Levi further asserts that his arguments regarding whether service had been properly effectuated on him under the Hague Convention did not waive his special appearance. In conducting our examination of this issue, we confine our review to the validity of the trial court's ruling on the special appearance and do not address the validity of the service of process on Levi because that issue is not before the Court in this original proceeding. *See In re T.M.E.*, 565 S.W.3d 383, 392 (Tex. App.—Texarkana 2018, no pet.) (stating that "under the Hague Service Convention, a Mexican national . . . can be served in Mexico with a foreign proceeding only through the Central Authority of Mexico").

We examine Levi's pleadings to determine if he properly asserted a special appearance in accordance with Rule 120a. *See* TEX. R. CIV. P. 120a; *Exito Elecs. Co.*, 142 S.W.3d at 304. Under the rule, a special appearance is made by sworn motion "for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State." TEX. R. CIV. P. 120a.

The Texas Supreme Court has directed us to examine the substance of the relief sought by a pleading despite the formal styling of the pleading. *In re J.Z.P.*, 484 S.W.3d 924, 925 (Tex. 2016) (per curiam); *Ryland Enter., Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011) (per curiam*); see generally State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980) (orig. proceeding) ("We look to the substance of a plea for relief to determine the nature of the pleading, not merely at the form of title given to it."); *see also* TEX. R. CIV. P. 71. A motion's substance is determined from the body of the instrument

and its prayer for relief. *In re D.W.G.K.*, 558 S.W.3d 671, 682 (Tex. App.—Texarkana 2018, pet. denied); *Doctor v. Pardue*, 186 S.W.3d 4, 16 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Stated otherwise, the substance may be determined by what effect it will have on the proceeding if granted. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 35 (Tex. App.—Houston [14th Dist.] 2006, pet. denied); *Austin Neighborhoods Council, Inc. v. Bd. of Adjustment of City of Austin*, 644 S.W.2d 560, 565 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

This doctrine applies in the special appearance context. *See*, *e.g.*, *Huynh v. Nguyen*, 180 S.W.3d 608, 616–17 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (construing a "motion to dismiss" as a special appearance "because it seeks dismissal based on lack of personal jurisdiction"); *N803RA, Inc. v. Hammer*, 11 S.W.3d 363, 366 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (dismissing the case after a Florida defendant sent a letter to the district clerk seeking "dismissal" based on contacts with Florida and the court treated the letter as a special appearance); *see also Windsor v. Round*, No. 10-14-00355-CV, 2019 WL 4072551, at *2 (Tex. App.—Waco Aug. 28, 2019, no pet.) (mem. op.) ("Although not stated in the title, Round made a special appearance in the substance of this document because he challenged the trial court's personal jurisdiction over him."); *Mays v. Dallas Cty.*, No. 06-16-00067-CV, 2017 WL 1739765, at *2 (Tex. App.—Texarkana May 3, 2017, pet. denied) (mem. op.) (construing a pleading purporting to be a special appearance as a motion to quash citation); *Goad v. Hancock Bank*, No. 14-13-00861-CV, 2015 WL 1640530, at *2 (Tex. App.—Houston [14th Dist.] Apr. 9, 2015, pet. denied) (mem. op.) ("Although Goad styles his request for relief as a special appearance under Rule 120a of the Texas Rules of Civil Procedure, the

substance of his complaint is that the trial court should have dismissed the suit based on the parties' contractual agreement.").

We begin by examining the "Respondent's Third Special Appearance under TRCP 120a With Notice of newly Retained Counsel (All Subject to 120a)." Here, Levi asserts that he has previously filed special appearances; however, as stated above, the record shows otherwise. The body of the instrument merely references the appearance of newly retained counsel, and there is no prayer for relief. *See In re J.Z.P.*, 484 S.W.3d at 925; *In re D.W.G.K.*, 558 S.W.3d at 682; *Doctor*, 186 S.W.3d at 16. In fact, this pleading lacks any request for affirmative relief. *See Hall*, 292 S.W.3d at 35. Accordingly, this pleading, although entitled as a special appearance, does not constitute a special appearance.

Next, we turn our attention to the "Respondent's Verified Plea in Abatement, Verified Plea to the [Jurisdiction]/Motion to Quash 106 Order Pending 'Hague-Compliant' Service of Process (All Subject to 120 Special Appearances)." Examining the substance of this document, we observe that Levi alleges that the trial court lacked personal jurisdiction over him "due to a lack of service" in accordance with the Hague Convention. In his prayer for relief, Levi asked that "this cause be abated, that the alleged citation and service of process thereon be quashed as being defective, and that service be perfected in accordance with the Hague Convention." If granted, this motion would not affect Levi's amenability to service of process; instead, it would ensure that process is served in accordance with the law. We conclude that this pleading does not comprise a special appearance.

A defendant does not consent to personal jurisdiction by including a challenge to the method of serving citation in its special appearance; however, if no special

appearance has been properly urged, an attack on defective service constitutes a general appearance. *GFTA Trendanalysen B.G.A. Herrdum GMBH & Co., K.G. v. Varme*, 991 S.W.2d 785, 786 (Tex. 1999) (per curiam). In *GFTA*, a German limited partnership (GFTA Partnership) filed a motion to dismiss pursuant to a special appearance challenging personal jurisdiction because the GFTA Partnership lacked minimum contacts in Texas. *Id.* The GFTA Partnership's motion also included a challenge to the method of service. *Id.* The GFTA Partnership alleged that it "was not amenable to service or suit because the method of service of citation violated the Due Process and Supremacy clauses of the United States Constitution," the Hague Service Convention, international laws, and the Texas Rules of Civil Procedure. *Id.* Interpreting its prior decision in *Kawasaki*, the supreme court held that a challenge to the method of service within a special appearance does not necessarily convert it into a general appearance. *Id.* (interpreting and discussing *Kawasaki Steel Corp.*, 699 S.W.2d at 203); *see also In re Marriage of Roman & Gonzalez*, No. 10-06-00023-CV, 2007 WL 1378493, at *1 (Tex. App.—Waco May 9, 2007, no pet.) (mem. op.) ("A special appearance motion that appropriately challenges personal jurisdiction is not converted into a general appearance merely because it also challenges the method of service."). The supreme court provided the following instruction regarding how we should interpret its opinion in *Kawasaki*:

> [A] mere challenge to the method of service fails as a special appearance and constitutes a general appearance. However, we did not hold [in *Kawasaki*] that a party waives a due process challenge for want of minimum contacts by challenging the method of service in the special appearance. To the contrary, although the defendant in Kawasaki had challenged the method of service in its special appearance, we did not suggest that the defendant had thereby waived its consent to jurisdiction based on minimum contacts. Instead, we carefully reviewed the record of the defendant's contacts with the forum before holding the defendant was amenable to suit.

GFTA, 991 S.W.2d at 786; *see Kawasaki Steel Corp*., 699 S.W.2d at 203. Because the GFTA Partnership "challenged jurisdiction and did not seek the trial court's decision on any other matter," the GFTA Partnership did not generally appear and consent to suit. *GFTA*, 991 S.W.2d at 786.

In short, a motion to quash does not function as a special appearance. *See id*.; *Kawasaki Steel Corp*., 699 S.W.2d at 201–02; *see also* TEX. R. CIV. P. 123 (when a judgment is reversed on appeal for failed or defective service of process, no new service is required because "the defendant shall be presumed to have entered his appearance"); *Summersett v. Jaiyeola*, 438 S.W.3d 84, 92 (Tex. App.—Corpus Christi–Edinburg 2013, pet. denied) ("Any defect in service is cured by a general appearance."); *see also Roberts v. Mariner Vill. Condo. Ass'n, Inc.*, No. 14-16-00021-CV, 2017 WL 89405, at *2 (Tex. App.—Houston [14th Dist.] Jan. 10, 2017, no pet.) (mem. op.) (stating that "by filing a motion to quash citation, a defendant appears in a case").

Here, Levi filed pleas and motions attacking an alleged defect in service; however, he did not file a special appearance. Levi's pleadings do not challenge his amenability to service or otherwise negate all grounds for personal jurisdiction alleged by relator. And, because no special appearance has been properly urged, Levi's attack on defective service constitutes a general appearance. *See GFTA*, 991 S.W.2d at 786; *Kawasaki Steel Corp*., 699 S.W.2d at 201–02. Thus, Levi has waived his objection to personal jurisdiction.[4]

[4] Even if we were to conclude that Levi's pleadings constituted a special appearance, it would have been error for the trial court to grant it. The Texas Family Code provides that Texas courts may exercise personal jurisdiction over a nonresident spouse if, in relevant part, there is a basis consistent with the state and federal constitutions for the exercise of personal jurisdiction. *See* TEX. FAM. CODE ANN. § 6.305(a); *Stallworth v. Stallworth*, 201 S.W.3d 338, 343 (Tex. App.—Dallas 2006, no pet.). Here, Levi resided in Texas for some period of time prior to deportation, married in Texas, and owns multiple properties in Texas which he utilizes for rental income. Under the applicable law, it would appear that Levi has had intentional

We sustain relator's first issue contending that Levi made a general appearance by filing pleadings attacking service of process rather than jurisdiction. Having so ruled, we need not address relator's remaining contentions. *See* TEX. R. APP. P. 47.1, 47.4.

V. CONCLUSION

The Court, having examined and fully considered the petition for writ of mandamus, the response, the reply, and the record presented, is of the opinion that the relator has met her burden to obtain mandamus relief. Accordingly, we conditionally grant the writ of mandamus and direct the respondent to vacate the September 17, 2019 orders granting Levi's special appearance. Our writ will issue only in the event that the trial court fails to promptly comply.

LETICIA HINOJOSA
Justice

Delivered and filed the
18th day of December, 2019.

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and purposeful contacts with Texas. *See Aduli v. Aduli*, 368 S.W.3d 805, 816 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (concluding that the Texas court had personal jurisdiction over the husband where he purchased, furnished, and made mortgage and utility payments a condominium in Houston; visited Houston several times a month for a few days at a time; and sent the wife money in Texas monthly); *Griffith v. Griffith*, 341 S.W.3d 43, 49 (Tex. App.—San Antonio 2011, no pet.) (concluding that the Texas court had jurisdiction over husband after his departure from the State when he, inter alia, visited and purchased real property and vehicles there); *Reynolds v. Reynolds*, 2 S.W.3d 429, 430 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (concluding that the Texas court had jurisdiction over the husband where the husband lived in Texas for two years, then left Texas after separation but continued to mail his wife money in Texas for mortgage, home insurance, and car insurance payments). And, the record is devoid of any indication that exercising personal jurisdiction over him would offend traditional notions of fair play and substantial justice. *See Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016).