NO. 12-17-00155-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN THE INTEREST OF	***§***	
A.E. AND G.R.,	***§***	***ORIGINAL PROCEEDING***
CHILDREN	***§***	

MEMORANDUM OPINION

Relator R.R., acting pro se, filed this petition for writ of mandamus, contending that the trial court erred by failing to take appropriate action after the Relator filed a motion to disqualify and by failing to sign an order after the adversary hearing. Relator also argues that the trial court misapplied or violated various laws and constitutional protections. We deny the petition.[1]

BACKGROUND

R.R. and M.E.[2] are the parents of G.R. On January 9, 2017, the Department of Family and Protective Services (the Department) filed an original petition for protection of A. E.[3] and G.R., for conservatorship, and for termination of R.R.'s and M.E.'s parental rights. After the adversary hearing, the trial court appointed the Department as temporary managing conservator of the child. Both parents were appointed possessory conservators and granted supervised visitation. On March 3, 2017, R.R. filed an objection to the phase plan and a motion to dismiss the Department's suit, alleging that his caseworker told him that he was required to attend Co-Dependents Anonymous (CoDa) meetings. He stated that the trial court and the Department were "flagrantly violating state and federal law" by requiring that he attend CoDa because it is a twelve step program based

[1] The real party in interest is the Department of Family and Protective Services. The Respondent is the Honorable Carole Clark, Judge of the 321st District Court, Smith County, Texas.

[2] M.E. is not a party to this proceeding.

[3] A.E. is the child of M.E. and A.A., and is not a subject of this proceeding.

on a religious concept of a "Higher Power." Six days later, R.R. filed an objection to the Department's phase plan requiring him to attend counseling, psychological evaluation, and anger management. There is no record of the trial court's ruling on these objections.

On March 20, R.R. filed a counterclaim and third party joinder, requesting that Respondent, among others, be joined to the suit and requesting declaratory relief, injunctive relief, and monetary damages. The Department filed a motion to dismiss. On May 2, 2017, two days before the hearing on R.R.'s counterclaim and third party joinder, he filed an objection to the pauper's oath hearing and a motion to disqualify Respondent. R.R.'s counterclaim and motion were set for hearing, but he did not appear. Respondent dismissed R.R.'s counterclaim and third party joinder, and dismissed R.R.'s motion to disqualify for want of prosecution. Later, however, Respondent declined to recuse herself and requested the Presiding Judge of the First Administrative Judicial Region to assign a judge to hear R.R.'s motion to recuse. That presiding judge assigned a judge to hear the motion to recuse and to hear any matters relating to the motion to dismiss third party joinder of Respondent. This original proceeding followed.

AVAILABILITY OF MANDAMUS

Mandamus relief is available when, under the circumstances of the case, the facts and law permit the trial court to make but one decision—and the trial court has refused to make that decision—and remedy by appeal to correct the ruling is inadequate. ***Proffer v. Yates***, 734 S.W.2d 671, 673 (Tex. 1987). Mandamus is allowed under the Texas Family Code under these circumstances. *See* ***In re Knotts***, 62 SW.3d 922, 923 n.1 (Tex. App.–Texarkana 2001, orig. proceeding).

To be entitled to mandamus relief, R.R. must establish a trial court clearly abused its discretion and he lacks an adequate remedy by appeal. ***In re Green***, 385 S.W.3d 665, 668 (Tex. App.–San Antonio 2012, orig. proceeding) (*citing* ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)). An abuse of discretion with respect to factual matters occurs if the record establishes the trial court could reasonably have reached only one decision. ***Id.*** at 668–69 (*citing* ***Walker v. Packer***, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

MOTION TO DISQUALIFY

In his first issue, R.R. argues that after he filed a motion to disqualify the Respondent, the Respondent's only options were to sign an order of recusal or refer the motion to the regional presiding judge. He complains that Respondent failed to do so.

Applicable Law

A judge must recuse in any proceeding in which the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party; is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or is to the judge's knowledge likely to be a material witness in the proceeding. *See* TEX. R. CIV. P. 18b(b)(7). An order denying a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment. *See* TEX. R. CIV. P. 18a(j)(1)(A). Thus, it is an unappealable interlocutory order. ***Hawkins v. Walker***, 233 S.W.3d 380, 401 (Tex. App.—Fort Worth 2007, no pet.).

A judge must disqualify in any proceeding in which (1) the judge has served as a lawyer in the matter in controversy, or a lawyer which whom the judge previously practiced law served during such association as a lawyer concerning the matter; (2) the judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy; or (3) either of the parties may be related to the judge by affinity or consanguinity within the third degree. *See* TEX. R. CIV. P. 18b(a). An order granting or denying a motion to disqualify may be reviewed by mandamus and may be appealed in accordance with the law. *See* TEX. R. CIV. P. 18a(j)(2). Disqualification cannot be waived but can be raised at any time. ***Buckholts Indep. Sch. Dist. v. Glaser***, 632 S.W.2d 146, 148 (Tex. 1982). After a motion to recuse or disqualify is filed, the respondent judge, within three business days after the motion is filed, must either sign and file with the clerk an order of recusal or disqualification or sign and file with the clerk an order referring the motion to the regional presiding judge. *See* TEX. R. CIV. P. 18a(f)(1).

Analysis

We must first determine whether R.R.'s motion is a motion to recuse or a motion to disqualify. In this case, R.R.'s motion is both. In his motion to disqualify, Relator alleges that Respondent is "disqualified" from hearing this case because "of consanguinity to herself and a financial interest in the outcome of the case." He specifically cites Texas Rule of Civil Procedure

18b(b)(7)(A), a ground for recusal. In his prayer for relief, Relator alleges that Respondent should be recused pursuant to Texas Rule of Civil Procedure 18b(b)(7)(A). As noted above, Relator has an adequate remedy by appeal regarding that portion of his motion pertaining to grounds for recusal. *See* TEX. R. CIV. P. 18a(j)(1)(A).

However, Relator also alleges grounds for Respondent's disqualification in his motion. Specifically, Relator alleges that Respondent is "disqualified" from hearing this case because "of consanguinity to herself and a financial interest in the outcome of the case." He states that Respondent has a financial interest in the outcome of the case because he filed a counterclaim and third party joinder against Respondent, and requested that Respondent be held liable for any costs. In his prayer for relief, he alleges that Respondent should be disqualified pursuant to Texas Rule of Civil Procedure 18b(a)(2) and (3). As noted above, a motion for disqualification may be reviewed by mandamus. *See* TEX. R. CIV. P. 18a(j)(2).

In his brief, however, Relator does not complain about the grounds of disqualification, but argues that Respondent did not sign an order of disqualification or sign an order referring the motion to the regional presiding judge. Here, Respondent set the motion for disqualification for hearing and Relator failed to appear. At that point, Respondent dismissed the motion for disqualification for want of prosecution, noting that Relator did not appear in order to urge his motion. However, approximately ten days later, Respondent signed an order referring Relator's "motion to recuse," and requesting that the Presiding Judge of the First Administrative Judicial Region assign a judge to hear the motion. The Presiding Judge did so, requesting the assigned judge to hear Relator's motion to recuse and to "hear any matters relating to a motion to dismiss third party joinder" of Respondent. As a result of Respondent's order of referral, this issue is now moot. *See* ***In re Watkins***, No. 05-12-00203-CV, 2012 WL 779658, at *1 (Tex. App.—Dallas Mar. 9, 2012, orig. proceeding) (mem. op.) (vacating standing order in question rendered issues presented in mandamus petition moot).

MISAPPLICATION OF THE LAW

In his second, third, and fourth issues, R.R. complains that Respondent misapplied or violated various laws and constitutional protections. In his second issue, R.R. argues that Respondent abused her discretion by interpreting section 261.001(1)(I) of the Texas Family Code in a manner contrary to the Department's interpretation. In his third issue, R.R. complains that

Respondent abused her discretion by granting the Department's petition for temporary managing conservatorship of G.R. based on a "disruption of the placement." In his fourth issue, R.R. argues that Article II, Section I of the Texas Constitution prohibited Respondent from undermining or interfering with the Department's "rulemaking authority."

However, we need not determine whether Relator is entitled to mandamus relief in these issues because he failed to make the necessary predicate request for relief in the trial court. "A party's right to mandamus relief generally requires a predicate request for some action and refusal of that request." ***In re Perritt***, 992 S.W.2d 444, 446 (Tex. 1999) (orig. proceeding) (per curiam). Relator did not file a motion objecting to Respondent's interpretation of section 261.001(1)(I) of the Texas Family Code, an objection to Respondent granting the Department's petition for temporary managing conservator as retaliation for Relator reporting alleged child abuse, or a motion regarding Respondent undermining or interfering with the state level Department's "rulemaking authority." Thus, the record contains no motions or objections regarding these issues, or resulting orders by the Respondent. *See* ***S.A.B. v. Schattman***, 838 S.W.2d 290, 295 (Tex. App.—Fort Worth 1992, orig. proceeding) (finding that respondent could not abuse his discretion on evidence not presented for review). Further, each ground falls outside Relator's second amended notice of accelerated appeal as none of these issues were the subject of temporary orders by the Respondent. Finally, to support his second and fourth issues, Relator relies exclusively on documents attached to his brief. These documents are not part of the appellate record and we may not consider them in our review. *See* ***Green v. Kaposta***, 152 S.W.3d 839, 841 (Tex. App.—Dallas 2005, no pet.). Thus, Relator has not established his entitlement to mandamus relief. Consequently, we deny Relator's petition for writ of mandamus pertaining to his second, third, and fourth issues.

ESTABLISHMENT CLAUSE

In his fifth issue, Relator complains that Respondent violated the Establishment Clause of the United States Constitution by ordering R.R. to participate in a religious program or conditioning the return of his child on his acceptance of a religious belief. "A party's right to mandamus relief generally requires a predicate request for some action and refusal of that request." ***In re Perritt***, 992 S.W.2d at 446. In two documents filed with the trial court, Relator objected to the service phase plan and its requirement that he attend and participate in CoDa.

Although the Relator requested that Respondent dismiss the suit or that he had been subjected to "harassment," the record contains no order by the Respondent refusing to dismiss the suit or denying Relator's objections to attending and participating in CoDa. *See* ***S.A.B.***, 838 S.W.2d at 295. Thus, Relator has not established his entitlement to mandamus relief. Consequently, we deny Relator's petition for writ of mandamus pertaining to his fifth issue.

ADVERSARIAL HEARING

In his sixth issue, R.R. argues that the "Law of the Case" doctrine requires that the case should be dismissed and G.R. be returned to him because there is no signed order from the adversarial hearing. After a full adversary hearing, the court shall issue an appropriate temporary order if the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that there is a continuing danger to the physical health or safety of the child and for the child to remain in the home is contrary to the welfare of the child. *See* TEX. FAM. CODE ANN. § 262.201(c) (West Supp. 2016). The subsequent reduction of a ruling to a written order signed by the court is a purely ministerial act. *See, e.g.*, ***Flores v. Onion***, 693 S.W.2d 756, 757-58 (Tex. App.–San Antonio 1985, orig. proceeding) (conditionally granting writ of mandamus requiring trial court to sign a "formal, typed decree" in accordance with previously rendered handwritten consent decree because signing of formal decree was merely ministerial act). Once a trial court pronounces its judgment or declares the content of its order, the act of committing the judgment or order to writing and signing it is a ministerial act. *See, e.g.*, ***Greene v. State***, 324 S.W.3d 276, 282 (Tex. App.–Austin 2010, no pet.); ***Alcantar v. Oklahoma Nat. Bank***, 47 S.W.3d 815, 821 (Tex. App.–Fort Worth 2001, no writ); ***Nicot–Bardeguez v. Fashing***, 718 S.W.2d 36, 38 (Tex. App.–El Paso 1986, orig. proceeding).

Here, Respondent held an adversary hearing and, upon its conclusion, appointed the Department as temporary managing conservator of the child. Further, both parents were appointed possessory conservators and granted supervised visitation. The record contains no order reducing Respondent's oral ruling to writing. Because Respondent pronounced her decision, the act of committing the order to writing and signing is a ministerial act. *See* ***Greene***, 324 S.W.3d at 282; ***Alcantar***, 47 S.W.3d at 821; ***Fashing***, 718 S.W.2d at 38. However, mandamus is not available to compel a trial court to perform an act if the action has not first been requested and then refused by the trial court. *See* ***In re Perritt***, 992 S.W.2d at 446. Here, Relator

has not established that he urged Respondent to sign a temporary order reflecting her decision as a result of the adversary hearing or that Respondent refused to do so. Consequently, we deny Relator's petition for writ of mandamus pertaining to his sixth issue.

DISPOSITION

Because Relator has not shown entitlement to mandamus relief, we ***deny*** his petition for writ of mandamus.

JAMES T. WORTHEN
Chief Justice

Opinion delivered November 8, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

NOVEMBER 8, 2017

NO. 12-17-00155-CV

R.R.,
Relator
V.
HON. CAROLE W. C LARK,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by **R.R.,** who is the relator in Cause No.16-1040-D, pending on the docket of the 321st Judicial District Court of Smith County, Texas. Said petition for writ of mandamus having been filed herein on May18, 2017, and the same having been duly considered, because it is the opinion of this Court that a writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **DENIED**.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.