NO. 12-17-00400-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	***§***	
MARGRET FONTAINE,	***§***	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

Relator, Margret Fontaine, filed this original proceeding in which she challenges the granting of a special appearance and dismissal of her guardianship proceeding.[1] We deny the writ.

BACKGROUND

In March 2016, Fontaine filed an application for appointment of temporary guardian of the person and estate of her father, Mitchel L. Horne, Sr., in Sabine County. Because the case was contested, it was transferred from county court to district court and given the cause number 13,218. Horne entered a general denial. According to a declaration of guardian in the event of later incapacity or need of guardian, signed March 28, Horne designated his stepson, Charles Rodney Pippin, as guardian and expressly disqualified Fontaine from serving as guardian. Pippin resides in Florida. On June 2, Respondent determined that Horne was not incapacitated. On June 13, Horne signed a statutory durable power of attorney, a medical power of attorney, and another declaration of guardian, all appointing Pippin. On August 26, Respondent signed an order memorializing its finding that Horne is not incapacitated.

Horne subsequently moved to Florida with Pippin and was placed in an assisted living facility on February 29, 2017. Fontaine filed an emergency motion for appointment as

[1] Respondent is the Honorable Craig M. Mixon, judge of the 1st Judicial District Court in Sabine County, Texas. The Real Party in Interest is Charles Rodney Pippin.

temporary guardian. On July 31, Fontaine filed an amended application for temporary guardianship and sought a restraining order and a temporary injunction. Respondent granted a temporary restraining order, which prohibited Pippin from (1) receiving, moving, transferring, spending, utilizing, and/or selling any of Horne's assets or property from certain facilities, (2) hiding or secreting Horne from Fontaine, and (3) moving Horne from the nursing home without notice to and approval from the court and all parties. Respondent also ordered that Horne be returned to Texas. On August 4, Pippin filed a petition for appointment of plenary guardian with the Fourteenth Judicial Circuit Court in Florida. At some point, Fontaine traveled to Florida and brought Horne back to Texas.

In September, Respondent denied Fontaine's application for a temporary injunction, noting that cause number 13,218 had been disposed of on June 2, 2016, i.e., the August 26, 2016 order. Accordingly, Fontaine filed applications for temporary and permanent guardianship in a new proceeding, cause number CV1713443. Pippin filed a special appearance. On October 31, Respondent signed an order granting the special appearance and dismissing the case. Respondent denied Fontaine's motion for reconsideration. This original proceeding was filed on December 21, 2017.

On February 5, 2018, the Florida judge signed an order appointing Pippin as Horne's guardian, both of the person and the estate. According to the court, the "parties concurred with the examining committee that the ward is now incapacitated and in need of appointment of a plenary guardian…[o]n December 13, 2017, the court entered an order determining that the ward is totally incapacitated." The judge noted that Horne executed a statutory durable power of attorney, a medical power of attorney, and a declaration of guardian in the event of later incapacity or need of guardian on June 13, 2016. The order further states that attorney Robert G. Neal and attorney ad litem Julie Conn testified that Horne was competent when he executed these documents and "[n]o persuasive evidence was presented rebutting this testimony[.]" When appointing Pippin as guardian, the Florida court stated:

> The court is required to appoint a designated standby guardian unless the court finds that it is contrary to the interest of the ward. In this case, Mitchel L. Horne, Sr., has designated Charles Rodney Pippin as standby guardian. The Court cannot simply ignore the wishes of the ward, and is indeed required to appoint Charles Rodney Pippin as Guardian of the ward.

PREREQUISITES TO MANDAMUS

Mandamus is an extraordinary remedy. ***In re Sw. Bell Tel. Co., L.P.***, 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding). A writ of mandamus will issue only when the relator has no adequate remedy by appeal and the trial court committed a clear abuse of discretion. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The relator has the burden of establishing both of these prerequisites. ***In re Fitzgerald***, 429 S.W.3d 886, 891 (Tex. App.—Tyler 2014, orig. proceeding.). "Mandamus will not issue when the law provides another plain, adequate, and complete remedy." ***In re Tex. Dep't of Family & Protective Servs.***, 210 S.W.3d 609, 613 (Tex. 2006) (orig. proceeding).

ADEQUATE REMEDY

According to Fontaine, Horne is a lifelong and continuous domiciliary of Texas, all of Horne's estate and assets are located in Texas, Horne's entire support system is in Texas, all witnesses, including experts, are located in Texas, Horne has no ties to Florida, Respondent is more familiar with the case than the Florida court, and when Pippin filed in Florida, Respondent ordered that Horne be returned to Texas. Fontaine argues that she lacks an adequate remedy by appeal because "exercise of Florida jurisdiction over the Proposed Ward, a Texas resident, would substantially vitiate the ability of Relator, a Texas resident, to present viable claims and/or defenses in a Florida court." She contends that (1) allowing Respondent's "unsubstantiated ruling that Florida somehow has jurisdiction in this matter to stand would substantially weaken the ability of Relator to fully and fairly litigate her rights in this matter[;]" and (2) "[t]he paramount benefits of mandamus in this matter, i.e., judicial efficiency and cost savings, as well as letting a Texas court decide guardianship matters pertaining to a Texas resident, far outweigh any detriments to mandamus relief."

Applicable Law

The civil practice and remedies code affords a remedy by interlocutory appeal from an order that grants or denies a special appearance. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (West Supp. 2017); *see* TEX. R. CIV. P. 120a(1) (a special appearance may be made by any party for the purpose of objecting to the court's jurisdiction 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 Texas). "When an interlocutory appeal is available, the 'extraordinary

circumstances' dictating mandamus relief from the denial of a special appearance usually will not be present if the interlocutory appeal is an adequate remedy." ***Raymond Overseas Holding, Ltd. v. Curry***, 955 S.W.2d 470, 471 (Tex. App.—Fort Worth 1997, no pet.); ***In re Western Aircraft, Inc.***, 2 S.W.3d 382, 384 (Tex. App.—San Antonio 1999, orig. proceeding).

"The operative word, 'adequate', has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." ***In re Prudential Ins. Co. of Am.***, 148 S.W.3d 124, 136 (Tex. 2004). "Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." ***Id***. "An appellate remedy is 'adequate' when any benefits to mandamus review are outweighed by the detriments." ***Id***.

Analysis

Fontaine contends that Texas appellate courts have "often granted mandamus relief in actions involving a court's threshold determination of jurisdiction, the Respondent in this action committed a clear abuse of discretion in ruling that Florida should exercise guardianship jurisdiction over a Texas resident, and no adequate remedy on appeal exists because the substantive rights of [Relator], a Texas resident, would be severely impaired if she has to litigate her claims in this matter in Florida."

"The reluctance to issue extraordinary writs to correct incidental trial court rulings can be traced to a desire to prevent parties from attempting to use the writ as a substitute for an authorized appeal." ***In re Entergy Corp***, 142 S.W.3d 316, 320 (Tex. 2004). "Because in the ordinary case no circumstances apart from the increased cost and delay of trial and appeal are present…mandamus typically will not lie from the denial of a special appearance." ***CSR Ltd v. Link***, 925 S.W.2d 591, 596 (Tex. 1996). Fontaine is correct that Texas appellate courts have conducted mandamus review of jurisdictional issues in certain cases. *See* ***In re Sw. Bell Tel. Co., L.P.***, 226 S.W.3d 400, 403 (Tex. 2007) (allowing a trial to proceed would interfere with the important legislatively mandated function and purpose of an administrative agency, such as the Public Utility Commission); *see also* ***In re Oceanografia, S.A. de C.V.***, 492 S.W.3d 330, 335

(Tex. App.—Corpus Christi 2014, orig. proceeding), *mandamus conditionally granted*, 494 S.W.3d 728 (Tex. 2016) (a motion to dismiss on forum non conveniens is erroneously denied, for which there is no interlocutory appeal); ***In re ArcelorMittal Vinton, Inc.***, 334 S.W.3d 347, 350-51 (Tex. App.—El Paso 2011, orig. proceeding) (the denial of a plea to the jurisdiction would force the relator to forgo the right to dismissal, or wait to appeal the ruling post-judgment); ***In re Godwin***, 293 S.W.3d 742, 747 (Tex. App.—San Antonio 2009, orig. proceeding) (the rights of religious organizations and important issues relating to the constitutional protections afforded by the First Amendment are involved). However, in cases where incidental rulings, such as a ruling on a special appearance, have been reviewed via mandamus, jurisdiction was exercised "not merely because inaction would have caused hardship to the parties, but because special, unique circumstances mandated the Court's intervention." ***In re Entergy Corp***, 142 S.W.3d at 321.

As the Texas Supreme Court has explained, "[m]andamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss[.]" ***In re Prudential Inc. Co. of Am.***, 148 S.W.3d at 136. "The requirement that there be no other adequate remedy by law is met when parties are in danger of permanently losing substantial rights." ***In re East Tex. Med. Ctr.,*** No 12-17-00183-CV, 2017 WL 4675511, at *2 (Tex. App.—Tyler Oct. 18, 2017, orig. proceeding) (mem. op.). Fontaine relies on this ground to support her contention that appeal is inadequate. The danger of permanently losing substantial rights "arises when the appellate court would not be able to cure the trial court's error, when the party's ability to present a viable claim is vitiated, that is, when the party is effectively denied a reasonable opportunity to develop the merits of its case, so that the trial would be a waste of judicial resources, or when the error cannot be made part of the appellate record, making appellate review impossible." ***Id***. None of these circumstances are present in the case at hand.

Fontaine had a right to immediate appellate review of the granting of Pippin's special appearance via interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7). There is no danger that an appellate court would be unable to cure any error through interlocutory appeal or that the error could not be made part of the appellate record, thereby precluding appellate review. The very purpose of the interlocutory appeal statute is to promote judicial economy and the legislature "carefully articulated which interlocutory orders may be

appealed." ***Bally Total Fitness Corp. v. Jackson***, 53 S.W.3d 352, 358-59 (Tex. 2001). Thus, it is reasonable to conclude that any error arising from Respondent's ruling on the special appearance could be cured through an interlocutory appeal. Nevertheless, rather than filing a notice of interlocutory appeal within twenty days after the trial court signed its October 31 order granting Pippin's special appearance, Fontaine filed this petition for writ of mandamus on December 21. *See* TEX. R. APP. P. 26.1(b) ("in an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed[]"); *see also* ***In re K.A.F.***, 160 S.W.3d 923, 927 (Tex. 2005) (in an accelerated appeal, absent a motion for extension of time, the deadline for filing a notice of appeal is strictly set at twenty days after the judgment is signed, with no exceptions, and a post-judgment motion or request for findings of fact and conclusions of law will not extend that deadline). Mandamus, however, may not be used as a substitute for an appeal and a party may not attack a trial court's ruling by seeking a writ of mandamus, even if the appellate remedy is no longer available. ***In re Sims***, No. 12-15-00190-CV, 2016 WL 4379490, at *1 (Tex. App.—Tyler Aug. 17, 2016, orig. proceeding) (mem. op.); ***In re Bernson***, 254 S.W.3d 594, 596 (Tex. App.—Amarillo 2008, orig. proceeding); *see* ***In re Hart***, 351 S.W.3d 71, 77 (Tex. App.—Texarkana 2011, orig. proceeding) (because relator did not "avail himself of the procedures available to file a notice of appeal, he lost the opportunity to file a direct appeal even though that avenue was available to him … [m]andamus is not available if another remedy, though it would have been adequate, was not timely exercised[]"); *see also* ***In re Pannell***, 283 S.W.3d 31, 35 (Tex. App.—Fort Worth 2009, orig. proceeding) ("A party's failure to comport with these rules which would have given him the time to file his notice of appeal is not a sufficient excuse to justify issuance of mandamus[]").

Nor does the granting of Pippin's special appearance deny Fontaine a reasonable opportunity to develop the merits of her case in a Florida court, such that the trial would be a waste of judicial resources. One such case arises "when a trial court imposes discovery sanctions which have the effect of *precluding a decision on the merits of a party's claims*—such as by striking pleadings, dismissing an action, or rendering default judgment—a party's remedy by eventual appeal is inadequate, unless the sanctions are imposed simultaneously with the rendition of a final, appealable judgment." ***Walker v. Packer***, 827 S.W.2d 833, 843 (Tex. 1992). As the Amarillo Court of Appeals explained:

> [W]hen pleadings are struck, actions dismissed, or default judgments entered, the party against whom the action is taken has little else to do. Under those circumstances, he has no realistic opportunity to develop a viable claim or defense. Indeed, his proceeding to trial could be viewed as a waste of judicial time since the outcome of the suit has been all but determined. The same cannot be said, however, when the litigant has other claims or defenses unaffected by the trial court's decision. Under those circumstances, he has matters to pursue in a trial and their eventual outcome of the proceeding has not been pre-determined.

In re Thornton-Johnson, 65 S.W.3d 137, 139 (Tex. App.—Amarillo 2001, orig. proceeding). Although Respondent's decision to grant Pippin's special appearance precludes Fontaine from pursuing guardianship proceedings in Sabine County, it is simply not the type of ruling that has the effect of precluding a decision on the merits. *See* ***Walker***, 827 S.W.2d at 843. Fontaine may still pursue her guardianship claims, albeit in the Florida court, and the eventual outcome has not been pre-determined by Respondent's ruling. *See* ***Thornton-Johnson***, 65 S.W.3d at 139. That proceedings in a Florida court might be more costly, inconvenient, or cause delay does not warrant mandamus review. *See* ***Link***, 925 S.W.2d at 596.

Accordingly, under the circumstances of this case, we conclude that the right to an interlocutory appeal of the order granting Pippin's special appearance serves as a plain, adequate, and complete remedy. *See* ***Tex. Dep't of Family & Protective Servs.***, 210 S.W.3d at 613. For this reason, Fontaine has failed to meet her burden of establishing both prerequesites to mandamus relief. *See* ***Cerberus Capital Mgmt., L.P.***, 164 S.W.3d at 382; *see also* ***Fitzgerald***, 429 S.W.3d at 891.

DISPOSITION

Having determined that Fontaine failed to establish her entitlement to mandamus relief, we ***deny*** the petition for writ of mandamus.

GREG NEELEY
Justice

Opinion delivered February 6, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

FEBRUARY 6, 2018

NO. 12-17-00400-CV

MARGRET FONTAINE,
Relator
V.

HON. CRAIG M. MIXON,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by Margret Fontaine; who is the relator in Cause No. CV1713443, pending on the docket of the 1st Judicial District Court of Sabine County, Texas. Said petition for writ of mandamus having been filed herein on December 21, 2017, and the same having been duly considered, because it is the opinion of this Court that the writ 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**.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.