Opinion issued June 28, 2016.

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00615-CV

RAYMOND C. CLARK, JR., Appellant

V.

WENDY JEAN MORROW CLARK, Appellee

On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Case No. 68312-D

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and

NO. 01-15-00729-CV

IN RE RAYMOND C. CLARK, JR., Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION

Raymond C. Clark, Jr. is appealing the February 20, 2015 order modifying the parent-child relationship signed by the trial court's Associate Judge, the Honorable Chad Bradshaw (the Order). Because the Order was never signed by the referring trial court, we dismiss Raymond's appeal for want of jurisdiction.

Raymond also filed a related petition for writ of mandamus, contending that respondent, the presiding judge of the referring court, the Honorable K. Randall Hufstetler, abused his discretion by failing to take any action with respect to the Order.[1] For the reasons set forth below, we conditionally grant the petition.

Background

Raymond and appellee/real party in interest Wendy Jean Morrow Clark were divorced in Fort Bend County in November 2009.[2] In their final divorce decree, Raymond and Wendy were appointed as joint managing conservators of their only

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[1] The underlying case is *In the interest of H.C.C.R., a Child*, Cause No. 68,312, pending in the 300th District Court of Brazoria County, Texas, the Honorable K. Randall Hufstetler presiding.

[2] An appellate court may judicially notice its own records in the same or related proceeding involving the same or nearly the same parties. *See Trevino v. Pemberton*, 918 S.W.2d 102, 103 n.2 (Tex. App.—Amarillo 1996, orig. proceeding) (citing *Turner v. State*, 733 S.W.2d 218, 221 (Tex. Crim. App. 1987)). Raymond's pending mandamus and appeal are so related. Accordingly, unless otherwise specified, any references to the "record" refers to the mandamus record, plus the clerk's record and reporter's record filed in the appeal.

child, H.C., and Raymond was given the exclusive right to designate H.C.'s primary residence. After Raymond moved from Fort Bend County in 2012, continuing, exclusive jurisdiction over the matter was transferred to the 300th District Court of Brazoria County.

In 2013, Raymond filed a petition to modify the parent-child relationship seeking to terminate Wendy's parental rights. Wendy then filed a counter-petition seeking sole managing conservatorship of H.C. A four-day trial was held on both petitions in November 2014 before Associate Judge Bradshaw. At the beginning of trial, and on the record, Raymond and Wendy waived their rights to a de novo hearing before Judge Hufstetler. Judge Bradshaw announced his ruling on the record at the conclusion of trial and stated that his ruling would "be in the form of a final order on modification since the parties have waived de novo." On February 20, 2015, Associate Judge Bradshaw signed the Order appointing Wendy as the joint managing conservator with the right to establish H.C.'s primary residence. Raymond filed a motion for new trial on March 23, 2015, challenging the Order.

On May 6, 2015, Judge Bradshaw issued an "Associate Judge's Report" in the form of a letter sent to the parties in which he stated that there was a clerical error in the Order and that "the Court finds that a judgment nunc pro tunc is granted to

correct the error."[3] Judge Bradshaw instructed Wendy's counsel to submit "an order nunc pro tunc" on or before June 12, 2015. Judge Bradshaw also recommended denying Raymond's motion for new trial. The record does not indicate that Judge Hufstetler took any action on the "Associate Judge's Report," and no "order nunc pro tunc" is included in the appellate record.[4]

On May 18, 2015, Raymond filed his first petition for writ of mandamus with this court (No. 01-15-00458-CV), requesting that we order "the Judge of the 300th Judicial District Court of Brazoria County, Texas" to vacate the Order and grant him a new trial. The order included in the mandamus record, however, was signed by the court's associate judge, Judge Bradshaw. Because this court lacks mandamus jurisdiction over actions of an associate judge, we dismissed the petition for want of jurisdiction. *See In re Raymond C. Clark, Jr.*, No. 01-15-00458-CV, 2015 WL 3877787, at *1 (Tex. App.—Houston [1st Dist.] June 23, 2015, orig. proceeding) (mem. op.) (citing TEX. GOV'T CODE ANN. § 22.221(b) (West 2004) and *In re*

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3 The Associate Judge's report states that the Order contains a clerical error because it "fail[s] to set forth the domicile restriction for the child as stated in the Court's rendition." At the end of trial, Associate Judge Bradshaw appointed Wendy the joint managing conservator with "the exclusive right to designate the primary residence of the child, restricted to Harris, Brazoria, and Fort Bend counties." The copies of the Order filed in the original proceeding and in a supplemental clerk's record in Raymond's appeal contain no such geographic restrictions on the child's residence.

4 Raymond is not complaining about Judge Hufstetler's failure to rule on the "Associate Judge's Report" or the lack of an "order nunc pro tunc."

Rooney, No. 01-12-01135-CV, 2012 WL 6645023, at *1 (Tex. App.—Houston [1st Dist.] Dec. 19, 2012, orig. proceeding) (mem. op.)).

On July 13, 2015, Raymond sent a letter to the presiding judge, Judge Hufstetler, asking him to take some action on the Order, in light of this court's dismissal of his first petition for writ of mandamus. Specifically, Raymond stated:

> The Court of Appeals denied the Petition for Writ of Mandamus on jurisdictional grounds because it appears that either Judge Bradshaw has not forwarded the final order of February 20, 2015 to you for your signature or other action as required by Tex. Fam. Code § 201.011 (e) or, if it has been forwarded to you, no action has been taken by the court to sign the final judgment or make any other changes deemed appropriate.

On July 14, 2015, Raymond filed a notice of appeal challenging the Order (No. 01-15-00615-CV).

On August 27, 2015, Raymond filed the current petition for writ of mandamus contending that Judge Hufstetler abused his discretion by failing to take any action with respect to the Order signed by Associate Judge Bradshaw. Wendy, the real party in interest, filed a response on September 8, 2015, in which she argued that the Order is a final appealable order pursuant to Texas Family Code sections 201.007(a)(16) and 201.015 because the parties "executed a waiver of their rights to appeal the decision to the referring court," and therefore, Judge Hufstetler has no obligation to act, and mandamus relief should be denied. *See* TEX. FAM. CODE ANN. §§ 201.007(a)(16) (West 2014), 201.015 (West Supp. 2015).

On September 23, 2015, we notified Raymond that his appeal was subject to dismissal for want of jurisdiction because the record did not indicate that the Order "ha[d] been signed by the referring court or constitute[d] an otherwise appealable order."

Appeal

This Court has jurisdiction over an appeal from a "final order rendered" in a suit affecting the parent-child relationship, which includes modification suits. *See* TEX. FAM. CODE ANN. § 109.002(b) (West 2014). While Raymond's appeal has been pending, this Court issued an opinion addressing the jurisdictional question presented by the Order, i.e., whether an order signed by an associate judge pursuant to Texas Family Code section 201.007(a)(16) after the parties have waived their right to a de novo hearing before the presiding judge is a final order over which this court has jurisdiction, even though the order has not been signed by the referring court. *See Gerke v. Kantara*, No. 01–14–00082–CV, 2016 WL 1590847, at *2–3 (Tex. App.—Houston [1st Dist.] Apr. 19, 2015, no pet. h.). We held that such an order is not a final, appealable order. *See id.* at *2 (rejecting argument that associate judge's order signed pursuant to section 201.007(a)(16) was final and appealable without any further action by referring court).[5]

[5] The concurring opinion in *Gerke* would hold that an associate judge's order that includes an express waiver of the parties' right to de novo hearing before the presiding judge is a final and appealable order, even if the order is not signed by the

The record reflects that the Order was signed by Associate Judge Bradshaw on February 20, 2015, after a trial on the merits during which Raymond and Wendy waived their right to a de novo hearing before Judge Hufstetler on the record. There is no evidence in the record that Judge Hufstetler signed the Order, or an order for judgment nunc pro tunc as contemplated by the associate judge's May 6, 2015 report. Accordingly, no final order has been rendered in this modification suit. *See id.* at *3.

We dismiss Raymond's appeal for want of jurisdiction.

Petition for Writ of Mandamus

In his petition for writ of mandamus, Raymond argues that Judge Hufstetler abused his discretion by failing to take any action with respect to the Order after Raymond brought the issue to the judge's attention.

A. Standard of Review

Mandamus is an extraordinary remedy, which is available only when (1) a trial court clearly abuses its discretion and (2) there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004).

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referring court. *See Gerke v. Kantara*, No. 01–14–00082–CV, 2016 WL 1590847, at *3 (Tex. App.—Houston [1st Dist.] Apr. 19, 2015, no pet. h.) (J. Massengale, concurring). The Order in question in this case does not contain an express waiver of the parties' right to a de novo hearing.

To establish entitlement to mandamus relief for a trial court's failure or refusal to act, the relator must establish that the trial court had a legal duty to perform a non-discretionary act, relator made demand for performance, and the court refused or failed to act within a reasonable period of time. *See In re Layton*, 257 S.W.3d 794, 795 (Tex. App.—Amarillo 2008, orig. proceeding); *see generally Graham v. Graham*, 414 S.W.3d 800, 802 (Tex. App.—Houston [1st Dist.] 2013, no pet.) ("Mandamus may be available to compel the trial court to consider the associate judge's proposed order or conduct a new hearing."). The relator must show that the trial court received and was aware of the relator's request for a ruling. *In re Villarreal*, 96 S.W.3d 708, 710 (Tex. App.—Amarillo 2003, orig. proceeding). "This is so because a court cannot be faulted for doing nothing when it was not aware of the need to act." *Id*. It is the relator's burden to properly request and show entitlement to mandamus relief. *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992).

B. Applicable Law

As we explained in *Gerke*, "[a]ssociate judges do not have the power to render final judgment outside the context of certain limited exceptions listed in section 201.007 of the Family Code." *Id.* at *2 (quoting *Graham*, 414 S.W.3d at 801); *see also* TEX. FAM. CODE ANN. § 201.007(a)(14) (West 2014) (setting forth categories of orders that associate judges may "render and sign"). None of the exceptions identified by subsection (a)(14) are applicable here.

Although an associate judge's power to *render* judgment is limited, associate judges may, nevertheless, "recommend" to the referring court that an order executed by the associate judge be "rendered" by the referring court and become a pronouncement, or final order, of that court. *See* TEX. FAM. CODE ANN. § 20l.007(a)(10) (West 2014); *Gerke*, 2016 WL 1590847, at *1. The associate judge's proposed order may be adopted, modified, or rejected or sent back to the associate judge by the referring court. TEX. FAM. CODE ANN. § 201.014(a) (West 2014). Such a proposed order becomes final and appealable from the date it is signed by the judge of the referring court. *See id.* § 201.016(b) (West Supp. 2015). This is specifically required when, as here, the parties have waived a de novo hearing before the referring court. *Id.* § 201.013(b) (West 2014) (stating that when parties waive de novo hearing before referring court, "the proposed order or judgment of the associate judge becomes the order or judgment of the referring court *only* on the referring court's signing the proposed order or judgment") (emphasis added).

C. Analysis

Based on this statutory scheme, Judge Hufstetler has a non-ministerial duty to take some action on Associate Judge Bradshaw's order. *See* TEX. FAM. CODE ANN. § 201.014(a) (setting forth referring court's options with respect to associate judge's proposed order or judgment). Although a referring court has discretion with respect

to *how* it chooses to act on an associate judge's proposed order or judgment, it cannot refuse to take any action.

In this case, it appears that Judge Hufstetler's inaction has effectively deprived Raymond of an appellate remedy because (1) without a final judgment in the modification suit, Raymond cannot challenge the Order on appeal, and (2) Raymond cannot challenge the Order by way of a petition for a writ of mandamus with respect to Judge Bradshaw because this court does not have mandamus jurisdiction over associate judges. We do, however, have mandamus jurisdiction over district court judges, such as Judge Hufstetler. *See* TEX. GOV'T CODE ANN. § 22.221.

Here, the record reflects that the Order was signed by Associate Judge Bradshaw on February 20, 2015. Raymond sent a certified letter directly to Judge Hufstetler on July 13, 2015, in which he expressly asked the judge to take some action on the Order, in light of our dismissal of Raymond's first petition for writ of mandamus. The record does not reflect that Judge Hufstetler has taken any action on the Order since Raymond asked him to act ten months ago. Under the circumstances of this case, ten months is an unreasonable amount of time for Judge Hufstetler to have taken no action on the associate judge's order. *See Barnes v. State*, 832 S.W.2d 424, 426 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding) (stating that whether trial court has acted within reasonable period of time depends on circumstances of case). Accordingly, we will conditionally grant Raymond's

petition for writ of mandamus and direct the respondent to take some action on the Order, as set forth by Family Code section 201.014(a). *See generally O'Donniley v. Golden*, 860 S.W.2d 267, 269 (Tex. App.—Tyler 1993, orig. proceeding) (stating that appellate court can only require trial court to act, it cannot order trial court to make particular decision).

We conclude that the trial court abused its discretion by failing to take any action on the Order, thereby depriving Raymond of an opportunity to challenge the Order in the appellate courts.

Conclusion

In cause number 01-15-00615-CV, we dismiss Raymond's appeal for want of jurisdiction. In cause number 01-15-00729-CV, we conditionally grant Raymond's petition for a writ of mandamus and direct the respondent to rule on or otherwise take some action on the Order, as set forth by Family Code section 201.014(a). The writ will issue only if the respondent fails to comply.

Russell Lloyd
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Lloyd.