Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-15-00244-CV

IN RE Sandra **SANDOVAL**

Original Proceeding[1]

OPINION DISSENTING FROM THE DENIAL OF REAL PARTY IN INTEREST'S MOTION FOR EN BANC RECONSIDERATION

Dissenting Opinion by: Luz Elena D. Chapa, Justice

Sitting en banc: Sandee Bryan Marion, Chief Justice
Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

Because the trial court's order denying relator Sandra Sandoval's plea to the jurisdiction does not award real party in interest Dino Villarreal possession of Sandra's children, I respectfully dissent. First, the panel's holding that mandamus is appropriate to correct a denial of a plea to the jurisdiction in any child-custody case to prevent any delay directly conflicts with a prior decision of this court and is not supported by the authority the panel cites. Second, due to the extraordinary number of child-custody disputes in this court's jurisdiction—including those involving

[1] This proceeding arises out of Cause No. 2015-CI-04420, styled *In the Interest of N.I.V.S. and M.C.V.S., Minor Children*, pending in the 224th Judicial District Court, Bexar County, Texas, the Honorable Gloria Saldaña presiding.

termination of parental rights—mandamus cannot be appropriate merely to correct any incidental ruling that would cause any delay in a child-custody dispute.

DIRECT CONFLICT WITH A PRIOR DECISION

This court has a policy and practice of sitting en banc to decide a case in direct conflict with a prior decision of this court. Furthermore, Texas Rule of Appellate Procedure 41.2(c) provides en banc consideration is appropriate when "necessary to secure or maintain uniformity of the court's decisions." TEX. R. APP. P. 41.2(c). The panel's holding that Sandra lacks an adequate remedy by appeal directly contradicts this court's holding in *In re Texas Department of Family & Protective Services*, No. 04-04-00834-CV, 2004 WL 2965434 (Tex. App.—San Antonio Dec. 22, 2004, orig. proceeding) (mem. op.). The panel in that proceeding, which also involved child-custody issues, concluded "that relator is not entitled to mandamus relief because it has an adequate remedy by appeal." *Id.* at *1. The relator sought mandamus relief after the trial court denied its plea to the jurisdiction, which asserted the real parties in interest lacked standing to maintain a suit to establish parental rights. *Id.* This court reasoned that mandamus is inappropriate "to supervise or correct incidental rulings of a trial court when there is an adequate remedy on appeal." *Id.* Here, the trial court denied Sandra's plea to the jurisdiction, which asserted Dino lacked standing to maintain a suit to establish parental rights, but the panel holds Sandra lacks an adequate remedy by appeal and concludes Sandra is entitled to mandamus relief.

The panel relies on two lines of authority, neither of which is on point as is this court's holding in *In re Texas Department of Family & Protective Services.* The panel's substituted opinion relies on cases in which we and the supreme court conditionally granted mandamus relief in child-custody cases to avoid a "jurisdictional dispute" involving conflicting custody orders from courts in different territorial jurisdictions. *See Geary v. Peavy*, 878 S.W.2d 602, 603-04 (Tex.

1994) (orig. proceeding) (per curiam) (Texas versus Minnesota); *In re Green*, 352 S.W.3d 772, 774-75 (Tex. App.—San Antonio 2011, orig. proceeding) (Texas versus Germany). However, Sandra has not presented a record to this court demonstrating there is any possibility of conflicting custody orders from different jurisdictions in this case. "Jurisdiction," as used in *Geary* and *Green*, does not generally refer to subject matter jurisdiction, it refers to conflicting orders from courts of different jurisdictions. Therefore, the decisions in *Geary* and *Green* are not on point.

The panel also relies on *In re Derzapf*, 219 S.W.3d 327 (Tex. 2007) (orig. proceeding) (per curiam). The supreme court in *Derzapf* ordered the trial court to vacate its temporary orders that granted grandparents access to a child in violation of the father's parental rights. *Id.* at 334-35. The "extraordinary circumstances" in *Derzapf* were that the trial court divested a fit parent of possession of his children. *Id.* at 335 ("*Such a divestiture* is irremediable, and mandamus relief is therefore appropriate.") (emphasis added). The supreme court's holding was expressly based on an order that erroneously divested the parent of his rights by awarding access to a non-parent. *Id.* The supreme court cited two cases in support of its holding; both awarded mandamus relief for an order that awarded a non-parent possession. *See id.* (citing *In re Mays-Hooper*, 189 S.W.3d 777, 778 (Tex. 2006) (orig. proceeding) (per curiam) ("direct[ing] the trial court to vacate its order . . . granting grandparent possession"); *Little v. Daggett*, 858 S.W.2d 368, 369 (Tex. 1993) (orig. proceeding) (ordering trial court to vacate "order granting visitation")). The trial court's order denying Sandra's plea to the jurisdiction does not award Dino possession of the children. Therefore, the supreme court's decision in *Derzapf* is not on point.

Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, a panel should not ignore the prior holding of another panel of this court. *See Chase Home Fin.,*

L.L.C. v. Cal W. Reconveyance Corp., 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A panel of this court has held that when a trial court erroneously denies a plea to the jurisdiction based on the lack of a party's standing to bring a suit involving child-custody issues, a relator has an adequate remedy by appeal. There is no on-point and contrary decision from the supreme court or this court sitting en banc, and there has been no intervening, material change in the statutory law. Thus, to be consistent with this court's policy and practice, this case should be decided en banc. *See id.*

EXTRAORDINARY CIRCUMSTANCES UNDER RULE 41.2(C)

The panel's holding also presents "extraordinary circumstances requir[ing] en banc consideration." TEX. R. APP. P. 41.2(c). The panel holds that a direct appeal is inadequate to correct any incidental ruling that delays the resolution of the child-custody dispute. There are an extraordinary number of child-custody disputes—including proceedings to terminate parental rights—in counties over which this court has jurisdiction. And many incidental rulings in a child-custody dispute could delay the dispute's resolution.

Although the panel suggests its holding is limited to "jurisdictional question[s]" based on *Geary* and *Green*, neither *Geary* nor *Green* holds that the lack of subject matter jurisdiction—without the possibility of conflicting custody orders—is sufficient to authorize mandamus relief. Texas law is clear that there must be something more than a trial court's lack of subject matter jurisdiction to authorize mandamus relief. *Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985) (orig. proceeding); *Pope v. Ferguson*, 445 S.W.2d 950, 954 (Tex. 1969) (orig. proceeding). When understood in that context, the panel's holding is that a direct appeal is inadequate to correct any incidental ruling that delays the resolution of any child-custody dispute.

But the supreme court has held a direct appeal is not necessarily inadequate in a child-custody dispute simply because mandamus might resolve the dispute slightly faster. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 614 (Tex. 2006) (orig. proceeding) (holding fact that mandamus would be slightly faster than pursuing accelerated appeal of order in child-custody case was insufficient reason to authorize mandamus). Whether a direct appeal is adequate "depends on a careful balance of the case-specific benefits and detriments of delaying or interrupting a particular proceeding." *In re Gulf Expl., LLC*, 289 S.W.3d 836, 842 (Tex. 2009) (orig. proceeding). Thus, the possibility of some delay in a child-custody proceeding cannot trump any and all other considerations regardless of "the case-specific benefits and detriments of delaying or interrupting a particular proceeding." *See id.*; *see also In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d at 614. Sandra has not demonstrated that any delay caused by the trial court's denial of her plea in this specific case would be sufficiently extraordinary to authorize mandamus relief.

In *Pope v. Ferguson*, the supreme court articulated the "sound reason why appellate courts should not have jurisdiction to issue writs of mandamus to control or to correct incidental rulings of a trial judge" when an appeal would be adequate:

> Trials must be orderly; and constant interruption of the trial process by appellate courts would destroy all semblance of orderly trial proceedings. Moreover, with this type of intervention, the fundamental concept of all American judicial systems of trial and appeal would become outmoded. Having entered the thicket to control or correct one such trial court ruling, the appellate courts would soon be asked in direct proceedings to require by writs of mandamus [that] trial judges enter orders, or set aside orders, sustaining or overruling (1) pleas to the jurisdiction, (2) pleas of privilege, (3) pleas in abatement, (4) motions for summary judgment, (5) motions for instructed verdict, (6) motions for judgment non obstante veredicto, (7) motions for new trial and a myriad of interlocutory orders and judgments; and, as to each, it might logically be argued that the petitioner for the writ was entitled, as a matter of law, to the action sought to be compelled.

445 S.W.2d at 954. Due to the extraordinary number of child-custody disputes in this court's jurisdiction, including those involving parental termination, mandamus cannot be appropriate to correct any incidental ruling that would cause a delay in a child-custody dispute.

CONCLUSION

The panel holds that mandamus is appropriate to correct any ruling delaying the resolution of a child-custody dispute—even when the challenged ruling is incidental and does not grant or deny possession of or access to a child. This holding directly conflicts with a prior decision of this court and presents extraordinary circumstances that require en banc reconsideration. *See* TEX. R. APP. P. 41.2(c). Because Rule 41.2(c) and the policy and practice of this court require this court sitting en banc to reconsider the panel's opinion, I respectfully dissent.

Luz Elena D. Chapa, Justice