DENY; and Opinion Filed June 23, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00610-CV

IN RE MATTHEW SCHKLAIR AND ABIGAIL SCHKLAIR, Relators

On Appeal from the 305th Judicial District Court
Dallas County, Texas
Trial Court Cause No. 16-00152-X

MEMORANDUM OPINION

Before Justices Francis, Brown, and Whitehill
Opinion by Justice Francis

Before the Court is relators' June 12, 2017 amended petition for writ of mandamus in which relators complain of the trial court's dismissal of their intervention in a suit affecting the parent-child relationship. To be entitled to mandamus relief, a relator must show both that the trial court has clearly abused its discretion and that relator has no adequate appellate remedy. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding). Here, the trial court dismissed the intervention on June 6, 2017 and signed a final order the same day. Although orders striking an intervention are generally reviewable through mandamus, such pretrial orders become appealable when a final judgment is signed. *See, e.g., In re Bradberry*, No. 12-12-00121-CV, 2012 WL 3201927, at *2 (Tex. App.—Tyler Aug. 8, 2012, orig. proceeding). Relators, therefore, have an adequate remedy by appeal. TEX. FAM. CODE ANN. § 109.002. We deny the request for mandamus relief without addressing whether the trial court abused its discretion in dismissing the intervention. That decision does not end our discussion,

however, because the events leading to this original proceeding and the actions of the real parties in interest cause the Court such great concern that we feel obliged to address those issues here.

The Dallas County Child Protective Services Unit of the Texas Department of Family and Protective Services (the Department) filed the underlying suit seeking to terminate the parental rights of the child's mother, who is incarcerated, and an unknown father. At the time of the June 6, 2017 trial, relators had been the child's foster parents for sixteen months. The child was four years old and recognized relators as "mommy" and "daddy." When the Department decided to seek placement of the child with the child's maternal aunt and uncle in Florida, relators intervened, asked that they be appointed the child's joint managing conservators, and asserted their desire to adopt the child. In the petition in intervention, relators asserted the Florida relatives were strangers to the child, the child had shown significant improvement during his time with relators in relation to his post-traumatic stress disorder and attendant developmental delays, and the child had grown close to relators. They also attached statements from two of the child's therapists expressing opinions that placing the child with the relatives in Florida would not be in the child's best interest.

Before trial began on June 6, 2017, the biological mother's attorney asked the trial court to strike relators' intervention and dismiss them from the suit because relators' petition did not state that the child's biological father was unknown and did not seek to terminate the unknown father's parental rights. The trial court agreed and dismissed relators' claims from the bench at 11:34 a.m. After a brief recess, the court began the trial outside of relators' presence at 11:49 a.m. Nine minutes later, at 11:58 a.m., the court verbally granted the relief requested by the Department, appointed Carmen and Isidro Soto, the Florida relatives, joint permanent managing conservators, found that appointing a parent as managing conservator would significantly impair the physical health or emotional development of the child, appointed the biological mother

possessory conservator, and ordered the Department to continue as temporary managing conservator for six months.

The Department was represented at trial by assistant district attorney Kimberly Austin. Following the trial, the parties made arrangements for the Department to take the child from relators' home that afternoon. At 1:50 p.m., relators' counsel sent an e-mail to Austin's supervisor, assistant district attorney Michael Kotwal, notifying him that relators were filing a petition for writ of mandamus and seeking an emergency stay of the order with the court of appeals. Neither Kotwal nor Austin notified the Department's case worker or her supervisor of the imminent filing even though the case worker was en route to relators' home to retrieve the child.[1] The case worker arrived at relators' home at 2:18 p.m., left with the child at 2:37 p.m., and by 2:43 p.m. was at a Braum's restaurant with the child getting ice cream because he was upset, so she was "trying to console him and just kind of explain to him what was going on." Relators filed the petition and motion for temporary relief at 2:42 p.m. While the case worker and the child were at Braum's, relators' petition and emergency motion were e-served on all parties, and relators' counsel sent text messages to all attorneys in the case notifying them of the filings. At 2:54 p.m., relators' counsel also sent an e-mail to Austin to notify her of the filings because the text message he sent to her bounced back as undeliverable. In the meantime, the case worker drove the child to Anna, Texas to the home where the Sotos were staying. At 3:24 p.m., the case worker released the child to the Sotos and they immediately left with the child to return to Florida.

This Court issued a stay order at 4:19 p.m. in which we stayed all further proceedings in the trial court, and stayed enforcement of any verbal or written orders issued by the trial court in

[1] The case worker had a trainee with her during the exchange of possession of the child. The case worker's supervisor testified that she spoke with the trainee sometime between when the case worker picked up the child from relators' home and when she transferred the child to the custody of the Sotos. The supervisor testified that she did not know about relators' appellate filings at the time she spoke to the trainee. The record is silent, however, regarding the substance of the supervisor's communication with the trainee.

relation to the June 6, 2017 hearings, including any efforts to remove the child from relators' home. Relators' counsel immediately sent an e-mail to Kimberly Austin, as well as the guardian ad litem and the biological mother's counsel, notifying them that the stay had been granted. At 4:22 pm., relators' counsel, Austin, and the guardian ad litem received the Court's written stay order. At 4:29 p.m., Austin also received a copy of the order from the assistant for relators' counsel. At or shortly after 5:00 p.m., Austin called the case worker's supervisor and told her this Court had issued a stay order. Neither the case worker's supervisor nor Austin attempted to contact the Sotos after learning of the stay order. The supervisor did not tell the case worker about the stay order until the following morning. The guardian ad litem left a voicemail for the Sotos at 6:43 p.m. telling them about the stay order and instructing them to stay in contact with the Department and to do what the Department asked them to do.

The next day, relators filed a motion to enforce the stay order and asked this Court to issue a writ of attachment ordering the child be returned to Texas and to relators' custody. In the motion, relators stated that the Department and its counsel refused to tell relators where the child was and refused to disclose the child's condition. Relators' counsel also averred that the Department's counsel told him that the Department was not required to take any actions to comply with this Court's stay order because the child had been delivered to the Sotos before this Court issued the stay order. We ordered the trial court to conduct a hearing and issue findings of fact regarding whether the Department violated the stay order, the timeline of events occurring on June 6, 2017 regarding each party's knowledge of the proceedings in this Court and orders from this Court, the timeline in which the Department transferred possession of the child and to whom possession was transferred, and the current location of the child and the names of the persons in possession of the child.

At the hearing, the case worker and her supervisor testified they did not know about relators' filings in this Court or the stay order until after the child had been released to the Sotos.

After a review of the record, it is clear to this Court that all counsel of record, including Austin, were served with relators' mandamus petition and emergency motion at least 45 minutes before the case worker released the child to the Sotos. Yet, Austin provides no explanation for why she did not contact the case worker or the case worker's supervisor about the filings and the record was not developed on this issue. Similarly, the record is silent regarding what Austin told the case worker's supervisor to do regarding the stay order when Austin spoke to her at 5:00 p.m. But the record confirms that the supervisor did nothing about the stay order after speaking to Austin and did not attempt to contact the Sotos after receiving notice of the stay order.

Because the record before us shows this Court's stay order issued after the child had been transferred to the Sotos, we are unable to move forward with contempt proceedings against the Department and the State. Although the Department did not technically violate the stay order, we question the Department's and the State's decision to remove the child from a safe, long-term placement within hours of the trial court's ruling in the face of relators' emergency filings in this Court. The Department's counsel knew of relators' filings and failed to notify the case worker or her supervisor until **hours** after the child had been given to the Sotos. Less than four hours after the trial court's verbal order, the Department released the child to the Sotos and the Sotos began the drive back to Florida with the child. The speed in which this process occurred went against the Department's own guidelines and shows a lack of concern for the best interest of the child. *See* DFPS PLACEMENT PROCESS GUIDE, January 2017, at 17–19. The State's failure to notify the Department of relators' filings potentially violated duties the State owed to the Department and basic tenets of professional conduct expected of Texas attorneys. *See, e.g.*, TEX. DISCPL. R. PROF. CONDUCT 1.03(a),(b) (a lawyer shall keep a client reasonably informed about the status of a matter and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation); *see also* TEX. DISCPL. R. PROF. CONDUCT 3.04(c)(5) (a lawyer shall not engage in conduct intended to disrupt the proceedings).

Moreover, the conduct of counsel for the State reflects a complete disregard for this Court's duty to review certain trial court orders that require expedited review. The more prudent and ethical action under this record would have been for the State to stop the exchange efforts at least until hearing whether the Court had ruled on the motion for emergency relief. Doing so would have prevented the expenditure of the resources of this Court, the trial court, and the parties in determining whether the stay order had been violated and would have allowed all parties time to present their arguments and allow this Court to finish its review of the case. This was not a situation where the child was in danger and needed to be removed immediately from relators' care. On the contrary, the record shows that just a few weeks earlier the trial court had granted a temporary restraining order to ensure the child remained in relators' care until a final hearing in the case. Waiting a few hours to allow this Court to review relators' petition and motion would have helped ensure a peaceful transition for this family and child and allowed a full adjudication of relators' concerns. Instead, as a result of the expedited removal process and the State's failure to notify its client of the appellate proceedings, the child is now in Florida under the care of his maternal aunt and uncle, and this Court's stay order was nullified.

We disapprove of the State's apparent decision not to inform its clients of relators' filings in this Court until after the child had been taken by the Sotos. We strongly caution the State to treat future emergency proceedings in this Court as serious matters deserving of review and respect. We admonish the State that future conduct of this kind may warrant referral to the grievance process and may result in our taking any additional actions deemed necessary to ensure compliance with the Court's orders.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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