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COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

IN THE MATTER OF THE MARRIAGE OF A.L.F.L. AND K.L.L., AND IN THE INTEREST
OF K.A.F.L., A CHILD,

No. 04-14-00364-CV

August 13, 2014, Decided

From the 438th Judicial District Court, Bexar County, Texas. Trial Court No. 2014-CI-02421.
Honorable Barbara Hanson Nellerhoe, Judge Presiding.

For APPELLANT ATTORNEY: William T. Deane, General Litigation Division, Austin, TX;
Michael Murphy, Solicitor General Division, Austin, TX.

For APPELLEE ATTORNEY: Deanna L. Whitley, Shellie Reyes, The Whitley Law Firm, P.C.,
San Antonio, TX; Judith K. Wemmert, Barry L. Efron, Attorney At Law, San Antonio, TX.

Sitting: Marialyn Barnard, Justice, Rebeca C. Martinez, Justice, Dissenting With Opinion To
Follow, Patricia O. Alvarez, Justice.

Marialyn Barnard

CORRECTED ORDER

This is an accelerated appeal from the trial court's denial of appellant's plea to the jurisdiction. On June 9, 2014, appellant, the State of Texas, filed a "Motion to Stay or Abate Appeal." In the motion, appellant claimed the issues in this appeal are similar to issues in two cases pending before the Texas Supreme Court — *In the Matter of the Marriage of J.B. & H.B.*, [326 S.W.3d 654](#) (Tex. App.—Dallas 2010, pet. granted), and *State v. Naylor*, [330 S.W.3d 434](#) (Tex. App.—Austin 2011, pet. granted). We agreed the issues to be presented in this appeal are similar to those issues pending before the Texas Supreme Court, i.e., the constitutionality of Texas

marriage law under article I, [section 32](#) of the Texas Constitution and section 6.204 of the Texas Family Code.

Thus, after reviewing the motion, appellee's response, appellant's reply, the clerk's record, and the cases pending before the supreme court, we agreed abatement was warranted. We therefore granted the appellant's motion and ordered the appeal abated and removed from this court's active docket. We advised that the appeal would be reinstated, at an appropriate time, by order of this court.

On August 11, 2014, appellant filed an emergency motion asking this court to lift our abatement for the limited purpose of granting an emergency stay. Specifically, appellant asserts the trial court is continuing to conduct proceedings in this matter and this threatens our jurisdiction with regard to the previously abated appeal. Appellant requests that we issue an order staying the trial court's order and all proceedings relating to the underlying divorce action until this court ultimately rules on the accelerated appeal, i.e., the plea to the jurisdiction. Appellee filed a response, in essence arguing we should not lift the abatement at appellant's request because appellant requested the abatement in the first instance — essentially an estoppel argument.

After considering appellant's motion and the response. We *ORDER* our previous abatement lifted for the sole purpose of rendering this order. The abatement and removal from our active docket remains in full force and effect but for the issuance of this order. We further *GRANT* appellant's motion and *ORDER* the trial court to stay all proceedings in this matter. Specifically, we *ORDER* the trial court not to take any action [*2] relating to its June 30, 2014 order or to take any other action with regard to the matters at issue in this interlocutory appeal. At issue in this appeal is, among other things, the trial court's subject matter jurisdiction over this matter. Thus, we *ORDER* all trial court proceedings relating to this matter stayed, including trial on the merits.

We *order* the clerk of this court to serve a copy of this order on all counsel and the trial court.

/s/ Marialyn Barnard

Marialyn Barnard, Justice

Rebeca C. Martinez

DISSENTING OPINION

I respectfully dissent to the panel's August 13, 2014 order granting the State of Texas's motion to lift the abatement and ordering the trial court to stay all proceedings in this matter. I disagree that the interlocutory appeal filed by the State stays all trial court proceedings in this matter pending resolution of the appeal. See [Tex. Civ. Prac. & Rem. Code Ann. § 51.014\(a\)\(8\)](#), (b) (West Supp. 2014). Subsection 51.014(b) of the Texas Civil Practice and Remedies Code provides as follows:

An interlocutory appeal under Subsection (a), other than an appeal under Subsection (a)(4) or in a suit brought under the Family Code, stays the commencement of a trial in the trial court pending resolution of the appeal. An interlocutory appeal under Subsection (a)(3), (5), or (8) also stays all other proceedings in the trial court pending resolution of the appeal.

See id. § 51.014(b) (West Supp. 2014), added by Acts 2013, 83rd Leg., R.S., ch. 916 (H.B. 1366), § 1, eff. Sept. 1, 2013 (emphasis added).¹ I believe the Legislature intended to exempt interlocutory appeals from the automatic stay provision in suits brought under the Family Code because of the possibility that a child is involved. *See, e.g.*, [Tex. Fam. Code Ann. § 109.001](#) (West 2014) (permitting temporary orders during pendency of appeal); *id.* § 152.314 (West 2014) (prohibiting stay of order enforcing child custody determination pending appeal). The case before this court is different from the same-sex divorce cases pending before the Texas Supreme Court because it involves a child born during the parties' legally-recognized marriage. *Cf.*, *In the Matter of the Marriage of J.B. & H.B.*, [326 S.W.3d 654](#) (Tex. App.—Dallas 2010, pet. granted); *State v. Naylor*, [330 S.W.3d 434](#) (Tex. App.—Austin 2011, pet. granted). It is uncertain how long our abatement will remain in effect, and because of the stay, the trial court is prohibited from rendering any orders during that time, even those relating to the best interest of the child. Surely, such a scenario does not benefit the child, who remains in limbo during the appellate process. As such, I would have denied the State's motion to lift the abatement for the purpose of granting an emergency stay.

Rebeca C. Martinez, Justice

[fn](#) ¹

Subsection 51.014(b) of the Texas Civil Practice and Remedies Code was amended two times on the same day in 2013. *See Acts* 2013, 83rd Leg., R.S., ch. 916 (H.B. 1366), § 1 and Acts 2013, 83rd Leg., R.S., ch. 1042 (H.B. 2935), § 4. Following the above-quoted amendment, Subsection 51.014(b) was amended to add that all other proceedings in the trial court are also stayed in Subsection (a)(12), but deleted the language relating to suits brought under the Family Code. None of the legislative history, however, indicates an intent to delete the language relating to suits brought under the Family Code. Rather, the legislative history reflects that the Legislature intended to add Subsection (a)(12) via the subsequent amendment. Because there is no precedent indicating which amendment controls, and because it appears that the Legislature intended to add, and not delete, the provision relating to suits brought under the Family Code, I rely on the amendment added by House Bill 1366.