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of Travis County, Texas

AUG 16 2019 JG

At Z. Sp. M.  
Velva L. Price, District Clerk

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Judge  
(512) 854-9306

200TH DISTRICT COURT  
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August 16, 2019

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Re: Cause No. D-1-GN-18-006882; Ex Parte, City of Magnolia; in the 419<sup>th</sup>  
District Court of Travis County, Texas

Dear Counsel:

Having considered the Interested Parties' (collectively, the "Churches") Motion for New Trial, the City of Magnolia's (the "City") Response, the Churches' Reply, the Attorney General's Statement, the City's Response to the Attorney General's Statement, the City's Motion to Strike the Attorney General's Statement, and the arguments of counsel, the Court hereby makes the following rulings:

- The Court GRANTS the Churches' Motion for New Trial; and
- The Court DENIES the City's Motion to Strike.

Although the Court could simply limit this letter to these rulings and request an order, I am including some of the bases for my reasoning below. This reasoning is not exclusive of other reasons I may have, will not be incorporated in any order, and does not limit the bases of support for any order.

### **The City's Petition Implicated The Churches' Due-Process-Protected "Private Rights"**

The parties appear to agree to the basic due-process ground rules set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and its progeny, and as applied by the Supreme Court of Texas in *In re E.R.*, 385 S.W.3d 552 (Tex. 2012). The crux of the parties' dispute here is whether the City's petition for expedited declaratory judgment implicates the Churches' "private rights," thereby giving rise to a due-process right to personal service of the petition? Or did the petition merely affect "public rights," such that the City's service by publication pursuant to the EDJA comported with due process? Specifically, the Churches contend that the City's petition affected their due-process-protected private rights in property (*i.e.*, their various causes of action challenging the City's allegedly discriminatory rates), and liberty (*i.e.*, free exercise of religion). The City counters that its petition and the Court's subsequent order adjudicated mere public rights, which courts have repeatedly held are adequately protected by service by publication.

The Supreme Court describes public rights as those "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests." *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 803 (1996) (internal citations omitted). In such cases, courts have routinely upheld service by publication. On the other hand, a private right is more akin to "a State's attempt to levy personal funds." *Id.* In a private-rights case, service by publication is constitutionally deficient when the affected party's identity is known or "reasonably ascertainable." *In re E.R.*, 385 S.W.3d at 561 (quoting *Tulsa Prof'l Collection Svcs., Inc. v. Pope*, 485 U.S. 478, 490 (1988)).

If a party is entitled to actual service but does not get it, the "failure of service deprives a litigant of due process and a trial court of personal jurisdiction; [thus,] the resulting judgment is void and may be challenged at any time." *Id.* at 566. "Accordingly, the statute [here, the EDJA] cannot place a temporal limit on a challenge to a void judgment filed by a defendant who did not receive the type of notice to which she was constitutionally entitled." *Id.* Thus, contrary to the City's contention, if the Churches are correct in arguing that service by publication in this case

was constitutionally deficient, the EDJA's accelerated timetable does not deprive the Court of plenary power to grant a new trial.

The Court concludes that the City's public-security-authorization petition directly implicated the Churches' private rights, namely their due-process-protected property and liberty interests. The City points to numerous out-of-state cases that have rejected due-process challenges to service by publication in similar bond-approval cases. But these cases addressed generalized grievances to rates as a whole, not distinct complaints like those alleged by the Churches here. The City's contention that all ratepayers are affected the same by the new rates and structure ignores the fact that the Churches and other non-profits have been specifically targeted as a subset of the overall ratepayer population to be charged higher rates than any other ratepayer—a complaint the City was well aware of at the time it filed its petition. This case, therefore, more closely resembles “a State's attempt to levy personal funds” than it does a taxpayer's generalized complaint “about an alleged misuse of public funds” affecting *all* payers equally. *Richards*, 517 U.S. at 803.

In separate litigation, the City similarly argued that the EDJA could *only* be read to affect public, rather than private, rights. The Third Court of Appeals rejected that narrow reading, recognizing that the EDJA “unambiguously ... encompass[es] not only persons who would possess only a generalized public right in the claims being adjudicated, but also some persons possessing particularized liberty or property interests enjoying Due-Process protections.” *Cities of Conroe, Magnolia, & Splendora v. Paxton*, 559 S.W.3d 656, 674-75 (Tex. App.—Austin 2018, pet. filed). The Court agrees with the Churches that this case presents the sort of “proper constitutional challenge to the statute's enforcement” that the court of appeals contemplated in *Cities of Conroe*. *Id.* at 676.

Because the Court concludes the Churches had private, due-process-protected rights that were implicated by the City's petition, and because the Churches and their claims were known to the City, the Court finds that the Churches were entitled to actual service of the City's petition. Because the Churches were not served in this manner, the Court finds their motion for new trial is well-taken and hereby grants the motion.

### **Rule 329**

The Churches cite Rule 329 as an alternative basis for granting a new trial. The City responds that granting a motion for new trial under Rule 329 would frustrate the expedited finality policies embodied in the EDJA's procedures. This, the argument goes, results in an inconsistency rendering Rule 329 and the EDJA incompatible and that the statute, under such a circumstance, should prevail. In light of the conclusion stated above, the Court will not engage in a lengthy analysis of the alleged incompatibility here, though the Court does note that the statute does not explicitly rule out (or even address) Rule 329's application in these sorts of cases.

Indeed, in *In re E.R.*, the statute at issue expressly supplanted Rule 329. 385 S.W.3d at 585 n.6. As the court noted, section 161.211(b) of the Texas Family Code states that “[n]otwithstanding Rule 329, Texas Rules of Civil Procedure, the validity of an order terminating the parental rights of a person who is served by citation by publication is not subject to collateral or direct attack after the sixth month after the date the order was signed.” *Id.* (quoting Tex. Fam.

Code § 161.211(b)). Nonetheless, the Court concluded that the petitioner was entitled to a new trial. The same reasoning applies *a fortiori* to the statute in this case, which does not expressly address Rule 329.

**Bond Requirement**

Finally, in their motion for new trial, the Churches contend that they should not be required to post any security to suspend enforcement of the Court's order in this case, citing Tex. R. App. P. 24.2(a)(3). The City did not respond to this argument in its response to the City's motion for new trial. The Court would like to give the City an opportunity to address what amount, if any, should be required as security, either under TRAP 24.2 or under section 1205.101, et seq., of the EDJA. The Court invites the parties to confer and propose a briefing schedule on this matter, if they so choose.

\* \* \*

Now that you have my rulings, please prepare appropriate orders, circulate them for approval as to form, and submit them for signature at your earliest convenience to Lisa Richard, at [REDACTED] If you have any questions, please contact Ms. Richard.

Sincerely,



Dustin M. Howell  
Judge, 200th District Court

DMH/sr/lkr

xc: Ms. Velva L. Price, Travis County District Clerk