

IN THE SUPREME COURT OF TEXAS

=====
No. 96-0442
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CYNTHIA LEE DAWSON-AUSTIN, PETITIONER

v.

WILLIAM FRANKLIN AUSTIN, RESPONDENT

=====
ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS
=====

Argued on April 23, 1997

JUSTICE BAKER, joined by JUSTICE ENOCH and JUSTICE ABBOTT, dissenting.

I respectfully dissent. After determining that it had jurisdiction, the trial court dissolved the parties' marriage, characterized Austin's Starkey Corporation stock as his separate property, and distributed about fifty-five percent of the community estate to Dawson-Austin and about forty-five percent to Austin. The court of appeals affirmed the trial court's judgment.¹ I would affirm the court of appeals.

I. BACKGROUND

Austin is the president of Starkey Laboratories, a Minnesota corporation. He owns sixty shares of Starkey stock, representing 100 per cent ownership. Austin owned the Starkey stock before he married Dawson-Austin. When Austin and Dawson-Austin married, they were domiciled in Minnesota. After continuing marital discord, they separated. There are no children of the marriage. Consequently, jurisdiction under Chapters 102, 152 or 159 of the Texas Family Code is not at issue.

The parties remained domiciled in Minnesota until just before this suit. In February 1992, Dawson-Austin moved to California. In March 1992, Austin moved to Texas. Dawson-Austin filed for divorce in California, but she did not obtain service on Austin for several months. After residing

¹ Justice Chapman dissented without an opinion.

in Texas for six months, and before Dawson-Austin served him in the California divorce action, Austin filed for divorce in Texas. Austin had Dawson-Austin served four days later.

In response to Austin's petition, Dawson-Austin filed, in one instrument: (1) a special appearance; (2) a motion to quash service of citation; (3) a plea to the jurisdiction; (4) a plea in abatement; and (5) subject to all of these, a general denial. On the day of the hearing for these motions, Dawson-Austin filed a motion for continuance. The trial court denied the motion for continuance, denied the special appearance because it was not verified, and proceeded to hear Dawson-Austin's motion to quash, which it also denied. The next day, Dawson-Austin amended her special appearance and moved for reconsideration. After another hearing a few days later, the trial court denied Dawson-Austin's motion for reconsideration.

II. SPECIAL APPEARANCE

The court of appeals held that the trial court properly overruled Dawson-Austin's original special appearance because it was unverified, and therefore defective. The court of appeals also held that because Dawson-Austin made a general appearance to argue other matters before filing her amended special appearance, the trial court properly overruled Dawson-Austin's amended special appearance and acquired jurisdiction. Dawson-Austin argues that the court of appeals erred when it held that she waived her special appearance by arguing her motion to quash after the trial court overruled her original special appearance.

A. RULE 120a

An objection to a Texas court's exercise of jurisdiction over a nonresident must be made by special appearance filed under Rule 120a of the Texas Rules of Civil Procedure. Rule 120a requires "strict compliance." *See Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 534 (Tex. App.-Corpus Christi 1985, writ ref'd n.r.e.). A special appearance must be made and determined on sworn motion prior to any other plea, pleading, or motion that seeks affirmative relief. *See TEX. R. CIV. P. 120a(1) and (2); Liberty Enters., Inc. v. Moore Transp. Co.*, 690 S.W.2d 570, 571-72 (Tex. 1985). Any appearance not in compliance with Rule 120a is a general appearance. *See TEX. R. CIV.*

P. 120a(1); *Portland Sav. & Loan Ass'n*, 716 S.W.2d at 534; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (“the personal jurisdiction requirement is a waivable right”). When a party generally appears, the trial court can exercise jurisdiction over the party without violating the party’s due process rights. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985); *see also* TEX. FAM. CODE § 6.305(a) (formerly TEX. FAM. CODE § 3.26(a)).²

A party may amend a special appearance. However, the party must not seek affirmative relief on any question other than that of the court’s jurisdiction between the time it files its original special appearance and its amended special appearance. *See* TEX. R. CIV. P. 120a(2)(special appearance “shall be heard and determined before . . . any other plea or pleading may be heard.”); *see also Liberty Enters.*, 690 S.W.2d at 571-72. Any intervening appearance to invoke the trial court’s judgment about a “question other than the court’s jurisdiction” is a general appearance. *See Moore v. Elektro-Mobil Technik GMBH*, 874 S.W.2d 324, 327 (Tex. App.--El Paso 1994, writ denied); *Investors Diversified Serv., Inc. v. Bruner*, 366 S.W.2d 810, 815 (Tex. Civ. App.--Houston 1963, writ ref’d n.r.e.).

B. ANALYSIS

Because Dawson-Austin’s original special appearance was not sworn, it was defective. *See* TEX. R. CIV. P. 120a(1). While Rule 120a allows for amendment, any amendment to cure a defective special appearance must be accomplished *before* arguing other matters. *See* TEX. R. CIV. P. 120a(2). Dawson-Austin did not amend her special appearance until *after* she argued other matters, namely

² Section 6.305(a) provides:

If the petitioner . . . is a resident or a domiciliary of this state at the time the suit for dissolution is filed . . . the court may exercise personal jurisdiction over the respondent . . . although the respondent is not a resident of this state if:

(1) this state is the last marital residence of the petitioner and the respondent and the suit is filed before the second anniversary of the date on which the marital residence ended; or

(2) there is any basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

TEX. FAM. CODE § 6.305(a)(formerly TEX. FAM. CODE § 3.26(a)).

her motion to quash and about discovery related to that motion. By doing so, Dawson-Austin invoked the trial court's jurisdiction and generally appeared. *See* TEX. R. CIV. P. 120a(1) and (2); *see also Elektro-Mobil Technik GMBH*, 874 S.W.2d at 327; *Portland Sav. & Loan Ass'n*, 716 S.W.2d at 535.

Dawson-Austin argues that because she sought a continuance before the hearing on her original special appearance, she could present her other motions before amending her special appearance. I would reject this argument. I generally agree that a motion for continuance is not a general appearance. A continuance would allow a party to amend its special appearance under Rule 120a. A continuance request for that purpose in no way invokes the trial court's judgment about anything other than the court's jurisdiction. *See Elektro-Mobil Technik GMBH*, 874 S.W.2d at 327. However, that is not what occurred in this case. Dawson-Austin did not seek a continuance to cure her defective special appearance, but instead contended that she needed time to take depositions to support *her motion to quash*.³ Regardless, Dawson-Austin did not provide the court of appeals with any briefing about whether the trial court improperly denied her a continuance. 920 S.W.2d at 782. She did not raise the issue in this Court.

Also, like the court of appeals, I reject Dawson-Austin's argument that she should be excused from arguing her motion to quash because Austin set the hearing. Dawson-Austin did not object to the trial court proceeding with her motion to quash or indicate to the trial court that she wanted to amend her special appearance before proceeding further. By arguing her motion to quash before amending her special appearance, Dawson-Austin committed a fatal procedural error and therefore generally appeared. *See Kawasaki Steel Corp.*, 699 S.W.2d at 201, 203. The Court should affirm the court of appeals.

III. DIVISIBLE DIVORCE

³ Austin argues that although Rule 120a allows for a continuance for discovery, including depositions, the rule only allows for discovery about the disputed issue of personal jurisdiction. *See Portland Sav. & Loan*, 716 S.W.2d at 535; TEX. R. CIV. P. 120a(3). I agree. As a policy matter, litigants should not engage in discovery on the merits of other issues until the special appearance is decided.

The Court compounds its error today by reversing the trial court's judgment except as to the grant of divorce. Where jurisdiction over the parties is established, Texas law does not allow a "divisible divorce." See TEX. FAM. CODE § 7.001 (formerly TEX. FAM. CODE § 3.63(a))("In a decree of divorce . . . the court shall order a division of the estate of the parties. . . ."); see also *Hollaway v. Hollaway*, 792 S.W.2d 168, 170 (Tex. App.--Houston [1st Dist.] 1990, writ denied); *Seibert v. Seibert*, 759 S.W.2d 768, 769-70 (Tex. App.--El Paso 1988, writ denied); *Vautrain v. Vautrain*, 646 S.W.2d 309, 314 (Tex. App.--Fort Worth 1983, writ dismissed). Here, because Dawson generally appeared, the trial court had jurisdiction over both parties. Therefore, it properly divided the marital estate.

Only recently, the Legislature codified the divisible divorce concept in cases where the court lacks jurisdiction over a nonresident party in a suit to dissolve a marriage. See TEX. FAM. CODE § 6.308 (in a suit to dissolve a marriage, a court may exercise its jurisdiction "over those portions of the suit which it has authority.")(Added by Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 1 and 4 (eff. April 17, 1997), 1997 Tex. Gen. Laws 8, 27, 43). Because of its effective date, section 6.308 does not apply to this case. See Act of April 3, 1997, 75th Leg., R.S., ch. 7, § 4, 1997 Tex. Gen. Laws 8, 43 ("The change in law made by this Act does not affect a proceeding under the Family Code pending on the effective date of this Act. A proceeding on the effective date of this Act is governed by the law in effect at the time the proceeding was commenced, and the former law is continued in effect for that purpose."). Because of the prior existing Texas law, and because the trial court had jurisdiction over both parties, it had to divide the marital estate.

The Court cites *Estin v. Estin*, 334 U.S. 541 (1948), for the proposition that the Supreme Court has recognized the concept of a "divisible divorce" and that it should apply here. See *Estin*, 334 U.S. at 549. In *Estin*, the wife initially sued for separation in New York. The husband answered, and the New York trial court granted a separation decree and awarded the wife permanent alimony. Two years later, after establishing residency in Nevada, the husband sued for divorce in Nevada. After constructive service (the wife was never personally served and never appeared), the

Nevada court granted the husband a divorce. The Nevada divorce decree made no provision for alimony. The gment, the husband argued that the Nevada divorce decree trumped the New York judgment. The New York court rejected his argument. The Supreme Court considered “whether Nevada could under any circumstances adjudicate rights of respondent [the wife] under the New York judgment when she was not personally served or did not appear in the [Nevada] proceeding.” *Estin*, 334 U.S. at 547. The Supreme Court held that under full faith and credit principles, the Nevada court could not adjudicate the wife’s rights under the New York judgment, “mak[ing] the divorce divisible . . .” *Estin*, 334 U.S. at 549. Thus *Estin* stands for the proposition that, in a case where an out-of-state respondent is not personally served and does not appear, and thus there is no personal jurisdiction, any part of an ex parte divorce decree that purports to affect the respondent’s property interests is not enforceable under full faith and credit principles. *See Estin*, 334 U.S. at 542; *see also Conlon v. Heckler*, 719 F.2d 788, 794-96 (5th Cir. 1983); *Fox v. Fox*, 559 S.W.2d 407, 410 (Tex. Civ. App.--Austin 1977, no writ); *Risch v. Risch*, 395 S.W.2d 709, 711 (Tex. Civ. App.--Houston 1965, writ dism’d). *Estin*’s holding does not override section 7.001’s command that “the court shall order a division of the estate of the parties,” whenever the court has jurisdiction over the respondent under section 6.305(a). *See* TEX. FAM. CODE § 6.305(a) (formerly TEX. FAM. CODE § 3.26(a)); *see also Ismail v. Ismail*, 702 S.W.2d 216, 221 (Tex. App.--Houston [1st Dist.] 1985, writ ref’d n.r.e.); *Comisky v. Comisky*, 597 S.W.2d 6, 9 (Tex. Civ. App.--Beaumont 1980, no writ); *Butler v. Butler*, 577 S.W.2d 501, 507 (Tex. Civ. App.--Texarkana 1978, writ dism’d).

I agree with the Court that “the district court did not have in personam jurisdiction over Dawson-Austin unless it was under Section 6.305(a)(2) [of the Texas Family Code].” ___S.W.2d ___. Indeed, but for her procedural errors, Dawson-Austin may have been able to establish that the trial court did not have in personam jurisdiction over her under section 6.305(a)(2). However, Dawson-Austin’s procedural errors resulted in a general appearance which satisfied section 6.305(a)(2)’s requirements. *See Kawasaki Steel Corp.*, 699 S.W.2d at 201, 203; *see also Burnham v. Superior Court*, 495 U.S. 604 (1990)(holding that due process clause did not prevent California

courts from exercising jurisdiction over nonresident husband served with divorce suit while in California on business trip). Dawson-Austin's general appearance gave the trial court jurisdiction to dissolve the marriage *and* to divide the marital estate, as it was required to do. *See* TEX. FAM. CODE § 7.001.

Because the trial court's jurisdiction was founded on Dawson-Austin's general appearance, the "divisibility" of the divorce turns on Texas law, which, when the court has jurisdiction over the parties, requires the court to divide the marital estate. *See* TEX. FAM. CODE § 7.001; *Hollaway*, 792 S.W.2d at 170; *Vautrain*, 646 S.W.2d at 314. This case should not be decided or "divided" on full faith and credit principles as in *Estin*.

IV. CONCLUSION

Today the Court permits less than strict compliance with Rule 120a. I believe that Dawson-Austin's efforts to specially appear were flawed. Therefore, she made a general appearance and the trial court properly exercised its jurisdiction. I would affirm the courts below. Because the Court holds otherwise, I dissent.

James A. Baker,
Justice

OPINION DELIVERED: February 13, 1998