



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-19-00018-CV

CONSTANT DERBEZ, APPELLANT

V.

ANA GABRIELA DERBEZ, APPELLEE

**On Appeal from the 365th District Court
Maverick County, Texas
Trial Court No. 16-08-33337-MCVAJA; Honorable Amado Abascal, Presiding**

May 21, 2020

OPINION

Before PIRTLE, PARKER, and DOSS, JJ.

Appellant, Constant Derbez, challenges the trial court's jurisdiction to issue a *Final Decree of Divorce* in Texas after his marriage to Appellee, Ana Gabriela Derbez, had been previously dissolved by a court in Mexico.¹ Presenting three issues, he contends

¹ Originally appealed to the Fourth Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between precedent of the Fourth Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. See TEX. R. APP. P. 41.3.

(1) the Texas court did not acquire subject matter jurisdiction over the divorce proceeding filed by Ana, (2) Ana's suit should have been dismissed for lack of subject matter jurisdiction or alternatively, comity, and (3) the trial court abused its discretion in entering a *Final Decree of Divorce*. On July 12, 2019, after appellate briefs were filed, Constant filed an *Opposed Motion for Judicial Notice* in this court of which we dispose in this appeal. We affirm the trial court's *Final Decree of Divorce*.

BACKGROUND

Ana and Constant were married in 1986 in Eagle Pass, Texas. Constant is a Mexican citizen and Ana is a United States citizen. At the time of the underlying proceedings, the parties had one minor child who resided with Ana and attended school in Eagle Pass. During their marriage, the parties had residences in Eagle Pass and in the state of Coahuila, Mexico. Their family business, however, was located in Mexico.

According to documents in the record, in 2015, Constant sued Ana for divorce in Coahuila, Mexico. Ana originally participated in the proceedings and challenged the Mexican court's jurisdiction. She alleged that the parties lawfully resided in Texas and thus, jurisdiction was proper in Texas. Her challenges were all rejected and the court in Mexico purportedly granted Constant's petition for divorce on April 19, 2016.

Ana refused to recognize the Mexican divorce and on August 2, 2016, she filed a petition for divorce in Maverick County, Texas. Constant initially appeared *pro se* but later retained counsel. The case lingered on the trial court's docket and after several continuances and notices of dismissal, a merits hearing was held on February 20, 2018.

At the brief hearing where both parties appeared and participated,² Ana testified that she and Constant had entered into an agreement that he would provide her with financial support of \$800 per month during his lifetime or until she remarried.³ According to Ana, the parties also agreed that Constant would pay her \$3,000 per month for five months to assist her in purchasing a vehicle. Constant also agreed to pay for car repairs to an older vehicle to be awarded to Ana. Ana testified she was to be awarded a duplex the parties owned in Eagle Pass. According to her testimony, Constant agreed to pay for needed repairs to the duplex, including new air conditioning units. She also testified that Constant agreed to pay \$1,200 for her to attend classes to obtain a real estate license.

Represented by counsel and with the assistance of a translator,⁴ Constant testified that he agreed to the financial obligations testified to by Ana and that he understood the proceedings. Following the presentation of testimony, the trial court pronounced its ruling in accordance with the parties' agreement.

After the hearing, Constant claimed he did not fully understand what had occurred. He indicated that he was concerned with the devaluation of the peso and believed he would not be able to afford what was ordered by the trial court. His main concern was that he would be unable to financially provide for his minor child who would be living with Ana. He blamed his attorney, who had assumed the parties had agreed to the terms

² Neither party raised the Mexican divorce during the hearing.

³ The trial court explained that spousal maintenance was not appropriate because it expires after ten years so the parties agreed to enter into a contractual agreement for support.

⁴ The record does not indicate whether the interpreter was certified.

testified to by Ana. Constant wrote a letter to the judge expressing his dissatisfaction with trial counsel's representation. Subsequently, counsel was allowed to withdraw.

Constant retained new counsel who filed an amended original answer with a plea to the jurisdiction on July 31, 2018. The plea to the jurisdiction challenged the trial court's jurisdiction to rule on Ana's divorce petition on the ground that the parties had already been divorced in Coahuila, Mexico. Attached to the plea to the jurisdiction were exhibits containing numerous documents. The official Certificate of Divorce was written in Spanish and not translated; however, an "apostille," similar to notarizing a document, was translated as well as a document from the Mexican United States Office Clerk certifying the Act of Divorce between Constant and Ana. Exhibit C to the plea to the jurisdiction, however, was a lengthy, untranslated document.

No hearing was ever held on the plea to the jurisdiction and the trial court did not rule on the plea. On October 29, 2018, several months after the plea to the jurisdiction was filed, the trial court did sign a *Final Decree of Divorce*, memorializing the parties' agreement from the February hearing.

Subsequent to the entry of that decree, Constant did not file a motion for new trial. Instead, thirty-two days after entry of the decree, he filed a *Motion to Dismiss for Lack of Jurisdiction* and a *Notice of Appeal*. By that time, the trial court's thirty-day plenary power had already expired. See, e.g., TEX. R. CIV. P. 329b(d) (granting trial court plenary power for thirty days to vacate, modify, correct, or reform a judgment). Constant's motion to dismiss was supplemented numerous times to include translations of certain documents. In his fifth and final supplement to the motion to dismiss, he included an affidavit from an

attorney who averred he was an expert in the Mexican legal system. The expert recited that he reviewed all the proceedings in the parties' Mexican divorce. He authenticated and translated the relevant documents that established the prior divorce between the parties, including an appeal that was resolved against Ana.⁵ Due to the late filing of the motion to dismiss, the trial court never took any action on that motion.

Constant's *Notice of Appeal* was originally presented to the Fourth Court of Appeals in San Antonio. On January 7, 2019, the Fourth Court of Appeals granted Constant's motion for extension of time to file his notice of appeal and, as noted above, the appeal was subsequently transferred to the Seventh Court of Appeals in Amarillo as a part of the Texas Supreme Court's docket equalization efforts. After briefs by both parties were filed, Constant filed an *Opposed Motion for Judicial Notice*, in this court, asking that we take judicial notice of the Mexican court records and documents under Rule 201 of the Texas Rules of Evidence. The motion is supported by the same affidavit from the expert who authenticated the documents in Constant's fifth supplement to his motion to dismiss filed with the trial court.

APPLICABLE LAW

Subject matter jurisdiction concerns the court's power to hear and determine a particular type of suit. *CSR Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996). Subject matter jurisdiction is essential for a court to have authority to decide a case; it is not presumed and cannot be waived or conferred by consent. *See Dubai Petroleum Co. v. Kazi*, 12

⁵ All the documents referenced by the expert were made part of the trial court record in subsequent motions to dismiss and are a part of the appellate record.

S.W.3d 71, 76 (Tex. 2000); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443-44 (Tex. 1993). See also *Alfonso v. Skadden*, 251 S.W.3d 52, 55 (Tex. 2008) (*per curiam*) (subject matter jurisdiction cannot be waived and can be raised at any time). Whether a trial court has subject matter jurisdiction is a question of law subject to *de novo* review. See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998); *In re G.S.G.*, 145 S.W.3d 351, 353 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

ANALYSIS

The gist of Constant's three issues is that the trial court did not have subject matter jurisdiction to grant Ana's divorce petition and that it abused its discretion in doing so because the parties had already been divorced in Mexico.⁶ Thus, in the interest of brevity, we will address his three issues simultaneously.

At the February 2018 hearing on the merits of Ana's petition for divorce, the trial court was completely unaware that a prior divorce proceeding had occurred in Mexico. There is no reference in Ana's pleading to the foreign divorce proceeding and during the hearing nothing was said by either party about a foreign divorce. In her pleadings, Ana alleged "[she] has been a domiciliary of the state of Texas for the preceding six-month period and a resident of Maverick County for the preceding ninety-day period" and her testimony at the hearing confirmed those allegations. Nothing about a foreign divorce was ever pleaded or testified to at the hearing.

⁶ We note that in her brief, Ana argues "it is ludicrous for [Constant] to argue that the trial court did not have personal jurisdiction over him." She mistakenly continues that he did not move to quash alternative service nor make a special appearance. Constant never challenged personal jurisdiction. His plea to the jurisdiction complains only of subject matter jurisdiction—the divorce proceeding.

During Constant's testimony, he was questioned by Ana's counsel. Constant confirmed that he heard and understood Ana's testimony. He testified he was in agreement with her testimony regarding the division of community property in Texas, the division of property in Mexico, and the financial support for Ana and their minor daughter. Believing the parties had reached an agreement, Constant's counsel chose not to question him except briefly regarding the vehicle he customarily drove.

At no time during the hearing did anyone raise the issue of a prior divorce between the parties. In his brief, Constant states "he informed his lawyers that there was a previous Mexican divorce" that "they believed was inconsequential." His statement is, however, unsubstantiated by the record. Ana, likewise, gave no indication of the prior divorce proceeding. Based on the information and evidence before the trial court at the time of the hearing, it found it had jurisdiction over the parties and the subject matter and ruled that the marriage be dissolved.

Months later, with the help of new counsel, Constant filed a plea to the jurisdiction alerting the trial court for the first time of a prior Mexican divorce and challenging the trial court's subject matter jurisdiction over the Texas proceeding. At the time, numerous untranslated documents were included as exhibits. Later filings included an affidavit from an attorney who provided his expert opinion on the Mexican legal system. In that affidavit, he averred that he reviewed and translated all the documents from the parties' Mexican divorce.

On appeal, Constant maintains the trial court should have taken judicial notice of the documents included in his plea to the jurisdiction under Rule 203 of the Texas Rules

of Evidence and should have also admitted those documents under Rule 1009 of the Texas Rules of Evidence which governs admissibility of translated documents. See TEX. R. EVID. 203, 1009.

Rule 203 provides in relevant part that a party intending to raise a foreign country's law must give reasonable notice *at least thirty days before trial* and supply all parties with copies of written materials or sources. TEX. R. EVID. 203(a). (Emphasis added). Rule 203 also provides that if the written materials or sources are in a language other than English, the proponent must, *at least thirty days before trial*, provide all parties with copies of the foreign language text and an English translation. *Id.* at 203(b). (Emphasis added). Rule 203 must be followed for the determination of foreign law. See *Cal Dive Offshore Contractors Inc. v. Bryant*, 478 S.W.3d 914, 921 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

What Constant misses, however, is that Rule 203(e) provides that Rule 203(a) and (b) do not apply to an action to which Rule 308b of the Texas Rules of Civil Procedure applies. Rule 308b, entitled *Determining the Enforceability of a Judgment . . . Based on Foreign Law in Certain Suits Under the Family Code*, provides that, in a suit for dissolution of a marriage pursuant to the provisions of the Texas Family Code, the recognition or enforcement of a foreign judgment, based on foreign law, is to be determined in accordance with the provisions of Rule 308b. See TEX. R. CIV. P. 308b(b)(1). Pursuant to that rule, a party seeking the recognition or enforcement of a foreign judgment of divorce must, within sixty days of filing an original pleading, give written notice to the court and to all parties that describes the court's authority to recognize the foreign judgment. See *id.* at 308b(d)(1). Within thirty days of the date that the Rule 308b(d)(1) notice is

given, a party opposing the recognition or enforcement of a foreign judgment must then give written notice to the court and all parties that explains the basis for the party's opposition. See *id.* at 308b(d)(2). At that point, the trial court must conduct a pretrial hearing, at least thirty days before trial, to determine whether to recognize the foreign judgment. The trial court must comply with all requirements of this rule and make an independent determination whether to recognize or enforce the foreign judgment even if no party opposes enforcement of that judgment. Here, Constant did not comply with any of these provisions.

Rule 1009 provides for admissibility of a foreign language document that is translated if, *at least forty-five days before trial*, the proponent serves all parties with the translation and the underlying foreign documents and with a qualified translator's affidavit or unsworn declaration setting forth the translator's qualifications. Furthermore, the translator must certify that the translation is accurate. *Id.* at 1009(a).

Constant correctly represents that a plea to the jurisdiction has no deadlines and can be raised at any time. However, a party relying on foreign law must strictly plead and prove the law. *Nguyen v. Nguyen*, 355 S.W.3d 82, 89 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

The hearing on the merits in the underlying divorce occurred on February 20, 2018, and the *Final Decree of Divorce* was signed on October 29, 2018. Not until July 31, 2018, when Constant filed the plea to the jurisdiction, was the Mexican divorce ever brought to the trial court's attention. And, not until November 30, 2018, after the trial court had lost plenary power and the *Decree of Divorce* had become final for purposes of appeal, did

Constant provide an expert's affidavit on Mexican law and a translation of the foreign divorce documents. As such, the trial court was never asked to take judicial notice or determine foreign law at a time when it could have taken that information into consideration. Neither was the trial court timely given an opportunity to consider admissibility of the translated documents. Consequently, Constant did not comply with the procedural rules which would have provided the trial court with the necessary information to take judicial notice of the Mexican divorce and determine whether it had subject matter jurisdiction. *Cf. Ashfaq v. Ashfaq*, 467 S.W.3d 539, 542-43 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (affirming dismissal of underlying divorce action for lack of jurisdiction where opponent of the Texas divorce produced evidence of Pakistani law and a prior divorce between the parties). Without adherence to the procedures and deadlines provided in the Texas Rules of Evidence, Constant's arguments fail.

Based on the evidence presented at the hearing on the merits, we conclude the trial court had subject matter jurisdiction and did not abuse its discretion in entering the *Final Decree of Divorce*. Constant's issues are overruled. Also, because his *Opposed Motion for Judicial Notice* filed in this court is not dispositive of the issues before us, that motion is rendered moot.

CONCLUSION

The trial court's *Final Decree of Divorce* is affirmed.

Patrick A. Pirtle
Justice