

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

THOMAS F. HUEBNER,

Petitioner,

v.

KIMBERLY P. HUEBNER,

Respondent.

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Case No. 2D12-516

Opinion filed July 20, 2012.

Petition for Writ of Mandamus to the
Circuit Court for Sarasota County; Judy M.
Goldman, Acting Circuit Judge.

Thomas F. Huebner, pro se.

Susan J. Silverman, Sarasota; and W.
Russell Snyder of W. Russell Snyder,
P.A., Venice, for Respondent.

PER CURIAM.

We deny this petition for writ of mandamus because it is moot. We write to give some guidance to counsel as to the nature of the response this court anticipates from the respondent when a response is ordered. We also address the Wife's motion for appellate attorney's fees.

The Huebners are involved in a dissolution proceeding in the circuit court. Although the Husband has counsel in the circuit court, he filed this petition for writ of

mandamus without the assistance of counsel. The petition alleges that the final hearing was concluded on May 18, 2011, and that the judge had not issued a final order of dissolution as of February 2012. The Husband asked that we issue a writ to compel the circuit court to rule.

Because the parties had been waiting for a ruling for approximately nine months, this court issued an order on February 16, 2012, asking the Wife to respond within fifteen days.¹ This court also served the order on the circuit court judge who was named in the petition. See Fla. R. App. P. 9.100(e)(2). Often such an order results in a brief response from the respondent, attaching a copy of an order issued by the named judge a few days after our order requiring a response. Other times, we receive a brief response admitting that the circuit court has not ruled and either joining in the petition for writ of mandamus or suggesting that we give the circuit court a time-specific period in which to rule.²

In this case, the circuit court did not rule during the fifteen-day window. Instead of a brief response, on March 2, the Wife's attorney filed an eighteen-page brief with a long description of the proceedings below and a full discussion of the law of mandamus, arguing that a writ should not issue. The attorney also filed a motion for attorney's fees pursuant to section 61.16, Florida Statutes (2007). This was followed on

¹In civil cases, this court does not have a set minimum period of delay between the hearing and the order that we use to decide whether to require a response. Generally, a delay of less than ninety days is unlikely to be regarded as facially sufficient to require a response. Likewise, a delay in excess of 180 days is more likely to result in an order requiring a response.

²This court normally does not order the named judge to file a response, and the judge is not required to respond in the absence of an order. The rule permits such a response, but it is rarely necessary. See Fla. R. App. P. 9.100(e)(3).

March 20 by the Wife's motion to dismiss the petition as moot because the circuit court had issued the order. The order resolving the matter was attached to the motion.

Because the circuit court has ruled, this petition is moot. We deny it on that ground.

Concerning the Wife's motion for attorney's fees, we conclude that section 61.16(1) does provide a basis for this court to award a fee in an appropriate case. The issues in a typical mandamus proceeding are very simple: (1) whether the case has been under advisement in the trial court for as long as the petitioner represents, (2) whether the court has ruled and, if not, (3) whether there is some explanation for the unusual delay. These proceedings are unlike appeals in which attorneys fulfill an adversarial role. All parties have a reasonable expectation of receiving a timely ruling from a court. In a mandamus proceeding, the respondent's attorney is serving largely as an officer of the court to help this court determine the best way to resolve any logjam that may exist in the lower tribunal.

In this case, the response opposing the issuance of a writ and discussing the law in detail was well beyond the needed response. We are hesitant to make the Husband pay attorney's fees for pleadings opposing his petition when his pro se petition was well-founded and actually benefitted both parties to the extent that it prompted the trial court to rule. Accordingly, we deny the motion for fees.

Petition for writ of mandamus is denied.

NORTHCUTT and DAVIS, JJ., Concur.
ALTENBERND, J., Concurs with opinion.

ALTENBERND, Judge, Concurring.

I agree with the court's opinion in all respects except that I do not conclude that section 61.16, Florida Statutes (2007), gives this court authority to grant fees in this type of original proceeding. Section 61.16(1) states:

The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals. In those cases in which an action is brought for enforcement and the court finds that the noncompliant party is without justification in the refusal to follow a court order, the court may not award attorney's fees, suit money, and costs to the noncompliant party.

(Emphasis added.)

A petition for writ of mandamus is an original common law proceeding commenced in this court. It is not a proceeding under Chapter 61. Just as section 61.16 does not apply in Chapter 741 proceedings, I do not believe it applies in this non-statutory common law proceeding. See Belmont v. Belmont, 761 So. 2d 406, 407 (Fla. 2d DCA 2000) (holding that attorney's fees could not be awarded under section 61.16 "for services rendered by counsel in a separately filed domestic violence injunction case"); Baumgartner v. Baumgartner, 693 So. 2d 84 (Fla. 2d DCA 1997) (same).

This petition is not in the nature of an enforcement action against the other party. See, e.g., Fortner v. Fortner, 631 So. 2d 327 (Fla. 2d DCA 1994). Section 61.16(2) has special provisions addressing criminal contempt, but there are no special provisions as to a petition for writ of mandamus. I have found no case expressly

awarding fees under this section in a mandamus proceeding,³ although I am certain that this court may occasionally have done so in an unpublished order. Even under a liberal interpretation of section 61.16, I cannot agree that this statute applies in an original common law proceeding naming the trial judge and seeking a ruling in the pending trial court case.

It may be that section 61.16 should be amended to provide some discretion to the district courts to award fees in mandamus, certiorari, and prohibition proceedings that arise from pending dissolution actions. On the other hand, given that a petition for mandamus in this context addresses a delay by the circuit court that is completely beyond the control of the other spouse, there is little justification to shift the legal costs from one spouse to the other.

³The only case I have located referencing this statute in connection with the word "mandamus" is Pefaur v. Pefaur, 617 So. 2d 425 (Fla. 3d DCA 1993). Pefaur does not address this issue.