



In The

Eleventh Court of Appeals

No. 11-16-00230-CV

IN RE SUNNY J. WALTON

Original Mandamus Proceeding

MEMORANDUM OPINION

Pending before this court is the petition of Relator, Sunny J. Walton, for a writ of mandamus. She asks us to review the temporary orders entered by the Honorable Thomas Wheeler, Judge of the 350th District Court, sitting for the 326th District Court of Taylor County, naming Real Party in Interest, Cody Walton, as the parent with the right to designate the primary residence of their children, D.J.W. and C.C.W. Relator contends that the evidence presented at the hearing from which the temporary orders emanated is insufficient to satisfy the statutory requirements permitting the modification. *See* TEX. FAM. CODE ANN. § 156.006(b)(1) (West Supp. 2016) (providing that a temporary order must be in the best interest of the child and be necessary because the child's present circumstances would significantly impair

the child’s physical health or emotional development). Specifically, Relator asserts that “[t]he evidence presented at the de novo hearing is not sufficient to show that the children’s present circumstances would significantly impair their physical health or emotional development.” For the reasons set forth herein, we deny Relator’s petition for writ of mandamus.

“[M]andamus is an ‘extraordinary remedy, not issued as a matter of right, but at the discretion of the court.’” *In re Reece*, 341 S.W.3d 360, 374 (Tex. 2011) (orig. proceeding) (quoting *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004) (orig. proceeding)). To obtain relief by writ of mandamus, a relator must establish that an underlying order is void or a clear abuse of discretion and that no adequate appellate remedy exists. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). An abuse of discretion occurs when a trial court’s ruling is arbitrary and unreasonable, made without regard for guiding legal principles or supporting evidence. *Ford Motor Co. v. Garcia*, 363 S.W.3d 573, 578 (Tex. 2012).

Relator’s petition is in the tenor of a challenge to the sufficiency of the evidence underlying the trial court’s finding regarding changed circumstances and the best interests of the child. “It is well established Texas law that an appellate court may not deal with disputed areas of fact in an original mandamus proceeding.” *In re Angelini*, 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding) (quoting *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding)); *In re M.C.W.*, 401 S.W.3d 906 (Tex. App.—Amarillo 2013, orig. proceeding). Simply put, an appellate court may not legitimately reconcile disputed factual matters in a mandamus proceeding. *See Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991) (orig. proceeding). If the record contains legally sufficient evidence both against and in support of the trial court’s decision, then mandamus will not lie because weighing conflicting evidence is a trial court

function. *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 686 (Tex. 2007) (orig. proceeding).

While Relator suggests otherwise, we conclude there is evidence that a rational factfinder could interpret as satisfying the statutory requirements to the effect that the temporary orders were necessary because the children's present circumstances would significantly impair the children's physical health or emotional development as required by Section 156.006(b)(1). Dr. Marc Orner testified that he had been D.J.W.'s counselor "for a period of time." When asked what effect the announced move to Snyder would have on D.J.W.'s "emotional or physical well-being," he stated: "I think it would be a pretty debilitating effect." Dr. Orner equated the announced move with the difficulty experienced "later on" by military children "when they're forced to move." He testified that, "[i]f you're being forced to do something, there are emotional, psychological ramifications no matter what it is we're forced to move -- to do." Dr. Orner further opined that D.J.W. and C.C.W. "need to be together wherever they are." This testimony constituted some evidence that the children's present circumstances, by virtue of the announced move, would significantly impair their physical health or emotional development.

As was the case in *In re M.C.W.*, this proceeding presents a disagreement about the quantum of weight that should be assigned to different aspects of the evidence presented below and the credibility of the witnesses. 401 S.W.3d at 907. Resolution of those matters lay with the trial court. *Id.* Furthermore, the extraordinary remedy of mandamus is only issued at the discretion of an appellate court. *See In re Prudential*, 148 S.W.3d at 138. In light of the possibility of the children being required to make multiple moves in a short period of time, we decline to exercise our discretion to grant mandamus relief.

We deny Relator's petition for writ of mandamus.

JOHN M. BAILEY
JUSTICE

February 28, 2017

Panel consists of: Willson, J.,
Bailey, J., and Countiss.¹

Wright, C.J., not participating.

¹Richard N. Countiss, Retired Justice, Court of Appeals, 7th District of Texas at Amarillo, sitting by assignment.