

Petition for Writ of Mandamus Denied and Memorandum Opinion filed October 28, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00966-CV

IN RE KRISTINA S., Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

MEMORANDUM OPINION

On October 7, 2010, relator Kristina S. filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code § 22.221; *see also* Tex. R. App. P. 52. Relator complains that respondent, the Honorable Kyle Carter, presiding judge of the 125th District Court of Harris County, abused his discretion in awarding appellate attorney's fees as sanctions in the final dismissal order in cause number 2010-29216.

Mandamus relief is available only to correct a clear abuse of discretion for which the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). We determine the adequacy of an appellate remedy by balancing the benefits of mandamus review against its detriments. *Id.* at 136.

On August 26, 2010, the trial court dismissed relator's suit for want of jurisdiction. After finding that the suit was brought for harassment, the trial court awarded sanctions, including attorney's fees in the event of an appeal. Relator filed a timely motion to modify, correct or reform the judgment, and she states that the trial court has not ruled on her motion. Therefore, relator's petition is premature because the trial court has not refused to modify its order. *See In re Perritt*, 992 S.W.2d 444, 446 (Tex.1999) (orig. proceeding) (per curiam) (holding that a party's right to mandamus relief generally requires a predicate request for action and a refusal of that request).

Moreover, because a final judgment has been rendered, relator has an adequate appellate remedy. A trial court may grant appellate attorney's fees as part of a sanctions order, but the award must be conditioned on the appeal's outcome. *In re Ford Motor Co.*, 988 S.W.2d 714, 721 (Tex. 1998). The trial court's assessment of attorney's fees in the event of an unsuccessful appeal does not improperly chill the right to seek appellate review; a conditional award of appellate fees is part of a sanctions award of trial court costs and is designed to compensate for the expense of defending the trial court award. *Loeffler v. Lytle I.S.D.*, 211 S.W.3d 331, 351 (Tex. App.—San Antonio 2006, pet. denied); *see also Law Offices of Windle Turley, P.C. v. French*, 164 S.W.3d 487, 493 (Tex. App.—Dallas 2005, no pet.) (upholding appellate attorney's fees ordered as sanctions because expense would be incurred as a result of unsuccessful appeal).

Relator complains that because the trial court failed to expressly condition the award of appellate attorney's fees on the outcome of the appeal, she has no appellate remedy, citing *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991). In *Braden*, the court held that ordering the relator to pay a discovery sanction before rendition of an appealable judgment denied him an adequate remedy by appeal. *Id.* at 930. Here, an appealable order has been entered, so *Braden* is not on point. Relator may suspend payment of the sanctions pending appeal. *See Tex. R. App. P. 24.1.* On appeal, a court may modify the

trial court's judgment to condition the award of appellate attorney's fees. *See In re K.A.R.*, 171 S.W.3d 705, 712 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Accordingly, we deny relator's petition for writ of mandamus.

PER CURIAM

Panel consists of Chief Justice Hedges and Justices Yates and Frost.