ARKANSAS SUPREME COURT

No. 08-647

	Opinion Delivered **December 11, 2008**
JAMES MUNSON Petitioner	PRO SE PETITION FOR WRIT OF MANDAMUS [CIRCUIT COURT OF FAULKNER COUNTY, E 93-608]
v.	
HON. DAVID L. REYNOLDS, CIRCUIT JUDGE Respondent	WRIT DENIED.

PER CURIAM

Now before us is a pro se petition for writ of mandamus filed by petitioner James Munson, who is incarcerated in the Arkansas Department of Correction. The petitioner asks this court to direct the circuit judge below to act on a petition to modify child support filed by petitioner.

The genesis of this matter is a 1993 divorce proceeding filed in Faulkner County, *Kathy Munson (Zimmerman) v. James Munson*, Case No. E 93-608.[1] A petition to transfer the case to a court in Mercer County, Illinois, was filed in 1998 by petitioner's former wife, who had moved to that state. No formal ruling was made until January 22, 2007, when the Illinois court rejected jurisdiction.

On February 8, 2007, petitioner filed a pro se petition to modify child support in Faulkner County. The circuit court clerk received a letter from petitioner on May 1, 2007, that inquired about

[1]Several documents relied upon to set out the facts in this matter are not contained in the record, but are exhibits to the instant petition for writ of mandamus filed by petitioner.

setting a hearing on the petition to modify. In the clerk's response, petitioner was given the name of a specific person to contact in the judge's office to request that a hearing be set. In September, 2007, petitioner again wrote to the circuit clerk, stating that he made a request to the proper person to set a hearing but had heard nothing. Petitioner sent a letter in November, 2007, to the judge's office asking again about setting a hearing and about taking steps for appointment of counsel.

A hearing in the matter was set for January 11, 2008. For petitioner to attend the hearing, a court order was required to transport him to court. Petitioner maintains here that he mailed a transport order for the judge to sign and then to forward to the Department of Correction. In a letter to the clerk dated January 12, 2008, petitioner notified her that he had not been transported to the hearing and that the Department of Correction informed him it had not received a transport order. He asked the clerk whether the hearing had been rescheduled and for the letter to be forwarded to the circuit judge's office. In a letter from the clerk's office, a copy of the file-marked transport order was enclosed and petitioner was informed that another court date had not been scheduled at that time. On January 23, 2008, petitioner filed a motion to reschedule the hearing.

On February 20, 2008, a letter from petitioner was received by the court clerk, asking again for the hearing to be rescheduled and for a copy of the letter to be forwarded to the judge's office. He set out in the letter that he had been informed that a certain person in the judge's office was responsible for scheduling hearings. In the letter, he asked this person about another hearing date and whether the judge had already ruled on the motion.

In an undated letter from the judge's administrative assistant, who was not the person petitioner was told to contact by the clerk's office, petitioner was informed that the judge's office was "NOT responsible for setting the dates for the hearing" as he requested. (Emphasis in original.)

Instead, petitioner was informed that the Office of Child Support Enforcement "has taken this case and they will be setting any future hearing dates."

In a letter dated April 1, 2008, from the clerk's office, petitioner was given notice that another hearing had been scheduled for April 4, 2008.[2] Petitioner informed the warden that a hearing had been set. A memorandum dated April 3, 2008, from the warden stated that no transport order had been received by his office.

On April 16, 2008, the clerk's office received another letter from petitioner asking about the outcome of the hearing and requesting notice if another hearing was going to be set. In response, the clerk notified petitioner that another court date had not been set "at this time[.]" On June 4, 2008, petitioner filed the instant petition for writ of mandamus.

A writ of mandamus is a remedy to be used on occasions where the law has established no specific remedy and justice requires it. *State v. Vittitow*, 358 Ark. 98, 186 S.W.3d 237 (2004). Mandamus is not a writ of right but is within the judicial discretion of the court to issue or withhold. *Robertson v. Norris*, 360 Ark. 591, 203 S.W.3d 82 (2005). The purpose of the writ is to enforce an established right or to enforce the performance of a duty, *Manila School District No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004), but not to establish or create a right that does not already exist, *Robertson, supra*.

A writ of mandamus is issued by this court only to compel an official or judge to take some action. *Manila, supra.* To be entitled to the writ, a petitioner must show that he has a clear, legal right to the subject matter and the absence of any other adequate remedy. *Id.*

In *Eason v. Erwin*, 300 Ark. 384, 781 S.W.2d 1 (1989), we addressed a similar situation.

[2]The hearing notice was file-marked by the clerk's office on February 12, 2008, but petitioner contends in the petition that he did not receive this notice until April 2, 2008.

There, for seven months after being filed, a motion for summary judgment had not been ruled upon by the judge. We recognized that a trial judge has the right to control his or her docket and dispose of pending motions. In that matter, we found that there was no clear indication that the trial judge failed to perform his duty. Mandamus will not lie to control or review matters of judicial discretion, but only to compel the exercise of such discretion. *Eason, supra* (citing *Rolfe v. Spybuck Drainage Dist. No. 1,* 101 Ark. 29, 140 S.W. 988 (1911)).

We find *Eason* to be instructive. In this case, we cannot say that there has been a clear showing by petitioner that the circuit judge has yet failed to perform his duty. As petitioner is entitled to a hearing on the petition,[3] the court is nevertheless urged to promptly attend to the matter. In setting a hearing on the petition, sufficient time should be allowed for an order of transport to be issued and served to ensure petitioner's attendance at the hearing.

Writ denied.

[3]Pursuant to Arkansas Code Annotated § 9-12-312(a)(1) (Repl. 2002), it is mandatory for the court to make decisions regarding the care and support of children in relation to a divorce proceeding. In discharging that duty, modifications to child support are subject to the same statutory requirements as the initial child support ruling. *Freeman v. Freeman*, 29 Ark. App. 137, 778 S.W.2d 222 (1989). Such modifications are justified by sufficient changed circumstances which is shown by evidence presented to, and considered by, the court. *Dottley v. Miller*, 101 Ark. App. 323, ___ S.W.3d ___ (2008). Based on the evidence, the court is then required to enter a written finding or make a specific finding on the record that sets out the basis for a departure from the Family Support Chart. Supreme Court Administrative Order No. 10; *In re Guidelines for Child Support*, 314 Ark. 644, 863 S.W.2d 291 (1993) (per curiam).