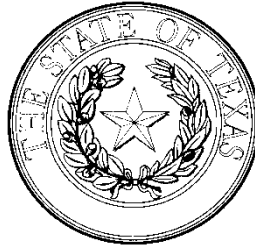


Opinion issued August 11, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00570-CV

IN RE MICHAEL TILOTTA, Relator

Original Proceeding on Petition for Writ of Mandamus

MEMORANDUM OPINION¹

By petition for writ of mandamus, relator, Michael Tilotta, challenges the trial court's order sustaining a contest to his affidavit of indigence under Rule 145 of the Texas Rules of Civil Procedure. Mandamus is an extraordinary remedy that

¹ The underlying case is *Michael Tilotta v. Dewana Smith-Tilotta*, No. 2009-37647 in the 257th District Court of Harris County, Texas, the Hon. Judy Warne presiding.

is only available when adequate remedy may not be had by appeal. *In re Sw. Bell Tel. Co.*, 235 S.W.3d 619, 623 (Tex. 2007); *In re Entergy Corp.*, 142 S.W.3d 316, 320 (Tex. 2004).

In February 2010, the trial court dismissed Tilotta's case for want of prosecution.² The trial court's order sustaining the contest to Tilotta's Rule 145 affidavit of indigence was then merged into the trial court's final judgment. *See Roccaforte v. Jefferson Cnty.*, No. 09-0326, 2011 WL 1661445, at *4 (Tex. Apr. 29, 2011); *Webb v. Jorns*, 488 S.W.2d 407, 408–09 (Tex. 1972). The trial court's plenary power over this case expired over a year before this mandamus was filed. *See* TEX. R. CIV. P. 329b. Because the underlying case is no longer pending and the trial court no longer has plenary power over its judgment, we conclude that Tilotta is not entitled to a writ of mandamus. *See In re Energy Transfer Fuel, L.P.*, 298 S.W.3d 352, 357 (Tex. App.—Tyler 2009, orig. proceeding) (denying petition for writ of mandamus when order on which mandamus was sought was subsequently merged into final, appealable judgment); *see also In re Kastner*, No. 14-09-00653-CV, 2009 WL 3401867 (Tex. App.—Houston [14th Dist.] Sept. 3, 2009, no pet.) (denying petition for writ of mandamus because relator failed to demonstrate that appeal was inadequate to review trial court's ruling on Rule 145 affidavit of

² We note that the trial court's order does not state that the dismissal is with prejudice to Tilotta's underlying claims.

indigency).³ Accordingly, we deny the petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Keyes, Higley, and Brown.

³ The record indicates that the underlying case is a bill of review relating to a divorce proceeding. We note that a trial court may have continuing jurisdiction to (1) modify an order that provides for the conservatorship, support, or possession of and access to a child, *see* TEX. FAM. CODE § 156.001 (West 2010), or (2) issue orders to enforce or clarify a prior order in a divorce proceeding. *See* TEX. FAM. CODE ANN. §§ 9.001, 9.006–.008. (West 2006); *see also In re Provine*, 312 S.W.3d 824, 830 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (“A party may seek clarification of a divorce decree through a suit for enforcement or a motion to clarify. In a suit to enforce the decree, a court has continuing jurisdiction to render further orders to enforce the division of the property made in the decree of divorce to assist in the implementation of or to clarify the prior order. However, a court may not amend, modify, alter, or change the division of property made or approved in the divorce decree.”) (citations omitted).