

Petition for Writ of Mandamus Denied and Memorandum Opinion filed January 6, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-01236-CV

IN RE DANIEL GAWLIKOWSKI, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

Trial Court No. 2010-68903
295th District Court
Harris County, Texas

MEMORANDUM OPINION

On December 20, 2010, relator Daniel Gawlikowski filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. §22.221; *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Caroline Baker, presiding judge of the 295th District Court of Harris County, to vacate her order granting the real party in interest's plea in abatement.

Relator Gawlikowski and his ex-wife, Brandi Sikes, are involved in a suit to modify custody of their child in cause number 2003-67714 pending in the 247th District Court in Harris County. The real party in interest, Wendy Burgower, was appointed as

the amicus attorney to represent the interests of the child. Subsequently, Gawlikowski filed suit in cause number 2010-68903, against Burgower alleging that Burgower violated several disciplinary rules in her representation in the custody suit.

Burgower answered the suit asserting that she is immune from suit for her actions as an amicus, but acknowledging that immunity would not apply to any actions taken with malice. *See* Tex. Fam. Code Ann. § 107.009(a) (“A guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.”). Subsection (b) of section 107.009 states that subsection (a) does not apply to an action taken with conscious indifference or reckless disregard to the safety of another, in bad faith or with malice, or that is grossly negligent or wilfully wrongful. *Id.* Burgower also filed a plea in abatement in the underlying suit requesting that the suit be abated until the custody matter is concluded.

At the hearing on Burgower’s plea, Gawlikowski argued that Burgower had not met her burden of showing that the custody case had dominant jurisdiction. Burgower’s plea, however, is not based on dominant jurisdiction. The court determined that if Gawlikowski’s suit was permitted to go forward, potential conflicts could arise with regard to the custody matter. For example, Gawlikowski filed a motion to recuse Burgower in the custody matter. If both suits were permitted to go forward at the same time, the family court’s ruling on the motion to recuse could have an impact on Gawlikowski’s suit against Burgower. For that reason, the trial court issued an order abating the proceedings in the suit against Burgower until such time as the custody matter is completed. Gawlikowski filed this petition for writ of mandamus contending the trial court abused its discretion by granting the plea in abatement.

Mandamus will not issue when the relator has an adequate remedy at law because mandamus is an extraordinary remedy available only in limited circumstances. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). Generally, mandamus is not available to control the incidental rulings of a trial court, such as rulings on pleas in abatement. *Abor v. Black*, 695 S.W.2d 564, 566–67 (Tex. 1985); *Texas Commerce Bank, N.A. v. Prohl*, 824 S.W.2d 228, 229 (Tex. App.—San Antonio 1992, orig. proceeding). Remedy by mandamus is available to resolve a conflict in jurisdiction between courts of coordinate jurisdiction only when the trial court first taking jurisdiction has been stopped from proceeding (e.g. when the second court enjoins the parties from taking any more action in the first court). *Abor v. Black*, 695 S.W.2d at 567. In this case, Gawlikowski has an adequate remedy at law. The underlying suit can be tried after the custody suit is concluded. The trial court’s order does not prohibit another court from proceeding; therefore, mandamus is not an appropriate remedy. *See id.*

Gawlikowski has not established entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny Gawlikowski’s petition for writ of mandamus.

PER CURIAM

Panel consists of Justices Anderson, Frost, and Brown.