



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-13-00611-CV

IN RE Dante D'AGOSTINO

Original Mandamus Proceeding¹

PER CURIAM

Sitting: Sandee Bryan Marion, Justice
Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: September 18, 2013

PETITION FOR WRIT OF MANDAMUS DENIED

On September 9, 2013, relator Dante D'Agostino filed a petition for writ of mandamus, complaining the trial court has failed to rule on various motions filed in a probate proceeding. However, in order to be entitled to mandamus relief, relator must establish the trial court: (1) had a legal duty to perform a non-discretionary act; (2) was asked to perform the act; and (3) failed or refused to do so. *In re Molina*, 94 S.W.3d 885, 886 (Tex. App.—San Antonio 2003, orig. proceeding). When a properly filed motion is pending before a trial court, the act of giving consideration to and ruling upon that motion is ministerial, and mandamus may issue to compel the trial judge to act. *See Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San

¹ This proceeding arises out of Cause No. 2011-PC-1730, styled *In the Estate of Margaret T. Whitmire, Deceased*, pending in the Probate Court No. 2, Bexar County, Texas, the Honorable Polly Jackson-Spencer presiding.

Antonio 1997, orig. proceeding). However, mandamus will not issue unless the record indicates that a properly filed motion has awaited disposition for an unreasonable amount of time. *See id.*

Relator has the burden of providing this court with a record sufficient to establish his right to mandamus relief. *See* TEX. R. APP. P. 52.7(a) (“Relator must file with the petition [] a certified or sworn copy of every document that is material to the relator’s claim for relief and that was filed in any underlying proceeding”); *see also* TEX. R. APP. P. 52.3(k)(1)(A); *Walker v. Packer*, 827 S.W.2d 833, 837 (Tex. 1992) (orig. proceeding).

Relator asserts he filed various motions in the probate proceeding which the court has failed to rule on. However, he has not provided this court with a file stamped copy of any of the motions or any other documents to show that a properly filed motion is pending before the probate court and has been brought to the court’s attention. Based on the foregoing, we conclude relator has not shown himself entitled to mandamus relief. Accordingly, relator’s petition for writ of mandamus is denied. *See* TEX. R. APP. P. 52.8(a).

PER CURIAM