

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)
LARRY KLAYMAN,)
)
 Relator,)
)
 vs.)
)
 CUYAHOGA COUNTY COURT)
 OF COMMON PLEAS, DOMESTIC)
 RELATIONS COURT, ET AL.,)
)
 Respondents.)

CASE NO. 2013-0296
Original Action in Mandamus

**RESPONDENT CUYAHOGA COUNTY COURT OF COMMON PLEAS,
DOMESTIC RELATIONS COURT'S MOTION TO DISMISS**

LARRY KLAYMAN
2020 Pennsylvania Ave, NW Suite 800
Washington, D.C. 20006
Tel: (310) 595-0800
leklayman@gmail.com

Relator pro se

TIMOTHY J. McGINTY (0024626)
Prosecuting Attorney of Cuyahoga County
CHARLES E. HANNAN * (0037153)
Assistant Prosecuting Attorney
* *Counsel of Record*
The Justice Center, Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
Tel: (216) 443-7758/Fax: (216) 443-7602
channan@prosecutor.cuyahogacounty.us

*Counsel for Respondent Cuyahoga County
Court of Common Pleas, Domestic Relations
Court*

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MICHAEL DEWINE (0009181)
Ohio Attorney General
DARLENE FAWKES PETTIT * (0081397)
* *Counsel of Record*

SARAH PEIRCE (0087799)
Assistant Attorneys General
Constitutional Offices Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
Tel: (614) 466-2872/Fax: (614) 782-7592
darlene.pettit@ohioattorneygeneral.gov
sarah.pierce@ohioattorneygeneral.gov

*Counsel for Respondent Eighth District
Court of Appeals*

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL.)	CASE NO. 2013-0296
LARRY KLAYMAN,)	
)	Original Action in Mandamus
Relator,)	
)	
vs.)	
)	<u>RESPONDENT CUYAHOGA COUNTY</u>
CUYAHOGA COUNTY COURT)	<u>COURT OF COMMON PLEAS,</u>
OF COMMON PLEAS, DOMESTIC)	<u>DOMESTIC RELATIONS COURT'S</u>
RELATIONS COURT, ET AL.,)	<u>MOTION TO DISMISS</u>
)	
Respondents.)	

Pursuant to S.Ct.Prac.R. 12.04(A), respondent Cuyahoga County Court of Common Pleas, Domestic Relations Court respectfully moves this Court for an order that dismisses the Verified Petition for Writ of Mandamus and this cause.¹ The grounds in support of this motion are that the Petition does not state any claim for relief in mandamus.

¹ The record for this case does not appear to affirmatively reflect the date of service on this respondent, leaving the date to respond somewhat indefinite. This motion is respectfully submitted so as not to delay the course of these proceedings.

A memorandum in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,

TIMOTHY J. McGINTY (0024626)
Prosecuting Attorney of Cuyahoga County

By:



CHARLES E. HANNAN * (0037153)

Assistant Prosecuting Attorney

** Counsel of Record*

The Justice Center, Courts Tower, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Tel: (216) 443-7758/Fax: (216) 443-7602

channan@prosecutor.cuyahogacounty.us

*Counsel for Respondent Cuyahoga County Court of
Common Pleas, Domestic Relations Court*

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CASE NO. 2013-0296
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**MEMORANDUM IN SUPPORT OF
RESPONDENT CUYAHOGA COUNTY
COURT OF COMMON PLEAS,
DOMESTIC RELATIONS COURT'S
MOTION TO DISMISS**

STATEMENT OF FACTS AND PROCEEDINGS

Dissatisfied with the judgments rendered against him below, relator Larry Klayman (“relator”) seeks to use this original action in mandamus as a substitute for appeal to challenge the judgments rendered respectively by respondent Cuyahoga County Court of Common Pleas, Domestic Relations Court (“respondent Domestic Relations Court”) and respondent Eighth District Court of Appeals (“respondent Court of Appeals”). A review of relator’s Verified Petition for Writ of Mandamus (“Petition”), however, reveals that it fundamentally fails to state any proper claim for extraordinary relief in mandamus. Respondent Domestic Relations Court accordingly requests that relator’s Petition and this cause be dismissed pursuant to S.Ct. Prac. R. 12.04(C).

The only facts material to this case are that relator was divorced from Stephanie Ann Luck in June of 2003. See Petition at para. 5. They were divorced in Virginia after entering into a Marriage Settlement Agreement that was incorporated into their divorce decree. Id.

As is recited in the Court of Appeals’ opinion in *Klayman v. Luck*, 8th Dist. Nos. 97074, 97075, 2012-Ohio-3354, Luck and the parties’ two (2) children relocated to the Cleveland area in

2004. *Id.* at ¶ 7. In July 2007, relator filed a motion in respondent Domestic Relations Court seeking to modify parental rights and responsibilities, alleging that Luck had failed to comply with the visitation schedule set forth the parties Marriage Settlement Agreement. *Id.* at ¶ 8. See also Petition at para. 6. Relator simultaneously filed a petition to register the parties foreign divorce decree. See *Klayman v. Luck, supra* at ¶ 8. In August 2007, he filed a motion to show cause alleging that Luck was denying him visitation with the children. *Id.* In September 2007, Luck moved to modify child support and temporarily suspend visitation. *Id.* She additionally filed several motions to show cause for relator's alleged nonpayment of child support. *Id.*

One Domestic Relations Court magistrate heard the parenting issues while another Domestic Relations Court magistrate presided over the child support issues. See *Klayman v. Luck, supra* at ¶ 9. The magistrate hearing the parenting issues granted Luck's motion, imposed supervised visitation on relator, and ordered him to pay Luck \$325,000.00 in attorney fees. *Id.* The magistrate hearing the child support issues found relator in contempt of court. *Id.* Relator filed objections to both magistrates' decisions. *Id.* at ¶ 10.

In June of 2011, the trial court overruled relator's objections and adopted the magistrates' decisions in their entirety. *Id.* at ¶ 10. See also Petition at Exhibits 3 and 4.

On July 26, 2012, the Court of Appeals overruled relator's seven (7) assignments of error and affirmed the trial court's judgment in *Klayman v. Luck*, 8th Dist. Nos. 97074, 97075, 2012-Ohio-3354.

Relator sought discretionary review by the Supreme Court of Ohio in the matter docketed as Case No. 2012-1771, asserting many of the very same issues that relator alleges here in his Petition. On November 28, 2012, the court denied relator's motion to stay. See *Klayman v. Luck*, 133 Ohio St.3d 1488, 2012-Ohio-5459, 978 N.E.2d 909 (table). On January 23, 2013, the

court declined to hear relator's appeal. *See Klayman v. Luck*, 134 Ohio St.3d 1422, 2013-Ohio-158, 981 N.E.2d 886 (table).

Little more than three (3) weeks later, relator commenced the instant original action in mandamus on February 14, 2013. Relator's Petition prays for "a writ of mandamus vacating and thus preventing the Court of Appeals and Court of Common Pleas from enforcing their respective judgments as they are null and void ab initio" for having applied Ohio law instead of Virginia law. Relator further prays for a writ ordering respondent Court of Appeals to apply Virginia law and respondent Domestic Relations Court "to hold a new trial with a reassigned and unbiased Magistrate and Judge and vacating all of their prior orders and judgment entries."

For the reasons that follow, respondent Domestic Relations Court respectfully submits that relator's Petition fails to state any proper claim for extraordinary relief in mandamus.

ARGUMENT AND LAW

Relator's Petition catalogs his disagreements with the underlying magistrates' decisions, the trial court's subsequent adoption of them in their entirety, and the Court of Appeals' subsequent affirmance of the trial court's judgment. Relator's Petition nevertheless fails to establish the fundamental elements necessary to obtain extraordinary relief in mandamus, perhaps none more glaring than relator's failure to allege much less establish that he lacks any plain and adequate remedy at law. For the reasons that follow, respondent Domestic Relations Court respectfully submits that relator's Petition and this cause should be dismissed pursuant to S.Ct. Prac. R. 12.04(C).

"Mandamus is a writ, issued in the name of the state to an inferior tribunal, *** commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. *See also State ex rel. Am. Legion Post 25 v. Ohio Civ.*

Rights Comm., 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶ 11. “The function of mandamus is to compel the performance of a present existing duty as to which there is a default.” *State ex rel. Willis v. Sheboy*, 6 Ohio St.3d 167, 451 N.E.2d 1200 (1983), syllabus at paragraph two.

To obtain this writ, it must be shown that (1) the relator has a clear legal right to obtain performance of an act; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy in the ordinary course of the law. *See State ex rel. MetroHealth Medical Center v. Sutula*, 110 Ohio St.3d 201, 2006-Ohio-4249, 852 N.E.2d 722, at ¶ 8.

“The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.” R.C. 2731.03. Thus “mandamus will not lie to control judicial discretion, even if that discretion is abused.” *State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789, 874 N.E.2d 510, ¶ 12.

Pursuant to R.C. 2731.05, “[t]he writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.” “Mandamus is not a substitute for an unsuccessful appeal.” *State ex rel. Martin v. Russo*, 130 Ohio St.3d 269, 2011-Ohio-5516, 957 N.E.2d 769, quoting *State ex rel. Marshall v. Glavas*, 98 Ohio St.3d 297, 2003-Ohio-857, 784 N.E.2d 97, ¶ 6.

Relator must prove his entitlement to the writ by clear and convincing evidence. *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, 958 N.E.2d 1235, syllabus at paragraph three.

In the matter at hand, relator initially contends that mandamus should issue because the respondents “are refusing to follow the law.” See Petition at p. 8. According to relator, “a writ of mandamus is appropriate to require a lower court to comply with and not to proceed contrary to the mandate of a superior court,” citing *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070 and *State ex rel. Dannaheer v. Crawford*, 78 Ohio St.3d 391, 678 N.E.2d 549 (1997). See Petition at para. 19. Without identifying any mandate issued by a superior court that the respondents supposedly failed to follow, relator generally maintains that the lower courts erred by applying Ohio law instead of Virginia law. Relator’s contention is without merit for several reasons.

First, there is no basis whatsoever for relator to suggest that the respondents failed to comply with or proceeded contrary to the mandate of a superior court. Relator does not identify any higher court’s ruling because there is none. Relator’s reliance on *State ex rel. Obojski v. Perciak*, *supra*, and *State ex rel. Dannaheer v. Crawford*, *supra*, is thus utterly misplaced.

Second, relator utterly fails to establish that he has no plain and adequate remedy in the ordinary course of the law to address the choice-of-law rulings he assails. Relator raised his choice-of-law contentions in the trial court and in the Court of Appeals, each of which rejected his contentions. Appeal is an adequate remedy at law that renders extraordinary relief in mandamus inappropriate. See *State ex rel. Davet v. Sutula*, 131 Ohio St.3d 220, 2012-Ohio-759, 963 N.E.2d 811, ¶ 2.

Beyond that, the availability of a discretionary appeal to this Court was an adequate remedy at law that will preclude extraordinary relief in prohibition. See *State ex rel. Atkins v. Hoover*, 97 Ohio St.3d 76, 2002-Ohio-5313, 776 N.E.2d 99, ¶ 6; *State ex rel. Heck v. Kessler*, 72 Ohio St.3d 98, 100, 647 N.E.2d 792 (1995). Relator accordingly cannot establish the grounds

for extraordinary relief in mandamus based on some supposed error in the state law that was applied.

Relator next contends that mandamus is appropriate to correct the alleged bias and prejudice relator encountered below. See Petition at p. 11. Relator specifically alleges that one of the Domestic Relations Court magistrates was biased against relator. Relator does not allege any bias on the part of the trial court judge who reviewed and rejected relator's objections to the magistrate's decision – including relator's claim that the magistrate was biased. Nor does relator allege any bias on the part of the Court of Appeals that reviewed and likewise rejected relator's claims of magistrate bias in *Klayman v. Luck*, 8th Dist. Nos. 97074, 97075, 2012-Ohio-3354 at ¶¶ 18-22.

At any rate, relator again fails to allege much less establish that he lacks an adequate remedy at law. Even if there were any factual basis for relator's claims of magistrate bias – which is categorically denied – relator's appeal to the Court of Appeals and discretionary appeal to the Supreme Court of Ohio provided him with adequate remedies at law to challenge the trial court's adoption of the allegedly biased magistrate's decision. The availability of those remedies available in the ordinary course of the law precludes relator's request for extraordinary relief in mandamus.

Relator's reliance on *State ex rel. Turner v. Marshall*, 123 Ohio St. 586, 176 N.E. 454 (1931), is misplaced because that case involved a writ of mandamus against a judge for alleged bias. As noted previously, relator does not allege any bias on the part of the trial court judge who independently reviewed the magistrate's decision and relator's objections to it.

And even if relator were to allege that the trial judge was biased, R.C. 2701.03 constitutes an adequate remedy at law to raise any allegations of bias in order to seek a judge's

disqualification that precludes extraordinary relief in mandamus. *See State ex rel. Hach v. Summit Cty. Court of Common Pleas*, 102 Ohio St.3d 75, 2004-Ohio-1800, 806 N.E.2d 554, ¶ 7; *State ex rel. Dehler v. Sutula*, 74 Ohio St.3d 33, 35, 656 N.E.2d 332 (1995).

In short, none of relator's claims provide him with grounds to seek extraordinary relief in mandamus. The record reflects that relator raised all of these claims in the courts below and again in his discretionary appeal to this Court. While relator was unsuccessful in those appeals, they still constituted adequate remedies at law. Relator may not use this original action in mandamus as a substitute for his unsuccessful appeals. *See State ex rel. Martin v. Russo*, 130 Ohio St.3d 269, 2011-Ohio-5516, 957 N.E.2d 769, quoting *State ex rel. Marshall v. Glavas*, 98 Ohio St.3d 297, 2003-Ohio-857, 784 N.E.2d 97, ¶ 6.

Mandamus is an extraordinary remedy that must be rendered cautiously. *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 103, 103, 488 N.E.2d 883 (1986); *State ex rel. Tarpy v. Board of Ed. of Washington Court House*, 151 Ohio St. 81, 84 N.E.2d 276 (1949), syllabus.

In this case, relator's Petition fundamentally fails to establish that he has any clear legal right to relief, that the judicial respondents have any clear legal duty to furnish such relief, and that relator lacks any adequate remedy at law so as to justify his request for extraordinary relief. Accordingly, respondent Domestic Relations Court respectfully requests that this Court dismiss relator's Petition and this cause pursuant to S.Ct. Prac. R. 12.04(C).

CONCLUSION

Respondent Cuyahoga County Court of Common Pleas, Domestic Relations Court respectfully requests that this Court dismiss the Petition and this cause pursuant to S.Ct. Prac. R. 12.04(C).

Respectfully submitted,

TIMOTHY J. MCGINTY, Prosecuting Attorney
of Cuyahoga County, Ohio

By: 

CHARLES E. HANNAN * (0037153)

Assistant Prosecuting Attorney

** Counsel of Record*

The Justice Center, Courts Tower, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Tel: (216) 443-7758/Fax: (216) 443-7602

channan@prosecutor.cuyahogacounty.us

*Counsel for Respondent Cuyahoga County Court of
Common Pleas, Domestic Relations Court*

PROOF OF SERVICE

A true copy of the foregoing Respondent Cuyahoga County Court of Common Pleas, Domestic Relations Court's Motion to Dismiss was served this 19TH day of March 2013 by regular U.S. Mail, postage prepaid, upon:

Larry Klayman
2020 Pennsylvania Ave, NW Suite 800
Washington, D.C. 20006

Relator pro se

Michael DeWine, Ohio Attorney General
Darlene Fawkes Pettit
Sarah Pierce
Assistant Attorneys General
Constitutional Offices section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Counsel for Respondent Eighth District Court of Appeals



CHARLES E. HANNAN *
Assistant Prosecuting Attorney
* *Counsel of Record*