Petition for Writ of Mandamus Denied and Memorandum Opinion filed February 12, 2009.

In The

Fourteenth Court of Appeals

NO. 14-08-00505-CV

IN RE JAMES DEREK ADAIR, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

M E M O R A N D U M O P I N I O N

On June 16, 2008, relator, James Derek Adair, filed a petition for writ of mandamus in this court. *See* Tex. Gov't Code Ann. § 22.221 (Vernon 2004); *see also* Tex. R. App. P. 52. In the petition, relator asks this court to compel the Honorable Gladys Burwell, presiding judge of the Probate Court of Galveston County, to vacate her May 20, 2008 order granting the motion for sanctions filed by real party in interest, Kelly Rutherford, Dependent Administrator with Will Annexed of the Estate of James Paul Adair, Deceased. We deny relator's petition for writ of mandamus.

BACKGROUND

When legendary fire-fighter Red Adair died, he left his estate to his son James Paul Adair ("Adair"), who died on April 9, 2006. On June 22, 2006, relator, who is Adair's son, filed with the trial court an application for independent administration and letters of administration pursuant to Section 145(e) of the Texas Probate Code, in which he alleged that Adair had died intestate, and requested that he be appointed independent administrator.[1] That same day, relator also filed an application to determine heirship, also alleging that Adair had died intestate. The application to determine heirship was sworn to by relator. With the help of a locksmith, relator gained entry into Adair's house and opened two safes.

On July 10, 2006, attorney Kenneth C. Kaye, who had custody of Adair's last will and testament dated September 2, 2005, and first codicil dated March 8, 2006, delivered the will and codicil to the trial court clerk. Notice of the delivery of the will was sent to relator's attorneys. On July 24, 2006, Kelly Rutherford filed an application for probate of will and codicil and issuance of letters of administration.[2] On August 7, 2006, the trial court signed the order admitting Adair's will and codicil to probate and authorizing letters of dependent administration to be issued to Rutherford as dependent administrator.

On August 29, 2006, Rutherford's attorney wrote relator's attorneys, demanding that relator return everything he had removed from Adair's house to Rutherford. On September 13, 2006, Rutherford filed a motion for sanctions against relator, alleging relator had known since at least April 11, 2006, that Adair had a will. Rutherford complained that relator had

---

[1] *See* Tex. Prob. Code Ann. § 145(e) (Vernon 2003) (providing for independent administration of an estate when decedent dies intestate).

[2] The will designated Northern Trust Bank of Texas, N.A. to serve as independent executor, but the bank was not willing to serve and filed its waiver and renunciation of its right to be appointed independent executor. The will designated Joetta Jankzak to serve as substitute independent executrix, but she also was not willing to serve and filed a waiver and renunciation of her right to be appointed independent executrix.

(1) filed documents with the trial court falsely alleging that Adair had died intestate, (2) obtained entry into Adair's home under the guise of Adair's having died intestate, (3) removed certain items belonging to Adair's estate from the home, and (4) refused to return those items.[3] Rutherford also complained that relator and his attorneys did not dismiss the application for heirship after the filing of the will.[4] Rutherford requested that the trial court order relator to file a motion to dismiss his applications with prejudice and that relator not be allowed to seek to set aside the will and codicil. Rutherford also requested attorney's fees.

The trial court conducted three evidentiary hearings on October 10, 2006, May 8, 2007, and August 8, 2007, on Rutherford's motion for sanctions. At the end of the October 10, 2006 hearing, the trial court continued the hearing and ordered relator to return the estate property to Rutherford by the next day, the parties and attorneys to sign off on the property relator returned, and Rutherford to assess damage to property in the Adair home and file a report with the trial court concerning missing property and repair estimates for any damage.

On October 18, 2006, Rutherford filed a report with the trial court regarding property returned to him, property returned in damaged condition, and estate property known to be missing. On November 6, 2006, Rutherford filed an amended motion for sanctions requesting attorney's fees and the costs of repairing or replacing estate property damaged by relator, and that relator be confined to the Galveston County jail for the lesser of 18 months or until he complied the trial court's order.

---

[3] Initially, Rutherford also sought sanctions against relator's attorney, Teresa Scardino, because she had signed relator's applications for independent administration and heirship, but later dismissed his motion for sanctions against Scardino because she had been "duped" by relator into believing Adair had no will.

[4] On October 10, 2006, the trial court signed the order granting relator's motion to dismiss his application for administration and application to determine heirship without prejudice.

On May 20, 2008, the trial court signed an order granting Rutherford's motion for sanctions. The trial court found that relator had (1) signed a document filed with the court claiming that Adair had died intestate when relator knew that was not true; (2) improperly obtained entry into Adair's home, removed items from the home, and caused damage to items in the home; (3) not returned any of the removed items in a timely manner even though the administrator had demanded their return; (4) not returned certain items after being ordered by the court on October 10, 2006; and (5) caused damage to estate property.

The trial court's order directed relator, by 5:00 p.m. on June 16, 2008, to (1) deliver to Rutherford all items on Exhibit "E(a)" attached to the order; (2) pay Rutherford $2,520.00 ($2,800.00, less $280.00 returned) that had been removed from one of the safes in Adair's home; (3) pay Rutherford $2,801.57 in property damage caused by relator in Adair's home; and (4) pay Rutherford $11,694.00 in attorney's fees and expenses. On June 16, 2008, relator filed an emergency motion for temporary relief and this petition for writ of mandamus requesting that we compel the trial court to vacate the May 20, 2008 sanctions order. On June 18, 2008, we stayed the May 20, 2008 sanctions order.

In his petition, relator asserts the trial court abused its discretion by imposing sanctions for entering and securing Adair's home on the advice of his attorneys and by compelling him to produce items he either does not have or never had. Relator further claims that he does not have the funds to pay damages, attorney's fees, and expenses set forth in the sanctions order, and having to pay the sanctions will interfere with his ability or willingness to continue any litigation. Relator, however, does not challenge the trial court's finding that he knowingly signed a document filed with the trial court claiming no will existed or the amount of the damages to estate property or the amount attorney's fees claimed by Rutherford.

STANDARD OF REVIEW

To be entitled to the extraordinary relief of a writ of mandamus, the relator must show that the trial court clearly abused its discretion and he has no adequate remedy by appeal. *In re Team Rocket, L.P.*, 256 S.W.3d 257, 259 (Tex. 2008) (orig. proceeding). A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). In determining whether the trial court abused its discretion in the resolution of factual matters, the court of appeals may not substitute its judgment for that of the trial court and may not disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding). Therefore, the relator must establish that the trial court could have reached only one decision. *Walker*, 827 S.W.2d at 840. An abuse of discretion does not exist if the trial court bases its decision on conflicting evidence and some evidence supports the trial court's decision. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 445 (Tex. 1997); *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 758 (Tex. 1993).

To determine if a party has an adequate remedy by appeal, we ask whether "any benefits to mandamus review are outweighed by the detriments." *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding). Appeal is not an adequate remedy when a party stands to lose a substantial right. *Walker*, 827 S.W.2d at 842.

ANALYSIS

"Securing the Property"

Relator asserts the trial court abused its discretion by imposing sanctions for entering and securing Adair's home on the advice of his attorneys.[5] On June 9, 2006, relator's

[5] Relator's phrasing of this issue mischaracterizes the trial court's findings. In the sanctions order, (continued...)

attorney, Teresa Scardino, advised him in a letter that "my office has advised you to secure the property so that no other party may enter the property." However, the record shows that Scardino did not know about Adair's will at the time she advised relator to "secure the property." Indeed, at the October 10, 2006 hearing, Scardino testified "[i]t was my very clear understanding that there was not a will." Scardino further testified that she advised relator "to secure the property because he was concerned about the goings on at the house." A review of Scardino's testimony reflects that she did not expressly advise relator to remove items from the home. This contention is without merit and relator has shown no abuse of discretion by the trial court.

Items Removed by Relator

Relator further asserts the trial court abused its discretion by compelling him to produce items he either does not have or never had. At the August 7, 2007 hearing, relator testified that, with respect to the items and money which had not been returned, he did not take those items or had not seen those items. The reporter's record reflects that Rutherford and Adair friend Vicki Walker testified that the missing items were in the house or in the safe at time of Adair's death, but were missing after relator had gained entry into the house. The locksmith relator hired to open the gun safe and jewelry safe in Adair's house testified about specific items he saw in those safes that are now missing.

Moreover, in an August 29, 2006 letter to relator's attorneys, Rutherford's attorney demanded that relator return everything he had removed from Adair's house, explaining that "[relator], in a lengthy telephone call to Mr. Rutherford, claimed that he was going to keep some of the items because they are somehow very personal to him or to members of the Adair family," and "stated to Mr. Rutherford that he was not going to return these items."

---

[5](...continued)
the trial court found that relator not only had improperly entered Adair's home, but also had removed a number of items from the home and caused damage to other items in the home.

Whether the missing items were in the house at the time of Adair's death is a fact issue, which the trial court determined against relator. Based on the evidence presented, the trial court could have reasonably inferred that relator took those after he had gained entry into the house and the two safes. We cannot say the trial court abused its discretion when making findings on conflicting evidence. *See IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 445; *Ruiz*, 868 S.W.2d at 758.

Ability to Pay Monetary Sanctions

Relator further claims he does not have the funds to pay the damages, attorney's fees, and expenses set forth in the May 20, 2008 sanctions order, and the payment of the sanctions will interfere with his ability or willingness to continue litigation. Ordinarily, a relator has an adequate remedy by appeal from a sanctions order awarding monetary sanctions. *Braden v. Downey*, 811 S.W.2d 922, 928 (Tex. 1991) (orig. proceeding); *In re Lavernia Nursing Facility*, 12 S.W.3d 566, 571 (Tex. App.—San Antonio 1999, orig. proceeding [mand. denied]). Thus, when mandamus is sought to vacate a monetary sanction order, the uncertainty of actual reimbursement after winning an appeal does not render appeal inadequate. *Prime Group, Inc. v. O'Neill*, 848 S.W.2d 376, 378–79 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding). However, when a monetary sanction is so severe as to threaten a party's continuation of litigation, an appeal is an adequate remedy only if payment is deferred until final judgment when the party can supersede the judgment and perfect an appeal. *Id.* at 379 (citing *Braden*, 811 S.W.2d at 929).

The Texas Supreme Court has set forth the following procedure for the trial court when a litigant contends that a monetary sanction award precludes his access to the court: the trial court must either (1) provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or (2) make express written findings, after a prompt hearing, as to why the award does not have such a preclusive effect.

Id. (quoting *Braden*, 811 S.W.2d at 929). This allows the trial court to levy some monetary sanctions during pretrial proceedings, but requires the payment of more severe sanctions be deferred until an appealable judgment is rendered. *Braden*, 811 S.W.2d at 929.

Although relator requests that we direct the trial court to vacate the May 20, 2008 order, he also suggests the hardship on him can be mitigated if the monetary sanction is not effective until the rendition of a final judgment that ends litigation in accordance with *Braden*. Relator has not preserved this issue for review in this original proceeding because he failed to raise it in the trial court. *See In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding); *Nabors Drilling USA, LP v. Carpenter*, 198 S.W.3d 240, 249 (Tex. App.—San Antonio 2006, orig. proceeding); *In re Steger Energy Corp.*, Nos. 04-01-00556-CV & 04-01-00670-CV, 2002 WL 663645, at *4 (Tex. App.—San Antonio Apr. 24, 2002, orig. proceeding) (not designated for publication). Relator did not argue to the trial court that he is unable to pay the monetary sanction or that his inability to pay the sanction will preclude his access to the court. Instead, at the end of the August 7, 2007 hearing, which was the third and final hearing related to Rutherford's motion for sanctions, relator's attorney argued there was no evidence that relator had taken the items that were still missing. Moreover, relator has not cited any evidence supporting his claim of inability to pay the monetary sanction.

Relator has failed to show that the trial court abused its discretion by not making the monetary sanction effective until there has been a final judgment. Relator also has not shown that he does not have an adequate remedy by appeal. Relator is not a beneficiary under Adair's will, and he does not explain or specify what "litigation" he will be prevented from pursuing.

Finally, relator argues the trial court was required to, but did not (1) try lesser sanctions first; (2) identify that any lesser sanction was tried without success; (3) explain

why any lesser sanction was or would be ineffective; (4) explain why the sanctions imposed were appropriate; or (5) attempt to reduce any hardship on relator by providing the sanction would take effect upon entry of final judgment. *See Cire v. Cummings*, 134 S.W.3d 835, 839 (Tex. 2004); *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993) (orig. proceeding). Relator asserts the sanctions order in this case is the functional equivalent of the "death penalty" sanction of striking of pleadings for discovery violations. Relator has not shown that he presented this complaint to the trial court, and that the trial court refused a request for correction.[6] "A party's right to mandamus relief generally requires a predicate request for some action and a refusal of that request." *In re Perritt*, 992 S.W.2d 444, 446 (Tex. !999) (orig. proceeding) (per curiam) (citing *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 556 (Tex. 1990) (orig. proceeding)). Even if relator had brought this complaint to the trial court's attention, it is without merit. Death penalty sanctions are those that terminate the presentation of the merits of a party's claims. *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 845 (Tex. 1992); *see also GTE Commc'ns Sys. Corp.*, 856 S.W.2d at 732 (explaining death penalty sanctions are case determinative). As addressed above, relator is not a beneficiary under Adair's will and he has not explained what claims the sanctions order prevents him from presenting.

[6] Relator initially informed this court he had requested that the trial court make findings of fact and conclusions of law, but later advised that the court would not be making such findings and conclusions. Relator did not provide this court with a copy of his request for findings of fact and conclusions of law filed in the trial court or show that such request was presented to the trial court. *See Walker*, 827 S.W.2d at 837 (stating that relator must provide sufficient record demonstrating entitlement to mandamus relief).

CONCLUSION

Relator has not established his entitlement to the extraordinary relief of a writ of mandamus. Accordingly, we deny relators' petition for writ of mandamus and further lift our stay order entered on June 18, 2008.

/s/ Leslie Brock Yates
Justice

Panel consists of Justices Yates, Anderson, and Brown.