COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-18-00088-CV

IN RE DARREN KEITH REED; DEREK PAUL SMITH, INDIVIDUALLY AND AS TRUSTEE OF THE SMITH IRREVOCABLE TRUST; CADDOA CREEK RANCH, LLC; CANADIAN RIVER RANCH PARTNERSHIP; SMITH LAND & CATTLE GP, LLC; SMITH RANCHING LTD; HIGH POINT RANCH, LLC; LAKESIDE RANCH BC, LLC; AND SMITH RANCH MERIDIAN, LLC — RELATORS

FROM THE 325TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 325-584465-15

MEMORANDUM OPINION[1]

Attorney Jeffrey Armstrong represents Relators[2] in the divorce proceeding between Real Parties in Interest Husband Daryl Greg Smith and Wife Karen

[1]*See* Tex. R. App. P. 47.4, 52.8(d).

Annette Smith. Relators are Darren Keith Reed,[3] six entities in which Husband purportedly holds an interest, a family trust, and the trustee thereof.[4] Armstrong has petitioned this court seeking a writ of mandamus ordering the trial court to allow him to withdraw as counsel for the Relators due to a conflict of interest. Because we conclude that Armstrong is entitled to the relief sought, we conditionally grant the writ.

Background

I. The divorce proceeding

After 18 years of what she described as a tumultuous marriage, Wife filed for divorce in October 2015. The proceedings appear to have been acrimonious and contentious ever since, with Wife accusing Husband of having deceptively secreted funds and property away from the community estate and to the Relators in the years prior to the divorce being filed. In fact, in March 2017, Wife filed a Second Amended Counterpetition naming Relators as third-party defendants and

---

[2]For ease of reading and convenience we will refer to Armstrong's clients—the individuals and parties identified in footnote 4 below—as "Relators."

[3]According to Wife, Darren Keith Reed acted as the Smiths' real estate agent in the purchase of a large ranch in Oklahoma, now known as Canadian River Ranch. As part of the transaction, Reed and his wife received a 10% interest in the ranch.

[4]The named parties are as follows: Darren Keith Reed; Derek Paul Smith, individually and as trustee of the Smith Irrevocable Trust; Caddoa Creek Ranch, LLC; Canadian River Ranch Partnership; Smith Land & Cattle GP, LLC; Smith Ranching Ltd; High Point Ranch, LLC; Lakeside Ranch BC, LLC; and Smith Ranch Meridian, LLC.

alleging that the Relators had acted individually or in concert with Husband to defraud the community estate through fraudulent transfers of community property interests.[5] Relators promptly retained Armstrong as counsel.

Adding to Wife's frustration is her view of Husband's alleged misconduct during the proceedings themselves. According to Wife, Husband has refused to pay spousal and child support, has refused to comply with discovery requests despite court orders to do so and sanctions for his failure to obey the orders, has hired and fired multiple attorneys representing him, and has wrongfully attempted to recuse the trial court judge. Wife blames Husband almost exclusively for delaying this case—two trial settings have been continued over the two-and-a-half years that the case has been pending—although she was the party who requested each continuance. The case is currently set for a two-week jury trial to begin June 4, 2018.

II. Armstrong's motion to withdraw and the hearing below

On March 2, 2018, Armstrong moved to withdraw from his representation of Relators, alleging that he was unable to effectively communicate with them. Ten days later, on March 12, 2018, Armstrong filed a supplement to his motion to withdraw in which he alleged that, in addition to being unable to effectively communicate with Relators, a conflict of interest had arisen between two or more of the Relators requiring his withdrawal. The motion and the supplement notified

[5]Wife also brought the same claims against Husband in his individual capacity and in other capacities related to the various entities.

Relators of Armstrong's request to withdraw and their right to contest his withdrawal. They did not file a written response.

The trial court heard Armstrong's motion to withdraw in a hearing on March 13, 2018. Relators did not attend. During the hearing, Armstrong argued three bases for his withdrawal: first, that he had been unable to effectively communicate with Relators; second, that a conflict of interest had arisen among at least two of the Relators; and third, that "there [was] a problem with fulfilling obligations to [his] firm with [his] clients."

Wife's written response and her counsel's argument at the hearing focused on her allegations of Husband's transgressions and her desire to avoid any further delay in the case. Wife argued that the trial court was empowered by the disciplinary rules to require Armstrong to continue representing Relators and that doing so was necessary to do justice in this case by preventing a third continuance of the trial setting and to avoid unfairness and prejudice to her.

Husband did not file a written response to Armstrong's motion, but at the hearing, Husband's counsel opposed Armstrong's withdrawal on the basis that the parties were in the midst of conducting discovery and had depositions scheduled.

In response to their opposition, Armstrong argued that he was required to withdraw because of the conflict of interest and that, even if the trial court could shield him from disciplinary action if he were required to remain as counsel to Relators, he would be exposed to potential malpractice actions or actions for

breach of any fiduciary duty owed to Relators. The following exchange then took place:

> THE COURT: What is the nature of the conflict?
>
> MR. ARMSTRONG: I understand the Court's question. I have to be careful and not – I still have a duty of confidentiality, Judge, and so under the rules I have to respond with, "Professional considerations require my withdrawal, and there's a conflict that exists."
>
> I understand the Court's question, Your Honor, but I have to maintain the confidence.
>
> [WIFE'S COUNSEL]: Your Honor, we object. There's no evidence of conflict that has actually been offered other than the say-so of Mr. Armstrong.
>
> MR. ARMSTRONG: And, Your Honor, to produce evidence of a conflict is to breach the confidence of my clients.

After further argument, the trial court denied the motion to withdraw, stating, "I'm not continuing this case. The motion to withdraw is denied." Armstrong asked the trial court to reconsider, urging that his withdrawal was mandatory and reiterating his concern regarding exposure for legal malpractice or breach of his fiduciary duty. The trial court replied, "I'm not."[6]

III. Armstrong's petition for mandamus relief

Three days later, on March 16, 2018, Armstrong filed a petition for writ of mandamus and an emergency motion seeking a stay of all proceedings in the trial court during the pendency of this mandamus proceeding. Armstrong's

[6]To our knowledge, the trial court has not issued a written order, but a written order is not necessary for mandamus relief. *See In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding).

petition urges that his withdrawal was mandatory due to the alleged conflict of interest, that he could not have disclosed any details of the conflict without endangering his obligations to his clients, and that the trial court was required to permit him to withdraw from the case.

On March 19, 2018, we issued an order staying all trial court proceedings until further order of this court and requesting responses to the petition from the real parties in interest be filed by March 29, 2018.

A. Affidavits submitted by Relators

On March 27, 2018, Relators filed three affidavits—one by Relator Darren Keith Reed, in his individual capacity and as the manager and corporate representative of Caddoa Creek Ranch, LLC, "Canadian River Ranch, LLC, and Canadian River Ranch Partners"; a second by Derek Paul Smith, individually and as the trustee of the Smith Irrevocable Trust; and a third by Donna Mallery, as the manager and corporate representative of Smith Land & Cattle GP, LLC, Smith Ranching Ltd., High Point Ranch, LLC, Lakeside Ranch BC LLC, and Smith Ranch Meridian LLC.

In each of these affidavits, the affiants asserted, on behalf of the Relators, that they were unaware of any conflict among the Relators.[7] Mallery's affidavit

[7]Each affiant also requests that we address items that are not a part of this proceeding, particularly the denial of their motion to transfer venue. Because these issues are outside the scope of this proceeding, we decline to address them. *But see, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b) (West 2017) (allowing review of venue determination upon direct appeal).

goes so far as to state, "This allegation is simply fabricated so that Mr. Armstrong may gain approval to withdraw," and "The only conflict is between Mr. Armstrong and his clients, in that Mr. Armstrong has been more appeasing to Mr. Nickelson,[8] one of the opposing attorneys in this case, rather than representing his clients." Reed also expressed his opinion that the case has been "bizarre and disturbing," and "only intended so that the attorneys in this case can get rich with ongoing, never ending litigation."

B. Wife's response

Wife filed a response that spends much of its time providing a "factual background" asserting her various claims of Husband's wrongdoing. Over more than ten pages, Wife lays out the roadmap of her arguments against Husband, detailing his allegedly nefarious transfers of community funds and misconduct during the court proceedings. To support her factual allegations, she attached almost 1,000 pages of pleadings from the divorce proceedings and her affidavit with another 122 pages of exhibits.

Finally, Wife argues that the trial court acted within its discretion by denying Armstrong's motion to withdraw because he did not reveal any information regarding the conflict. Thus, according to Wife, the trial court could have decided—based upon its knowledge of Husband's repeated acts of

[8]Mr. Nickelson represents Wife.

misconduct—that Armstrong was not credible and concluded that Armstrong's motion was only a ploy to further delay the trial in this case.

C. Husband's reply to Wife's response

Husband has filed a brief reply to Wife's response that denies the factual background statements made by Wife in her response but adopts her legal arguments in support of denying the request for mandamus relief.

D. Armstrong's reply

Armstrong has filed a reply to Wife's response, in which he also objects to Wife's lengthy recitation of facts regarding Husband's misconduct. Armstrong reiterates his reliance on the disciplinary rules, distinguishes himself and the Relators from Husband's misconduct, and notes that Relators' filing of the three affidavits in this court further supports his request to withdraw. He additionally argues that Wife waived portions of her argument by failing to make them in the trial court.

E. Wife's sur-reply

Wife filed a sur-reply in which she argues that the trial court could have considered evidence of Husband's misconduct because it either was submitted in prior hearings, was produced in discovery by Husband, or is part of public records. She additionally argues that Relators' affidavits conclusively prove that no conflict of interest exists, that we cannot grant mandamus relief based on any inability of Armstrong to communicate effectively with Relators, and, finally, that either Relators or Armstrong are being dishonest.

Discussion

I. Standard of review

Mandamus relief is proper only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re State*, 355 S.W.3d 611, 613 (Tex. 2011) (orig. proceeding).

A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it fails to correctly analyze or apply the law. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). With respect to the resolution of factual issues or matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court unless the relator establishes that the trial court could reasonably have reached only one decision and that the trial court's decision is arbitrary and unreasonable. *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding); *Walker*, 827 S.W.2d at 839–40. In other words, we give deference to a trial court's factual determinations that are supported by evidence, but we review the trial court's legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding).

Absent extraordinary circumstances, mandamus will not issue unless the relator lacks an adequate remedy by appeal. *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210–11 (Tex. 2004) (orig. proceeding) (citing *Walker*, 827 S.W.2d at 839). This requirement "has no comprehensive definition." *In re Ford*

Motor Co., 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding). Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of interlocutory review. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *Id.*

An appellate remedy is adequate when 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). When the benefits outweigh the detriments, we must conduct further analysis. *Id.* An appeal is inadequate for mandamus purposes when parties are in danger of permanently losing substantial rights, such as when the appellate court would not be able to cure the error, the party's ability to present a viable claim or defense is vitiated, or the error cannot be made part of the appellate record. *Van Waters & Rogers, Inc.*, 145 S.W.3d at 210–11; *Walker*, 827 S.W.2d at 843–44. An appellate court should also consider whether mandamus will allow the court "to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments" and "whether mandamus will spare litigants and the public 'the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.'" *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (orig. proceeding) (quoting *Prudential*, 148 S.W.3d at 136).

II. Withdrawal and the disciplinary rules

An attorney may withdraw from representing a party only upon written motion for good cause shown. Tex. R. Civ. P. 10. While the disciplinary rules of professional conduct are not controlling standards governing motions to withdraw, they articulate important considerations to the merits of such motions. *In re Posadas USA, Inc.*, 100 S.W.3d 254, 257 (Tex. 2001) (orig. proceeding) (citing *Spears v. Fourth Ct. App.*, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding)). As the moving party who invoked the rules of professional misconduct, Armstrong bore the burden to establish that his continued representation of Relators would result in a violation of the disciplinary rules. *Id.*

Rule 1.06(b) of the disciplinary rules governs conflicts of interests in representation and provides that a lawyer shall not represent a client if the representation "involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm." Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013). The rule requires a lawyer to "promptly withdraw" if "multiple representation properly accepted becomes improper under this Rule." Tex. Disciplinary Rules Prof'l Conduct R. 1.06(e).

Rule 1.15 also makes clear that a lawyer "shall withdraw" if continued representation will violate the rules of professional conduct. Tex. Disciplinary Rules Prof'l Conduct R. 1.15(a)(1). But perhaps most important to this case, the

rules recognize the confidential nature of the relationship and note that, while a "tribunal may wish an explanation for the withdrawal," the lawyer is nonetheless "bound to keep confidential the facts that would constitute such an explanation." *Id.* The rule further guides the court that '[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." Tex. Disciplinary Rules Prof'l Conduct R. 1.15, cmt. 3 (referring to rule 1.06(e)).

II. Application

A. Abuse of discretion

We are not persuaded by Wife's arguments against Armstrong's withdrawal. Despite Wife's extensive fingerpointing in Husband's direction and her accusations regarding his allegedly nefarious connections with the Relators, Armstrong does not represent Husband, he represents Relators. And we fail to see how bad behavior by Husband or dubious dealings between Husband and Relators would be relevant in judging the veracity of the attorney representing Relators, especially given that the record is bereft of any evidence of any improper or nefarious conduct by Armstrong himself. Indeed, given the complete lack of evidence as to bad faith or bad conduct on Armstrong's part, it would have been improper for the trial court to draw such a conclusion. *Cf. TransAm. Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991) (orig. proceeding) (explaining, in the context of imposing discovery sanctions, that trial courts must ascertain who is the true offender by determining "whether the offensive conduct

is attributable to counsel only, or to the party only, or to both"); *Loeffler v. Lytle ISD*, 211 S.W.3d 331, 349 (Tex. App.—San Antonio 2006, pet. denied) (op. on reh'g) (noting that a party should not be sanctioned for its attorney's conduct unless the party's own conduct is implicated).

Instead, we recognize the predicament faced by Armstrong in carrying out his duty to his clients by withdrawing without revealing to the court or the opposing parties the nature of the conflict of interest that had arisen. As their attorney, Armstrong acts as a fiduciary for the Relators, a relationship characterized by "integrity and fidelity," and which requires "most abundant good faith," absolute perfect candor, openness, and honesty, and the absence of any concealment or deception. *Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (quoting *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942), and citing *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 263–66 (Tex. App.—Corpus Christi 1991, writ denied)). This relationship and the duties it imposes align with the additional duty, provided by the disciplinary rules, to promptly withdraw from multiple representation if a conflict of interest arises. Tex. Disciplinary Rules Prof'l Conduct R. 1.06(e). As the rules recognize, to protect the duties he owes to his client, an attorney may not be able to reveal the circumstances of such a conflict to the trial court. Tex. Disciplinary Rules Prof'l Conduct R. 1.06(e), cmt. 3. And a trial court should not expect or demand that he do so; to the contrary, judges have an obligation to enforce ethical standards in our system of justice. *See,*

e.g., Tex. Code Jud. Conduct, Canon 1, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. B (West 2013) ("A judge should participate in establishing, maintaining, and enforcing high standards of conduct . . . ."); *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 506–07 (Tex. 2015) (Guzman, J., concurring) (noting that courts have been constitutionally and statutorily charged with the "solemn duty" to promote and enforce ethical behavior by attorneys).

Wife argues that Armstrong failed to meet his burden to withdraw by failing to provide details of the conflict of interest. She points to other cases in which the attorney seeking to withdraw provided evidence of such a conflict, such as through an in camera hearing. *See, e.g.*, *Posadas*, 100 S.W.3d at 257 (noting that withdrawing attorney testified at an in camera hearing, detailing the conflict between his two clients).[9] However, that other attorneys may have properly revealed conflicts in other circumstances does not support the notion that Relators' attorney was required to do so in this circumstance.

[9]Despite being notified of the hearing, Relators did not appear at the hearing, and there was no evidence that they had agreed to waive their attorney-client privilege in order to allow Armstrong to testify. *See, e.g.*, *Hovious v. Hovious*, No. 2-04-169-CV, 2005 WL 555219, at *1 (Tex. App.—Fort Worth Mar. 10, 2005, pet. denied) (mem. op.) (noting that party waived her attorney-client privilege, allowing attorney to testify at withdrawal hearing to information that was potentially prejudicial to her).

Furthermore, Wife's argument in her sur-reply that the Relator's affidavits conclusively establish that Relators are not adverse and hostile towards one another, thereby "eliminating" Armstrong's concern of a conflict of interest, is unconvincing. Even if Relators waived a conflict among themselves and consented to Armstrong's continued representation, rule 1.06(c) requires that *Armstrong* "reasonably believe[] that the representation of each client will not be materially affected." Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b). The undisputed evidence establishes that Armstrong does not believe that.

In fact, contrary to Wife's assertion in her sur-reply, the affidavits submitted after the fact and directly to this court by Relators—apparently without Armstrong's knowledge—underscore the problems Armstrong faces in continuing his representation of Relators. Despite their disavowing any conflicts of interest among themselves, one affidavit openly acknowledges a conflict between Armstrong and his clients and accuses Armstrong of simply acting so as to "appease" opposing counsel, and another accuses the attorneys—presumably including Armstrong—of only trying to "get rich" by extending litigation unnecessarily.

We find this case to be similar to *In re Harrison*, No. 14-15-00430-CV, 2018 WL 894442 (Tex. App.—Houston [14th Dist.] Feb. 15, 2018, no pet. h.). In the similarly contentious but significantly more drawn out divorce proceeding, the wife's attorney sought to withdraw less than a month before the trial because of an alleged conflict of interest between the attorney and the wife. *Id.* at *7. The

attorney explained to the trial court, "[T]here is a big conflict of interest. There are reasons that I cannot at this point ethically and—I cannot ethically represent [wife] pursuant to our Disciplinary Rules . . . that we follow, Your Honor." *Id.* at *8. The attorney made additional statements that "a personal conflict" had arisen that prevented her from ethically representing the wife, but did not give any further information or detail regarding the supposed conflict. *Id.* The trial court granted her request to withdraw and, on direct appeal, the court of appeals held that the trial court had not abused its discretion in so doing. *Id.* at *9–10; *see also* Tex. Comm. on Prof'l Ethics, Op. 669, 81 Tex. B.J. 260, 260–61 (2018) (concluding that, to protect the insured's confidential information, an attorney employed by an insurer should avoid disclosing to the court or the insurance company the reason for his withdrawal).

While we recognize the trial court's role in determining the credibility of the parties before it, it does not appear from the record that the trial court based its decision on a determination of Armstrong's credibility. Rather, by her own words, it appears that the trial court denied the motion in order to avoid moving the trial date again. We understand the time constraints and scheduling difficulties faced by parties in cases such as these, but such concerns do not justify forcing an attorney to place his law license at risk by representing parties with conflicting interests. We trust that the trial court can grant an expeditious trial setting, but one that is adequate to ensure that the rights of all litigants are protected.

Based upon our review of the record, the applicable disciplinary rules, and the caselaw, we hold that the trial court abused its discretion by denying Armstrong's motion to withdraw.

B. No adequate remedy by appeal

The supreme court has recognized that the withdrawal of counsel is a proper subject of a mandamus proceeding. *Posadas*, 100 S.W.3d at 256–57. Not only would forcing Armstrong to continue representing Relators force them to submit to a trial of this case without the benefit of conflict-free representation, but it could potentially cause Armstrong to commit legal malpractice or breach his fiduciary duty to a client. *See id.* We therefore hold that Armstrong is entitled to mandamus relief.

Conclusion

Having held, based on the record before us, that the trial court abused its discretion by denying Armstrong's motion to withdraw, we conditionally grant Armstrong's petition for writ of mandamus. Accordingly, Judge Wells is directed to grant Armstrong's motion to withdraw. A writ of mandamus will issue only if

Judge Wells fails to comply with these instructions. We lift our March 19 stay of all trial court proceedings.[10]

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; MEIER and PITTMAN, JJ.

DELIVERED: April 26, 2018

[10]Wife also included in her response a motion for sanctions against Relators and Armstrong, alleging that they have only brought this mandamus proceeding for purposes of delay, and a motion to lift the March 19 stay of all trial court proceedings. Because we hold that Armstrong is entitled to mandamus relief, we deny Wife's motion for sanctions and necessarily lift the March 19 stay, rendering Wife's motion in that respect moot.