

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00583-CV

In re Jennifer Durbin; Robert L. Gibbins, Jr.; Steve A. Gibbins; and Kyndal Wood

ORIGINAL PROCEEDING FROM TRAVIS COUNTY

MEMORANDUM OPINION

Relators Jennifer Durbin, Robert L. Gibbins Jr., Steve A. Gibbins, and Kyndal Wood filed a petition for writ of mandamus asking this Court to direct the trial court to vacate or set aside its orders denying the relators' motions to compel discovery in a probate proceeding. *See* Tex. Gov't Code § 22.221; *see also* Tex. R. App. P. 52.1. At the same time, the relators filed a motion for emergency stay of all proceedings in the underlying case, which we granted. Having reviewed the petition, the record, the response of the real party in interest, and the relators' reply, we will conditionally grant in part the requested mandamus relief.

This original proceeding arises out of a declaratory-judgment lawsuit filed by the real party in interest, Pamela G. Reed, as Independent Executor of the Estate of Robert L. Gibbins. Reed and Gibbins had been married for thirty-two years at the time of Gibbins's death. Relators are Gibbins's children from his first marriage.

Reed seeks a declaration that a foreign trust created before Gibbins's death (the Maple Trust) was valid and passed outside the estate upon Gibbins's death. She also seeks a declaration that she has no duty as executor to disclose information concerning the Trust to relators. The relators

filed a counterpetition for declaratory judgment, contesting the validity of the Maple Trust and two will codicils admitted to probate based on Gibbins's alleged lack of capacity, or alternatively, Reed's undue influence. They also assert claims for breaches of fiduciary duty, tortious interference with inheritance rights, removal of Reed as independent executor, a constructive trust, and rescission of the Maple Trust. The trial court denied the relators' motion to compel production of documents and their motion to compel answers to interrogatories and to deposition questions. The relators seek mandamus relief from the trial court's orders.

In three issues, the relators contend that the trial court abused its discretion by denying the motions to compel. First, they contend that the discovery they requested related to the Maple Trust is relevant to Reed's claim that the Trust should pass outside the estate, to their defense against that claim, and to their counterclaims asserting the Trust's invalidity and Reed's breaches of fiduciary duty. Second, they argue that they are entitled to discovery of Gibbins's estate-planning file because it is relevant to their challenge to Gibbins's capacity to execute the 2004 Maple Trust and the 2004 and 2008 codicils to his will. Third, the relators assert that the trial court should have compelled Reed to answer questions at a deposition about money borrowed from Reed's parents five months before Gibbins's death. The relators assert that Reed, who is also the executor of her mother's estate, should have to answer questions about why she entered into the loan and the estimated value of her mother's estate because this information is relevant to their allegations that Reed has breached her fiduciary duties as executor of Gibbins's estate and that she has a conflict of interest because she is acting as executor of both estates. In response, Reed primarily argues that the trial court decided to try the capacity issue first because resolution of that claim would affect how

much additional discovery, if any, would be warranted. She further contends that none of the discovery for which the relators seek relief affects their ability to prove Gibbins's lack of capacity at the time he executed the Maple Trust and the 2004 and 2008 codicils, which she contends is the only relevant issue.

Mandamus is an extraordinary remedy granted only when the relator shows that the trial court abused its discretion and that no adequate appellate remedy exists. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). The relator bears the burden of proving these two requirements. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). We first consider the abuse-of-discretion element. While we may not substitute our judgment for the trial court's with respect to resolution of factual issues or matters committed to the trial court's discretion, our review of its determination of the legal principles controlling its ruling is much less deferential. *Id.* at 839-40. "The trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion" *Id.* at 840. The trial court's basis for denying requested discovery is "a legal conclusion to be reviewed with limited deference." *Id.* at 838, 840 (determining that trial court erred by incorrectly applying rules of civil procedure and case law related to relevancy of discovery).

Regarding the lack of an adequate appellate remedy, "[a] trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial severely compromises a party's ability to present a viable defense." *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 663 (Tex. 2009). "[T]he relator must establish the effective denial of a reasonable

opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources.” *Walker*, 827 S.W.2d at 843.

As a preliminary matter, although the record reflects that the trial judge several times orally expressed his desire to resolve the capacity issue before allowing discovery related to the Trust and its assets, there is no oral or written order requiring separate trials and no oral or written order abating discovery on all issues other than capacity. There is no indication in the record before us that Reed moved the court to render such an order. Further, even if the trial court had ordered separate trials under Texas Rule of Civil Procedure 174(b), without an order abating discovery, the general discovery rules apply. *See, e.g.*, Tex. R. Civ. P. 190.4(b)(2) (contemplating that a Level 3 discovery-control plan may phase discovery to resolve discrete issues), R. 192.3 (addressing scope of discovery), R. 192.4 (encouraging trial court to limit scope of discovery in appropriate situations); *see also In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 180-82 (Tex. 1999) (discussing general principles underlying trial court’s discretion to schedule discovery and to bifurcate discovery on certain issues when warranted); *Hall v. City of Austin*, 450 S.W.2d 836, 838 (Tex. 1970) (“An order for a separate trial *leaves the lawsuit intact* but enables the court to hear and determine one or more issues without trying all controverted issues at the same hearing.” (Emphasis added.)).

Discovery related to the Maple Trust

The relators are beneficiaries of Gibbins’s estate as well as the remainder beneficiaries of the Maple Trust. They assert that they accordingly are entitled to discovery on the Maple Trust generally, the past and present assets of the Maple Trust, and the origin of those assets. In particular, they assert that their discovery requests are relevant to Reed’s claim that the Trust

should pass outside the estate and to their defense against that claim, as well as to their counterclaims, because Reed's position that the Trust should pass outside the estate is contrary to the estate's interests and because Reed is breaching her fiduciary duty by failing to disclose material facts about the Trust that may affect their rights.

Specifically, the relators contend that the trial court should have granted their motion to compel responses to seventeen requests for production related to the Maple Trust. The requests seek any documents: (1) showing any non-probate assets that Reed, the Trust, or anyone else received as a result of Gibbins's death; (2) related to any trusts created by Gibbins during his marriage to Reed; (3) related to the transfer of any assets owned by Gibbins or Reed to the trustee of the Maple Trust; (4) showing any distributions made out of the Maple Trust or any trust created under the Trust; (5) showing all accountings provided by the trustee of the Maple Trust; (6) showing the assets held in the trust estate of the Maple Trust; (7) showing changes in the trustee of the Maple Trust; and (8) showing the current value of the assets held by the Maple Trust. They also seek all life-insurance policies on Gibbins that benefitted the Maple Trust; any trusts or foreign structures or entities of which Gibbins or Reed are beneficiaries, protectors, or trustees; all Foreign Bank Account Reports filed from 2004 through the present; all amendments to the Trust; and all correspondence between Reed and any trustee or protector for the Trust. The relators also requested production of all unredacted tax returns and work papers and all gift tax returns from 2007 through 2013 to allow them to evaluate assets that the Maple Trust once held.

The relators also sought to compel responses to interrogatories and deposition questions seeking the identity of all current and former trustees of the Maple Trust, the current assets

of the Trust, the assets in the Trust on the date of Gibbins's death, the distributions Reed has received from the Trust and how the distributions work, any other distributions made from the Trust, the transfers into the Trust from its inception to the present, whether Reed communicates with the trustee, the identity of the "protector" of the Trust, who controls the Trust's assets, and whether a certain insurance policy is the only Trust asset and if that policy has been terminated.

The trial judge discussed on the record his conclusion that most, if not all, of these documents would not "be put into evidence" unless the court determines that Gibbins did not have capacity to execute the Maple Trust in 2004 and it is thus invalid. But unless and until the trial court makes a determination that the trust is invalid, these documents appear to satisfy the requirements of Rule 192.3. They are "not privileged and [are] relevant to the subject matter of the pending action" because they relate to Reed's claim, the relators' defense, and some of the relators' counterclaims, and they appear "reasonably calculated to lead to the discovery of admissible evidence." Tex. R. Civ. P. 192.3(a). Moreover, on the record before us, it appears that these documents go to the heart of some of relators' counterclaims, and without them, the relators cannot develop the merits of their case. *See Walker*, 827 S.W.2d at 843. We conclude that the trial court abused its discretion by denying the relators' motions to compel for the discovery requests related to the Maple Trust, as outlined above, with one exception.

The exception is the unredacted tax returns, corresponding work papers, and gift tax returns. The party seeking discovery of tax returns has the burden of showing materiality and relevance. *In re Sullivan*, 214 S.W.3d 622, 624 (Tex. App.—Austin 2006, orig. proceeding). "Federal income tax returns are not material if the same information can be obtained from another

source.” *Id.* at 624-25. The requesting party must show that it cannot obtain whatever relevant information is contained in the tax returns from another source, such as interrogatories and depositions. On this record, we conclude that the relators have not shown that they are entitled to production of the unredacted tax returns and related documents. Until the other requested documents have been produced and the interrogatories and deposition questions have been answered, this record does not support a finding that the requested tax returns are material so as to be discoverable.¹ *See id.* at 625.

The estate-planning file

The relators also challenge the trial court’s denial of their request for Gibbins’s estate-planning file, which is under Reed’s control as executor of the estate. The relators contend that the file is relevant to their challenge to Gibbins’s capacity to execute the 2004 Maple Trust and the 2004 and 2008 codicils to his will. Reed asserted objections and the attorney-client privilege in response to the request for the estate-planning file, and she also provided a privilege log. *See* Tex. R. Evid. 503(b).

At the hearing on the motion to compel, the relators argued that Rule 503 provides that the attorney-client “privilege does not apply . . . [i]f the communication is relevant to an issue between parties claiming through the same deceased client.” *Id.* R. 503(d)(2). After argument by both parties regarding whether the entire estate-planning file would be relevant to capacity and not

¹ We emphasize that our ruling is based solely on the record before us, and we express no opinion about whether these documents could be shown to be material after additional discovery. *See In re Sullivan*, 214 S.W.3d 622, 625 (Tex. App.—Austin 2006, orig. proceeding).

protected by the privilege or whether the request for the entire file was overly broad, the trial court stated “I’m going to order — I want [the estate-planning attorney] to turn over anything immediately that goes to capacity.” Also at the hearing, Reed tendered the documents in the file that had been identified as privileged for in camera review by the trial court, and after the hearing, she tendered for in camera review the additional documents in the file that had not been claimed as privileged but were withheld on other grounds. Following the trial court’s receipt of the additional documents for in camera review and confirmation by Reed’s counsel that three documents concerning capacity had been produced to relators, the court denied the motion to compel.²

The relators argue in their mandamus petition that the trial court abused its discretion by not compelling production of the entire estate-planning file because they assert the entire file is relevant to the issue of whether Gibbins had capacity when he executed the 2004 and 2008 codicils and the 2004 Maple Trust and is not privileged. The trial court instructed Reed to produce any documents in the file relevant to the issue of capacity without limitation as to Reed’s claim of attorney-client privilege, and Reed complied.³ Thus, the trial court concluded that only certain documents in the estate-planning file are relevant to the issue of capacity (the issue upon which the relators based their document request), not the entire file, and that the documents relevant to capacity should be produced.⁴ *See In re Texas A&M-Corpus Christi Found., Inc.*, 84 S.W.3d 358, 361 (Tex.

² The three documents are witness statements made in January 2004 in connection with Gibbins’s execution of the 2004 codicil and the Maple Trust.

³ Although the trial court’s instruction is not memorialized in a written order, Reed did not challenge it.

⁴ Reed argued at the hearing and continues to contend in this mandamus proceeding that because the estate-planning file concerned the joint representation of Reed and Gibbins, the

App.—Corpus Christi 2002, orig. proceeding) (applying plain meaning of Rule 503(d)(2) and concluding that trial court abused its discretion by denying motion to compel discovery from estate-planning attorneys related to client’s mental capacity).

In their mandamus petition, the relators urge this Court that the entire estate-planning file should be produced, relying on testimony of the estate-planning attorney from a deposition taken a month after the trial court required Reed to produce the file documents related to capacity. The relators contend that the attorney’s testimony indicates that there are other documents in the file that are relevant to capacity and reasonably calculated to lead to the discovery of admissible evidence, including schematic charts used to explain the complicated Trust document and the estate plan to Gibbins, as well as communications with Reed, the attorney’s “primary liaison,” about Gibbins’s estate planning and the Trust. Accordingly, they argue that the trial court abused its discretion by not ordering Reed to produce the entire estate-planning file. It does not appear from the mandamus

exception should not apply because Reed’s communications remain protected by her attorney-client privilege, relying on *In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 922 (Tex. App.—Dallas 2006, orig. proceeding). In that case, which involved inadvertent disclosure of privileged documents, the Dallas Court of Appeals stated that “[w]here the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.” *Id.* (concluding that one party did not waive its ability to assert the attorney-client privilege because documents were disclosed to a third party who had a common legal interest and shared the same counsel). The trial court appears to have concluded that the common-legal-interest principle does not serve to prevent the application of the Rule 502(d)(2) exception when a privileged communication is relevant to an issue between parties claiming through the same deceased client.

record that the relators ever presented the estate-planning attorney's testimony to the trial court. Consequently, we cannot conclude that the trial court abused its discretion by denying the relators' motion to compel the entire estate-planning file based on testimony it never had the opportunity to consider.

The estate's debt to Reed's mother's estate

The relators also challenge the trial court's denial of their motion to compel Reed to answer deposition questions related to a \$300,000 loan that Reed entered into with her parents five months before Gibbins's death. Although the promissory note is only in Reed's name, Reed contends that she borrowed the money on behalf of the community to provide herself and Gibbins with living expenses. Reed has produced the promissory note and the bank-account statement showing the deposit of the funds into her and Gibbins's joint checking account. She also answered questions about the loan and the use of the proceeds for living expenses, but she refused to answer questions about why she entered into the loan rather than taking distributions from the trust and about the estimated value of her mother's estate (to which the note is payable). The relators contend that the answers to these deposition questions are relevant to their breach-of-fiduciary-duty and conflict-of-interest allegations because Reed is the executor of both estates. They allege that as the executor of her mother's estate, Reed has the ability to partially forgive the note and that this creates a conflict of interest with her duties as Gibbins's executor.

We conclude that the trial court did not abuse its discretion by denying the relators' motion to compel answers to questions about why Reed entered into the loan and the estimated value of her mother's estate. The relators have not alleged that the loan was improper or that the proceeds

were used for anything other than community living expenses. *See* Tex. R. Civ. P. 192.3(a) (discovery must be relevant to subject matter of case). Nor have the relators articulated how Reed's status as executor of both estates has resulted in a breach of any fiduciary duty that she owes to Gibbins's estate. *Id.*

Accordingly, we conditionally grant in part the petition for writ of mandamus as to the discovery requests related to the Maple Trust, except for the request for unredacted tax documents. *See* Tex. R. App. P. 52.8. We deny in part the petition for writ of mandamus as to (1) the estate-planning file and (2) the deposition questions related to the \$300,000 loan and the estimated value of Reed's mother's estate. *See id.* We lift the stay of the proceedings in the underlying case. *See id.* R. 52.10. Writ will issue only in the event that the trial court does not act in accordance with this opinion.

Cindy Olson Bourland, Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Filed: June 16, 2017