

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD G. MARSHALL; AND TSAI
LAN GERTH,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELISSA F. CADISH,

Respondents,

and

CHINA POST NO. 1 OF THE
AMERICAN LEGION,

Real Party in Interest.

No. 56973

FILED

JUN 20 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angela*
DEPUTY CLERK

ORDER GRANTING PETITION

This original petition for a writ of prohibition challenges district court orders directing petitioner Edward G. Marshall to permit real party in interest China Post No. 1 of the American Legion to inspect and copy documents Marshall, an attorney, assembled on behalf of his client, co-petitioner Tsai Lan Gerth, and holding Marshall in contempt for failing to do so.

A writ of prohibition may issue to arrest district court proceedings when such proceedings exceed the district court's jurisdiction, NRS 34.320, and "there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330. Because writ relief is an extraordinary remedy, "the decision to entertain a writ petition lies within our discretion." Haley v. Dist. Ct., 128 Nev. ___. ___, 273 P.3d 855, 858 (2012). In an appropriate case, "a writ of prohibition [may] issue to

prevent discovery required by court order entered in excess of the court's jurisdiction." Wardleigh v. District Court, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995). Prohibition is also available to arrest a district judge's exercise of contempt powers when NRS 22.030(3) applies and dictates that the contempt proceeding be conducted before a different district judge. McCormick v. District Court, 67 Nev. 318, 332, 218 P.2d 939, 945 (1950); see Pengilly v. Rancho Santa Fe Homeowners, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000).

NRS 22.030(3) provides that, "if a contempt is not committed in the immediate view and presence of the court, the judge of the court in whose contempt the person is alleged to be shall not preside at the trial of the contempt over the objection of the person." By its terms, this statute applies to the contempt proceeding in this case. The contempt charged did not occur "in the immediate view and presence of the court[;]" it consisted of disobedience of an inspection order that American Legion later reported to the court. The contemnor, Marshall, timely and specifically objected to the judge whose order he reportedly violated deciding the contempt charge. Under McCormick, 67 Nev. at 332, 218 P.2d at 945, the district judge thus exceeded her jurisdiction in presiding over the contempt proceeding.

Defending the contempt order, American Legion argues that NRS 22.030(3) does not, and constitutionally cannot under the separation-of-powers doctrine, apply to civil contempt proceedings. The identical arguments were made and rejected in McCormick, which also involved "a civil or perhaps quasi-criminal contempt," 67 Nev. at 326, 218 P.2d at 942. At issue in McCormick was the predecessor to NRS 22.030(3), which provided "that in all cases of contempt arising without the immediate view

and presence of the court, the judge of such court in whose contempt the defendant is alleged to be shall not preside at such trial over the objection of the defendant.” 4 NCL § 8943 (1929). An earlier case, Pacific Live Stock Co. v. Ellison Ranching Co., 46 Nev. 351, 213 P. 700 (1923), had invalidated a statute requiring jury trials in contempt proceedings under separation-of-powers doctrine because the statute effectively removed the court as the arbiter of contempt, substituting it with a jury. Distinguishing the Pacific Live Stock decision, McCormick holds that NRS 22.030(3)’s predecessor did not unconstitutionally invade the prerogative of the judicial branch, since “the identical court whose decree is claimed to have been violated hears and determines the contempt charge[,] . . . [t]here is no transfer to a different tribunal[, and o]nly the judge of that court becomes disqualified when the proper objection is made.” McCormick, 67 Nev. at 330, 218 P.2d at 944. Continuing, McCormick notes that, “Disqualification of judges, under the regulatory power of the legislature, is by no means new to our statutes.” Id. On this basis, this court issued a writ of prohibition barring the district judge, violation of whose order gave rise to the indirect contempt charge, from presiding over the contempt proceeding. Id. at 332, 218 P.2d at 945.

McCormick’s rationale—that NRS 22.030(3) survives separation-of-powers clause challenge because the disability is imposed on the individual judge, not the court itself—distinguishes the broad language in Matter of Water Rights of Humboldt River, 118 Nev. 901, 909, 59 P.3d 1226, 1231 (2002), to the effect that, “[c]ourts have inherent power to enforce their decrees through civil contempt proceedings, and this power cannot be abridged by statute.” (Emphasis added.) We therefore conclude that McCormick remains good law and controls. Rewriting NRS

22.030(3), whose constitutionality McCormick upholds, to apply only to criminal contempt proceedings is for the Legislature, not this court sitting in a three-judge panel.

The court-ordered production of attorney Marshall's entire client file also appears problematic, although the limited record available defeats meaningful analysis, and hence, writ relief from this court as to the production order. The production order rested on NRS 165.180, which empowers the district court to require "trustees to . . . give beneficiaries information or the privilege of inspection of trust records and papers." (Emphases added.) The district court's inspection order was directed and enforced not against the trustee, Gerth, but against the trustee's attorney, Marshall, and included any documents or things

which are in [attorney] Marshall's possession and which relate in any manner to [the trustor], the Trust, the Estate of [the trustor], and all proceedings related to [the trustor,] . . . including but not limited to, written communications, letters, correspondence, memoranda, notes, records, business records, media releases or articles, photographs, tape or sound recordings, contracts, agreements, telephone records, facsimile records, logs and/or notations of telephone conversations or personal conversations, diaries, desk calendars, statements, reports, computer records, email, data compilations of any kind and in any form, and material similar to any of the foregoing, however denominated and to whomever addressed.

"Generally, a beneficiary is entitled to inspect any opinions of counsel the trustee procures in administering the trust, though in a few states this seems not to be the case." 3 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, Scott and Ascher on Trusts § 17.5, p. 1202 (5th ed. 2007) (footnote omitted). Nevada does not appear to have

resolved the issue and its related work-product implications. But see Martin v. Valley Nat. Bank of Arizona, 140 F.R.D. 291, 322 (S.D.N.Y. 1991) (“The common law recognizes an obligation on the part of the trustee to provide full and accurate information to the beneficiary on his management of the trust. As part of this obligation, the trustee must make available to the beneficiary, on request, any communications with an attorney that are intended to assist in the administration of the trust.”). “But when there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for the trustee’s own protection, the beneficiaries are generally not entitled to inspect it.” Scott, Fratcher & Ascher, supra, § 17.5, at 1202-03. To the extent a beneficiary is entitled to inspect a trustee’s attorney’s client file, the right of inspection flows from the trustee’s fiduciary duties to the beneficiary, casting the beneficiary as client, not a stranger to the attorney-client relationship. Martin, 140 F.R.D. at 323. As such, Marshall’s concern that the production order violated his retaining lien arguably had more merit than the district court accorded it.


That said, writ relief is only appropriate when the right to it is clearly demonstrated and required to prevent irreparable injury. From the limited record submitted in support of the petition for a writ of prohibition, it appears that the retaining lien issue associated with the production order may be moot in light of Marshall’s assertions that the retaining lien has already been destroyed by his production and American Legion’s copying of his file related to the trust.¹ We therefore deny writ


¹With regard to Marshall’s claims that certain documents in the file were protected from inspection by the work product doctrine, the district
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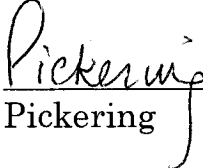
relief as to the production order, but in doing so note that further proceedings as to that order may be appropriate, consistent with this order.

In sum, we vacate the contempt order and direct the clerk of this court to issue a writ of prohibition barring the district judge who issued the contempt order from presiding over any further proceedings concerning the indirect contempt alleged to have occurred in this case. We deny writ relief as to the production order.²

It is so ORDERED.³


_____, C.J.
Cherry


_____, J.
Gibbons


_____, J.
Pickering

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court concluded that none of the documents were so protected, and Marshall does not challenge that finding in his writ petition.

²Nothing in the documents presented to this court indicates that the district court has resolved the issues with regard to compensation of petitioners for their work for the trust. Accordingly, petitioners are not entitled to a writ of prohibition as to these issues.

³In our October 13, 2010, order directing an answer, we temporarily stayed the proceedings in District Court Case No. PI10067881. In light of this order, we vacate the temporary stay.

cc: Hon. Elissa F. Cadish, District Judge
Edward G. Marshall
Lionel Sawyer & Collins/Las Vegas
Eighth District Court Clerk