
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Trial court abused its discretion in disqualifying respondent's attorney. [In re T.E.D.](06-3-16)

On July 31, 2006, the Tyler Court of Appeals held that the trial court abused its discretion in disqualifying respondent's attorney where attorney represented state's witness's daughter in unrelated matters.

¶ 06-3-16. **In Re T.E.D.**, ___ S.W.3d. ___, No. 12-06-00143-CV, 2006 Tex.App.Lexis 6758 (Tex.App.—Tyler, 7/31/06).

Facts: The State of Texas filed a petition alleging delinquent conduct by T.E.D., a juvenile. On March 31, 2006, the trial court held a hearing on a motion to suppress T.E.D.'s statement. One of the State's witnesses at the suppression hearing was Penny Hatchel, an associate municipal judge for Gun Barrel City, Texas. Prior to T.E.D.'s giving a statement to police, Hatchel, as a magistrate, gave him the statutory warnings. *See TEX. FAM. CODE ANN. § 51.095(a)(1)(A)* (Vernon Supp. 2005). Apparently, she then heard T.E.D.'s statement to police.

During the suppression hearing, Hatchel informed the State's attorneys that T.E.D.'s attorney, Dan Wood, Jr., had represented her son-in-law and daughter in previous legal proceedings. The State then asked the court to go into a separate hearing and consider its motion to disqualify Wood as T.E.D.'s attorney. Hatchel was the only witness during the disqualification hearing.

Hatchel testified that she had never been represented by Wood. She said that her daughter, Ashley, and her son-in-law, Wesley Weaver, had been represented by Wood previously. Hatchel testified that Wood had represented Ashley in October 2005 when she probated her father's will as a muniment of title in Kaufman County, Texas. Hatchel testified that her husband (Ashley's father) bequeathed real property to her in the will, but there was a contingency that if the real property was ever sold, twenty-five percent of the proceeds would go to Ashley. Hatchel testified that she did not want to deal with probating the will but that Ashley had contacted Wood and hired him to probate the will as a muniment of title because she had an interest in the real property.

Hatchel also testified that Wood had represented Wesley Weaver in 2001 in two Child Protective Services ("CPS") cases filed against Ashley by the State of Texas. Hatchel testified that Weaver is now married to Ashley, but was not in 2001. However, he was a party to both of the CPS cases against Ashley.

On April 5, 2006, the trial court entered an order disqualifying Wood as T.E.D.'s attorney. On April 10, 2006, the trial court denied a motion for reconsideration of its April 5, 2006 order. This original

proceeding followed.

Held: Writ conditionally granted.

Opinion: AVAILABILITY OF MANDAMUS

A writ of mandamus will issue only if the trial court has committed a clear abuse of discretion and the relator has no adequate remedy by appeal. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005). The trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *Id.* Mandamus is appropriate to correct an erroneous order disqualifying counsel because there is no adequate remedy by appeal. *In re Sanders*, 153 S.W.3d 54, 56 (Tex. 2004).

DISQUALIFICATION OF COUNSEL

Disqualification of counsel is a severe remedy. *Id.* Disqualification is a measure that can cause immediate harm by depriving a party of its chosen counsel and disrupting court proceedings. See *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002). Texas courts have long held that the right to be represented by counsel of choice is a valuable one. *In re Moore*, 153 S.W.3d 527, 532 (Tex. App.--Tyler 2004, orig. proceeding [mand. denied]). The unwarranted denial of that right can result in immediate and palpable harm. *Id.* Although the right is not absolute, a court should not grant a motion to disqualify counsel unless a compelling reason exists. *Id.*

To prevent a motion to disqualify counsel from being used as a dilatory tactic, trial courts must strictly adhere to an exacting standard when considering such motions. *NCNB Nat'l Bank v. Coker*, 765 S.W.2d 398, 399 (Tex. 1989). In moving to disqualify a party's counsel of choice, the movant bears a heavy burden of establishing that disqualification is justified. See *Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex. Crim. App. 2003). The moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to former counsel will be divulged. See *NCNB Nat'l Bank*, 765 S.W.2d at 400. When contemplating whether disqualification of counsel was proper, the court must determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit. *Id.* at 399-400. The severity of the remedy requested requires the movant to establish a preponderance of the facts indicating a substantial relationship between the two representations. *Id.* at 400.

ABUSE OF DISCRETION

In its response to Wood's mandamus petition, the State contends that Wood is disqualified because of *Texas Disciplinary Rule of Professional Conduct 1.05(b)(3)*, which states as follows:

(b) Except as permitted by paragraphs ©) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

....

(3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(3), reprinted in *TEX. GOV'T CODE ANN.*, tit. 2, subtit. G app. A (Vernon 2005) (*TEX. STATE BAR R. art. X, § 9*).

We note that this section of the Texas disciplinary rules specifically applies to an attorney-client relationship. Hatchel herself testified that she never had an attorney-client relationship with Wood. Further, at the summation of her testimony, the court specifically asked Hatchel, "Are you friendly with or acquainted with Mr. Wood?" Hatchel answered "No." The State has therefore failed to cross the required threshold for this disciplinary rule to apply, which would be to establish an attorney-client relationship between its witness and T.E.D.'s attorney in a previous legal proceeding.

Even had the State established a previous attorney-client relationship between Hatchel and Wood, the State still failed to show how the facts in the current legal proceeding involving T.E.D. are "substantially related" to the factual matters involving the probate of her husband's will and the CPS proceedings involving her daughter and future son-in-law. See *NCNB Nat'l Bank*, 765 S.W.2d at 399-400. Precise factors establishing a substantial relationship between the two representations must be established before the court can enter an order of disqualification of an attorney. *Id.* at 400. There is no evidence in the record before us that would establish a substantial relationship between either the probate case or the CPS cases and the current proceeding involving T.E.D.

Conclusion: Based upon our review of the record and the foregoing analysis, we conclude that the trial court had no basis upon which to disqualify Wood as the attorney for T.E.D. Therefore, we hold that the trial court abused its discretion in disqualifying Wood. Appeal is an inadequate remedy for an erroneous order disqualifying counsel. Accordingly, we conditionally grant mandamus relief. We trust that the trial court will promptly vacate its order of April 5, 2006 disqualifying Wood. The writ will issue only if the trial court fails to comply with this court's opinion and order *within ten days*. The trial court shall furnish this court, within the time for compliance with this court's opinion and order, a certified copy of its order evidencing such compliance.

Writ conditionally granted.