

Conditionally Granted in Part and Opinion Filed August 20, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00574-CV

IN RE JOHN SAKYI, Relator

**Original Proceeding from the 256th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-19-16018**

MEMORANDUM OPINION

**Before Chief Justice Burns, Justices Pedersen, III, and Reichek
Opinion by Justice Reichek**

In this original proceeding arising out of a suit for divorce, Relator John Sakyi seeks a writ of mandamus complaining that the trial court abused its discretion by: (1) denying two requests for a continuance before trial; (2) failing to hear his motion for protection during a de novo hearing; and (3) overruling his objection to a trial via videoconference. We granted a stay and requested a response to Relator's petition. After reviewing the petition, the real party in interest's response, and the mandamus record, we conclude that Relator is entitled to partial relief because the trial court abused its discretion by denying his June 2 request for a trial continuance.

Background

In August 2019, real party in interest Abena Sakyi (“RPI”) filed a petition for divorce. In January 2020, the case was set for trial on June 5, 2020. Relator’s counsel first appeared in this case on March 25. Although Relator’s responses to written discovery requests were due in mid-April, his counsel thought that the discovery deadlines were automatically tolled for 30 days under the Texas Supreme Court’s COVID-related emergency orders. When RPI’s counsel advised Relator’s counsel that this understanding was incorrect, Relator’s counsel asked RPI’s counsel for an extension, but RPI’s counsel refused.

RPI then filed a motion to compel discovery, and Relator filed a motion for protection asking for an order extending discovery deadlines. On May 7, after a videoconference hearing on both motions, an associate judge issued an order directing Relator to comply with the discovery requests by May 29 and granting expenses and attorney’s fees to RPI. Upon seeing the order, Relator emailed the associate judge for clarification as to whether there was a ruling on the motion to compel. The associate judge replied that “the signed order reflects the Court’s ruling.”

On May 14, Relator filed his first motion for continuance. In the motion, Relator stated that, due to COVID-related constraints, including the emergency orders and the CDC’s recommendations, “it has been difficult for [Relator] to effectively communicate.” Relator objected to a bench trial via videoconference,

expressing concern about his counsel's inability to talk to him without violating social distancing recommendations. Relator accordingly asked for an order continuing the proceedings to a date on or after July 1. The trial court denied the motion.

During the week of May 25, Relator received RPI's document production. Relator's counsel avers that it was at this point she realized there was an overlap between RPI's marriage to Relator and RPI's marriage to another individual named Ian Joseph. Specifically, RPI produced a picture of the final decree of divorce issued in Maryland between RPI and Joseph. That decree showed they divorced in 2007, two years *after* RPI's and Relator's 2005 marriage in Ghana. Based on this newly discovered information, Relator filed a motion to compel, motion for leave, original petition for annulment of marriage, and motion to consolidate. Relator attempted to set the motions for a hearing, but he was informed that the associate judge could not hear the motions until June 15, which would be after the June 5 trial date.

Accordingly, Relator submitted a second request for continuance with an accompanying affidavit of diligence from his counsel. In the motion, Relator asserted that a continuance was necessary so that RPI's ex-husband, Joseph, could be secured as a witness. The affidavit explained that Relator's counsel had spoken with Joseph—who lives in Maryland—and, although Joseph expressed his willingness to comply with a subpoena and to testify to facts alleged in the diligence affidavit, he needed more notice due to his work schedule. Relator explained that

more discovery about the overlapping marriages was critical because the original deed for real property held by Relator and RPI as husband and wife showed it was purchased in 2006 when RPI was also apparently married to Joseph. Relator further noted that there were four additional properties purchased by Joseph during the two-year period when the marriages overlapped. Joseph's testimony was thus necessary to prove the timeline of the overlapping marriages and to address ownership of the properties. Relator additionally explained he was seeking financial documents to ascertain what money was used to purchase each property at issue. Relator stated that, due to the closure of offices during the pandemic, he was unable to obtain the certified copies required by the rules of evidence.

At a hearing on June 2, the court heard Relator's de novo appeal of the associate judge's ruling on RPI's motion to compel, as well as Relator's second motion for continuance. When Relator's counsel tried to address the motion for protection that was originally heard in connection with RPI's motion to compel, the trial court concluded that issue was not preserved because it was not included in Relator's request for de novo appeal. Instead, Relator's appeal of the associate judge's ruling focused solely on the award of attorney's fees stemming from the motion to compel.

Regarding the motion to compel, RPI's counsel pointed out that, at the May 26 hearing, Relator's counsel had indicated on the record that the discovery responses were ready to go, yet Relator waited until 6:33 p.m. on May 29 to send

those documents. The trial court expressed its concern about “good faith,” noting that when the associate judge gave Relator a deadline of May 29, she meant that they needed to be turned over by 5:00 p.m., and that “when you do it after 5:00 p.m., it’s essentially the next day.” Despite Relator’s counsel’s protests that the rules provide for a midnight deadline and the associate judge had not specified a 5:00 p.m. deadline, the trial court ruled in favor of RPI and granted her additional attorney’s fees.

Regarding Relator’s second motion for continuance, Relator’s counsel explained that, after going through RPI’s complete document production, she learned that RPI’s marriage to Joseph between 2003 and 2007 overlapped with RPI’s marriage to Relator in 2005. The parties’ homestead was purchased in 2006, during the period of overlapping marriages. Relator’s counsel also learned, through due diligence, that Joseph and RPI had purchased at least four different properties across two different states during that same period. The overlapping marriages thus raised questions as to what was in the marital estate, and whether funds Relator put into the marital estate were used to unjustly enrich another marital estate. Relator’s counsel further noted that she had been unable to get certified copies of the necessary documents because offices were closed due to the pandemic.

RPI’s counsel, on the other hand, contended the parties were married in 2011, when they entered into a formal marriage in the United States. Although RPI and Relator had a marriage ceremony in Ghana in 2005, RPI’s counsel asserted that

marriage was not valid in the United States. RPI's counsel further complained that Relator had waited until the last minute to look into this matter and seek additional discovery. Relator's counsel then explained that she wasn't sure about the divorce until she saw the picture of the divorce decree that RPI provided, and argued it was RPI's fault for failing to disclose it earlier when she knew the date of the marriage would be contested.

Acknowledging that the conflicting marriage dates created an issue of fact, the trial court nonetheless denied the continuance and directed the parties to proceed to a bench trial via videoconference. This mandamus proceeding followed. Relator raises three issues arguing the trial court abused its discretion in: (1) denying his requests for a continuance; (2) refusing to consider his motion for protection during the de novo appeal of RPI's motion to compel; and (3) disregarding relator's objections to a trial via videoconference.

Standard of Review

Mandamus is warranted when the relator demonstrates a clear abuse of discretion and there is no adequate appellate remedy. *E.g., In re St. Thomas High School*, 495 S.W.3d 500, 506 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding). A trial court abuses its discretion when it acts in an unreasonable or arbitrary manner or when it acts without reference to guiding rules and principles. *In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998).

Discussion

A. Denial of Relator's Requests for a Continuance

Ordinarily, an order denying a motion for continuance presents an incidental trial ruling not reviewable by mandamus. *See In re Allied Chem. Corp.*, 227 S.W.3d 652, 658 (Tex. 2007) (orig. proceeding). Under extraordinary circumstances, however, a trial court may abuse its discretion by denying a continuance. *See Gen. Motors Corp. v. Gayle*, 951 S.W.2d 469, 477 (Tex. 1997) (orig. proceeding); *see also Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986) (finding abuse of discretion in denying motion for continuance where counsel withdrew two days before trial, and withdrawal was not caused by client's negligence or fault). Further, mandamus provides an appropriate remedy when the court denies "discovery going to the heart of a party's case." *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992) (orig. proceeding); *In re SWEPI L.P.*, 103 S.W.3d 578, 583 (Tex. App.—San Antonio 2003, orig. proceeding).

1. May 14 Motion for Continuance

Relator has not met his burden of showing entitlement to mandamus relief with respect to his May 14 motion for continuance. As a threshold matter, he has not provided this Court with a copy of the trial court's order or transcript denying the relief he requested. *See* TEX. R. APP. P. 52.3(k)(1)(A) (requiring relator to file an appendix that includes a certified or sworn copy of the order complained of, "or any other document showing the matter complained of"); *In re Latimer*, No. 05-14-

01099-CV, 2014 WL 4288886, at *1 (Tex. App.—Dallas Aug. 29, 2014) (orig. proceeding) (mem. op.) (denying mandamus petition because the record does not include the challenged order). Thus, he has not met his burden of providing the Court with a sufficient mandamus record establishing his right to mandamus relief. *See Walker*, 827 S.W.2d at 837; *In re Chavez*, 62 S.W.3d 225, 228, 229 (Tex. App.—Amarillo 2001, orig. proceeding).

Even if Relator had filed an adequate record, the trial court did not abuse its discretion in denying the May 14 motion for continuance because Relator did not supply a reason as to why he needed the continuance, other than to say that he objected to a trial via videoconference. As explained more fully below, the trial court does not require a party's consent to proceed with a bench trial by videoconference. Accordingly, Relator has not shown that the trial court abused its discretion with respect to his May 14 motion for continuance.

2. June 2 Motion for Continuance

In contrast, we conclude the trial court's denial of Relator's June 2 motion for continuance was an abuse of discretion. Although Relator failed to provide a copy of the trial court's order or transcript denying the relief he requested with respect to this motion as well, RPI has provided the transcript. The trial court's oral pronouncement denying the motion for continuance is a clear, specific, and enforceable ruling that is adequately shown by the reporter's record. *In re Penney*, No. 05-14-00503-CV, 2014 WL 2532307, at *2, n.3 (Tex. App.—Dallas June 4,

2014, orig. proceeding) (mem. op.); *In re Bledsoe*, 41 S.W.3d 807, 811 (Tex. App.—Fort Worth 2001, orig. proceeding).

Relator’s second motion was based, in part, on his need for additional discovery. To assess whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery, this Court considers “the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought.” *In re Estate of Brinkman*, No. 05-12-00387-CV, 2013 WL 3227644, at *2 (Tex. App.—Dallas June 24, 2013, no pet.) (mem. op.) (citing *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004)). Moreover, in reviewing the denial of a motion for continuance during the current COVID pandemic, this Court has recently recognized that “the unique and serious circumstances created by the COVID pandemic require flexibility and adaptability in all aspects of our legal system.” *In re Rodriguez*, No. 05-20-00523-CV, 2020 WL 2487061, at *2 (Tex. App.—Dallas May 13, 2020, orig. proceeding) (mem. op.).

In this case, all factors weigh in favor of concluding that the trial court’s denial of the continuance was an abuse of discretion. First, this case is not old; at the time the continuance was sought, the case had been on file for less than a year. Second, the discovery sought is central to the underlying divorce suit since RPI’s marriages, if overlapping, may affect the determination of what property is in the marital estate

at issue and raise equitable considerations of possible fraud. Indeed, the trial court acknowledged that the conflicting marriage dates created an issue of fact. Third, Relator's counsel submitted an affidavit describing her diligent efforts to obtain the necessary discovery before trial. Once she discovered the overlapping marriage dates during the week of May 25, she promptly reached out to Joseph on May 29. Joseph expressed his willingness to comply with a subpoena and to testify, but he needed more notice due to his work schedule. Moreover, Relator's counsel explained that she had been unable to obtain certified copies of documents she needed for trial, because offices have been closed due to the pandemic.

RPI argues that Relator has not made the requisite showing of diligence because, even if the motion "outlines a flurry of activity" in the days before filing the second motion for continuance, it did not explain why such steps could not have been taken earlier in the litigation. But Relator explained that his counsel did not determine there were overlapping marriages until RPI sent Relator the picture of the divorce decree between RPI and Joseph during the week of May 25.

RPI also contends the June 2 request for continuance was defective because it did not include Joseph's address. It stated only that Joseph lived at "ADDRESS Maryland." Under Rule 252 of the Texas Rules of Civil Procedure, a motion for continuance shall state, among other things, the name and residence of the absent witness. TEX. R. CIV. P. 252. Although Relator's motion did not provide Joseph's specific address, it stated that Joseph resided in Maryland. We conclude this

information substantially complied with the rule and denial of the motion based solely on the omission of a more specific address would be an abuse of discretion in this case.

Given the foregoing, we conclude the trial court abused its discretion to the extent it denied relator's June 2 request for a continuance. Relator lacks an adequate remedy on appeal because the discovery he seeks goes to the heart of what property belongs in the marital estate. Accordingly, Relator has met his burden of establishing his entitlement to mandamus relief on this issue.

B. Trial Court's Failure to Rule on the Motion for Protection and De Novo Appeal

The trial court did not, however, abuse its discretion by failing to consider Relator's motion for protection. Under section 201.015 of the Texas Family Code, when a case has been referred to an associate judge, "a party may request a de novo hearing before the referring court" regarding rulings issued by the associate judge. TEX. FAM. CODE § 201.015(a). But review is "limited to the specific issues stated in the de novo hearing request." *In re A.L.M.*, 593 S.W.3d 271, 276 (Tex. 2019); *see* TEX. FAM. CODE § 201.015(b); TEX. GOV'T CODE § 54A.115(a).

Here, Relator's request for a de novo hearing complained that the associate judge had not issued a ruling on the motion for protective order. But Relator then proceeded to request "the following and interim temporary orders," focusing solely on the court's award of attorney's fees to RPI. Relator made no other mention of the

motion for protective order. Thus, the trial court correctly declined to hear the motion for protection at the de novo hearing because it was not specified in Relator's request as an issue for the trial court to consider.

At the de novo hearing, the trial court ordered additional fees to RPI, and Relator complains that this was an abuse of discretion as well. However, discovery sanctions in the form of an award of attorney's fees can properly be reviewed on appeal from a final judgment and, thus, generally are not subject to mandamus unless it impairs the party's continuation of litigation. *See* TEX. R. CIV. P. 215.2(b)(8); *Braden v. Downey*, 811 S.W.2d 922, 928–29 (Tex. 1991) (holding that adequate remedy by appeal exists for monetary discovery sanctions when imposition of sanctions does not threaten party's continuation of litigation). Relator has not shown that the attorney's fees award will threaten his continuation of litigation, so we do not reach the question of whether the trial court acted reasonably by ordering additional sanctions.

C. Relator's Objection to a Trial via Videoconference

We also hold that the trial court did not abuse its discretion by overruling Relator's objection to trial via videoconference. In its emergency orders, the supreme court expressly granted trial courts the discretion, "subject only to constitutional limitations" and "without a participant's consent," to require that all participants in hearings, depositions, "or other proceeding[s] of any kind" participate remotely, "such as by teleconferencing, videoconferencing, or other means."

Emergency Order 1, ¶ 2(b); Emergency Order 17, ¶ 3(c). Although the emergency orders do not specify bench trials, these would easily fall under the category of “other proceeding[s] of any kind.” Relator has not claimed that a bench trial by videoconference would violate any of his constitutional rights, so the trial court did not abuse its discretion in requiring Relator to participate in this manner.

CONCLUSION

We conditionally grant the writ of mandamus in part, and direct the trial court to vacate its denial of the June 2 motion for continuance. The writ will issue should the trial court fail to comply. All other relief is denied.

/Amanda L. Reichel/

AMANDA L. REICHEK
JUSTICE

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