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Jamie Zimmerman
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Johanson vs. Dist. Ct., 123 Nev. Adv. Op. No. 58 (Dec. 27, 2007)¹

FAMILY LAW – SEALING DIVORCE PROCEEDINGS

Summary

Petitioner requested writ of mandamus to vacate a district court order sealing divorce proceedings and issuing a gag order restricting all communication regarding the case.

Disposition/Outcome

The Court granted the petition for a writ of mandamus directing the district court to vacate its order sealing divorce proceedings and issuing a gag order.

Factual and Procedural History

Petitioner Jane Elizabeth Johanson and Robert W. Lueck obtained a divorce, in December 1999. Lueck, a district court judge at the time, was ordered to pay monthly child support pursuant to the divorce decree. Lueck was not reelected to his seat as a district court judge in November 2004 and accordingly filed a motion to reduce monthly child support payments. The district court entered an order reducing the amount of child support arrears, as well as the amount of future payments. The order did not provide that the record was to be sealed.

Lueck filed a motion to correct a clerical error, arguing that the order was inaccurate as to reducing child support arrears. Lueck argued that he did not want the arrears order to be used against him during his campaign, as he was again running for a district court judgeship. The district court entered an order sealing the case and also issued a gag order sua sponte preventing the parties and counsel from disclosing any information or discussing any portion of the case with any other party.

Johanson petitioned the Court for a writ of mandamus or prohibition to direct the district court to vacate its order sealing the entire case and issuing a gag order. Alternatively, Johanson petitioned the Court for a writ to direct the district court to amend its order in compliance with constitutional and statutory provisions governing divorce proceedings' records.

Discussion

A petition for a writ of mandamus requests the court to compel an official to perform a legally required duty or to control a manifest abuse of discretion.² A petition for a writ of prohibition requests the court to arrest district court proceedings when the proceedings exceed the district court's jurisdiction.³ As writs for mandamus and prohibition are "extraordinary remedies," the Court has sole discretion in determining whether or not to entertain such

¹ By Jamie Zimmerman.

² See *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 620, 6 P.3d 465, 468 (2000); NEV. REV. STAT. § 34.160 (2005).

³ NEV. REV. STAT. § 34.320 (2005).

petitions.⁴ The Court generally entertains petitions for writs of mandamus or prohibition “only when no ‘plain, speedy and adequate remedy [exists] in the ordinary course of law.’”⁵ Here, the Court concluded that although an appeal often constitutes a speedy and adequate legal remedy, no such adequate legal remedy is available in this matter and therefore the Court elected to entertain the petition.⁶

The issue before the Court was whether the district court abused its discretion in ordering the entire case file sealed, without making any findings pursuant to Nevada Revised Statutes § 125.110, and in issuing a gag order prohibiting all communication regarding the case.

Sealing Divorce Records

Under Nevada law, all pleadings, orders of the court, and judgments shall remain open to the public in divorce proceedings.⁷ Finding that Nevada law clearly provides that certain documents “shall” remain open to the public, the Court concluded that the district court did not possess the discretion to seal the divorce pleadings in the instant case. As such, the Court found that the district court abused its discretion in sealing the entire divorce case file.

Lueck argued that the district court possesses the discretion to seal divorce papers under *Whitehead v. Commission on Judicial Discipline*, wherein the court noted “the obvious and equally well-established principle . . . that courts do have the inherent power to close their proceedings and records when justified by the circumstances.”⁸ Although the *Whitehead* Court noted exceptions under which civil cases may be sealed⁹, the Court concluded that *Whitehead* is not controlling in divorce proceedings, as Nevada Revised Statutes § 125.110 expressly provides that divorce proceedings “shall” remain open to the public.

Issuance of Gag Order

With respect to the district court’s issuance of the gag order, the Court discussed whether the district court’s gag order was unconstitutionally vague and overbroad, as to amount to a violation of free speech. Gag orders which operate to prevent parties from making extra-judicial statements regarding their own case constitutes a prior restraint on speech, and as such violates the First Amendment right to free speech.¹⁰

⁴ Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

⁵ NEV. REV. STAT. §§ 34.170, 34.330 (2005).

⁶ The Court reviewed the district court’s order de novo.

⁷ NEV. REV. STAT. § 125.110(1)(b) (2005). The Court noted that only the summons, complaint, judgment, and affidavit and order shall remain public in divorce proceedings in which the complaint is unanswered by the defendant. NEV. REV. STAT. § 125.110. As to all other divorce proceedings in which the complaint is answered by the defendant, the Court noted that all other papers may be sealed upon written request of either party. NEV. REV. STAT. § 125.110(2).

⁸ 111 Nev. 70, 121, 893 P.2d 866, 897 (1995), superseded by constitutional amendment as stated in Mosley v. Comm’n on Judicial Discipline, 117 Nev. 371, 374 n.1, 22 P.3d 655, 657 n.1 (2001).

⁹ In *Whitehead*, the Court noted that case files should only be sealed in the following circumstances: ensure compliance with public policy, protect trade secrets, protect a compelling governmental interest, obtain evidence to determine legal issues in a case, protect innocent third parties from injury, or to protect privacy interests of the parties when disclosure will amount to a substantial injury. 111 Nev. at 120-21, 893 P.2d at 897 (quoting Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988)).

¹⁰ U.S. v. SCARFO, 263 F.3d 80, 92 (3d Cir. 2001).

The Court adopted the following standard, which provides that a district court may only issue a gag order in the following circumstances: “(1) the activity restrained poses either a clear or present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available.”¹¹

Although the Court noted that the Ninth Circuit has held that publicity may constitute a serious and imminent threat,¹² the district court failed to consider whether publicity may constitute a serious and imminent threat in this case.

A narrowly drawn gag order is one which provides “clear guidance” as to the types of speech prohibited by the order.¹³ As the present order prohibited the parties and counsel from discussing the case or disclosing any information to any other party, the Court concluded that the order was overbroad.

With regard to the availability of less restrictive alternatives, the Court concluded that the district court did not satisfy this prong of the test because it failed to explore any less restrictive alternative prior to issuing the gag order sua sponte.

As the district court’s gag order failed to satisfy the aforementioned test, the Court concluded that the gag order violated Johanson’s right to free speech.¹⁴

Conclusion

The Court concluded that the district court abused its discretion in sealing the entire case file, as such files are required to remain open pursuant to Nevada Revised Statutes § 125.110. The Court also concluded that the district court abused its discretion in issuing the gag order, as the gag order was not necessary to protect a serious and imminent threat, was overbroad, and the district court failed to examine any less restrictive alternatives. As such, the Court instructed the clerk of the court to issue a writ of mandamus directing the district court to vacate its order sealing the entire case file and issuing a gag order prohibiting all communication regarding the case.

¹¹ The Court adopted the standard set forth by the Ninth Circuit, in *Levine v. U.S. Dist. Court for C. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985).

¹² *Id.* at 598.

¹³ *Id.* at 599.

¹⁴ The Court also noted that the district court violated Johanson’s procedural due process rights by failing to provide her with reasonable notice and an opportunity to be heard before it issued the gag order sua sponte.