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Summary of Marquis & Aurbach v. Dist. Ct., 122 Nev. Adv. Op. No. 97

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PROFESSIONAL RESPONSIBILITY – ATTORNEY FEES

Summary

Parties petition for writs of mandamus challenging district court orders confirming an arbitration award of contingency fees for the original dispute, and denying attorney fees for a subsequent action attempting to enforce the agreement, but awarding costs.

Disposition/Outcome

The Nevada Supreme Court granted a petition for writ of mandamus on behalf of the client, vacating the district court's order granting contingency fees and awarding subsequent costs to the attorney, and ordered the district court to conduct a de novo review of the original arbitration award of reasonable attorney fees. Further, the court dismissed the attorney's petition for writ of mandamus seeking attorney fees for the action attempting to enforce the contingency fee agreement.

Factual and Procedural History

In 1973, Andrew and Judy Tompkins obtained a divorce decree. The divorce decree contained an agreement dividing the community property. The agreement provided that Andrew would keep almost all of the community property, and pay Judy for her interest in the property. Judy's interest totaled \$650,000. Andrew paid \$50,000 within six months and the \$600,000 balance by promissory note. Under the promissory note, Andrew would make interest-only monthly payments, with an adjustable interest rate. The interest rate adjustment constituted Judy's alimony. Further, Judy had the option of requesting \$50,000 of the principle each year. However, Andrew could not prepay the principle. By 1998, Judy had only twice requested the \$50,000 principle payment. Thus, Andrew's monthly payments were over \$8,500. Consequently, Andrew filed a complaint against Judy, challenging the agreement's validity and Judy's actions under the agreement.

Judy retained the law firm Marquis & Aurbach. Marquis & Aurbach offered Judy a choice of fee agreements. She could choose a \$5,000 retainer with hourly billing, or pay a one-third contingency. Judy selected the contingency agreement. After settling the case for a \$600,000 lump sum payment, the contingency agreement entitled Marquis & Aurbach to a \$200,000 fee.

Subsequently, William Kenneth Tompkins, II, the conservator of Judy's person and estate, disputed the contingency fee agreement. Tompkins and Marquis & Aurbach agreed to participate in arbitration. The Nevada State Bar's fee dispute arbitration committee found that because the fee was partly contingent upon alimony, the fee agreement violated Supreme Court Rule 155(4)(a). Nevertheless, the committee awarded Marquis & Aurbach reasonable attorney

¹ By Krystallin Hernandez

fees in the amount of \$75,000. Marquis & Aurbach's appeal to the committee's executive council was denied.

Applying de novo review,² the district court considered Marquis & Aurbach's petition to vacate the award, and Tompkins's petition to confirm the award. The district court disagreed with the arbitration committee, finding that the contingency fee agreement did not violate SCR 155. The dispute was remanded to the committee to determine whether the contingency fee was reasonable.

On remand, the committee awarded Marquis & Aurbach the entire \$200,000 contingency fee. The district court confirmed the arbitration award and costs for the subsequent action to enforce the agreement, and entered judgment on these awards. However, the court denied Marquis & Aurbach attorney fees for the enforcement action.

Marquis & Aurbach challenged the district court's order denying the attorney fees, via writ of mandamus petition. Accordingly, Tompkins filed a writ of mandamus petition challenging the district court's order confirming the arbitration award.

Justice Hardesty, with Justices Rose, Becker, Douglas, Maupin, and Parraguirre concurring, grant Tompkins's petition and dismissed Marquis & Aurbach's petition. The court held that the contingency fee agreement violated SCR 155. Justice Gibbons dissents, agreeing with the district court that the contingency fee agreement did not violate SCR 155.

Discussion

Writs of Mandamus Petitions

The court first addressed whether the writs of mandamus petitions were properly before the court, or whether the parties could appeal the district court decision. The court consulted SCR 86(12), which allows district court review of the state bar's fee dispute arbitration committee awards. However, the statute does not address whether the district court's judgment may be appealed. The court drew its conclusion from the Nevada Rules of Appellate Procedure 3A(b)(1), which provides that an appeal may be taken from "a final judgment in an action or proceeding commenced in the court in which the judgment is rendered." Finding that a fee dispute arbitration proceeding is not commenced before the district court; the court determined the rule does not apply in this case. As an appeal is not available, the court held that the writs of mandamus petitions were the proper avenue for relief.

Validity of the Contingency Fee Agreement

Reviewing the district court's interpretation of SCR 155(4)(a) de novo, the court rejects the finding that the statute allows for a contingency fee agreement under these facts. The court

² Tompkins later filed a petition challenging the standard of review, under NRS Chapter 38, Nevada's Uniform Arbitration Act. The case was still pending at the time of this decision. However, the court persuaded Tompkins that de novo review was the appropriate standard, under SCR 86(12).

disagreed that the domestic relations component ceased to exist after Andrew and Judy obtained a divorce decree, over twenty-five years ago. The agreement arose out of a divorce, the agreement provides for alimony, the parties considered the dispute as regarding alimony, and the family court division also had jurisdiction to hear the dispute. Therefore, the court held that the dispute is a domestic relations matter subject to the SCR 155(4)(a) contingency fee prohibition.

Additionally, the court determined that the recovery Marquis & Aurbach initially sought to obtain for Judy would result in a modification of the original property settlement agreement, thus, modifying the alimony payments.³ This draws a direct link between the amount of attorney fees Marquis & Aurbach would be entitled to, under the contingency fee agreement, and the amount of alimony. SCR 155(4)(a) prohibits contingency fees when the fee is based upon “the amount of alimony or support, or property settlement in lieu thereof.”

Even so, Marquis & Aurbach argued that other jurisdictions have allowed contingency fee agreements when the post-divorce action sought only to enforce the agreement. The court refers to several opinions supporting Marquis & Aurbach’s argument. In addition to actions to collect past-due payments, the court considered contingency fee agreements permissible in actions to modify property settlement agreements which did not provide for support. However, as Marquis & Aurbach sought to recover a lump sum amount, inconsistent with the original agreement, the court was not persuaded that Marquis & Aurbach’s intent was to enforce the agreement. Therefore, the court held that the contingency fee agreement violated SCR 155(4)(a).

Consequently, the court granted Tompkins’s petition and dismissed Marquis & Aurbach’s petition. The court considered Marquis & Aurbach’s petition challenging the district court’s denial of attorney fees in the enforcement action as moot.

Dissent

Justice Gibbons agrees with the district court’s ruling that the contingency fee agreement did not violate SCR 155(4)(a). Rather than considering a link to future support as the deciding factor in determining whether a contingency fee agreement violates the statute, Justice Gibbons focuses on the agreement’s reasonableness. SCR 155(1) requires that all fees be reasonable. Further, other jurisdictions and ethics opinions have established additional factors to consider when determining whether a contingency fee in a post-divorce action is permissible. Specifically, the majority agreed that in post-divorce actions which do not otherwise violate the statute, the fee must be reasonable, any statutory fees awarded should be credited against the contingent fee, and the client should be advised in advance of other available options, which could include an hourly fee agreement. Justice Gibbons would permit contingency fee agreements where the fee is reasonable and these additional factors are met.

In this post-divorce action, Judy chose the contingency fee agreement, rather than the retainer with hourly billing. Therefore, the facts support a finding of reasonableness under

³ The court emphasized Judy’s desire for a lump sum payment from Andrew. A modification to the original agreement of this sort would modify alimony, as Andrew would no longer be making monthly indefinite interest payments on the promissory note’s balance.

established factors. Thus, the language of SCR155 should be modified to permit this type of contingency fee agreement.

Conclusion

The court found that the contingency fee agreement between Marquis & Aurbach and Judy Tompkins violated SCR 155(4)(a). While the court accepts the argument that contingency fee agreements may be permissible in some post-divorce actions, the contingency fee must not be based upon the amount of future support. Here, the court determined the contingency fee agreement was based upon a recovery which modified future alimony payments. Therefore, the court granted the petition for a writ of mandamus vacating the district court's order confirming the arbitration award, the order awarding costs to Marquis & Aurbach, and the judgment entered on the arbitration and costs awards. Further, the court dismissed the petition for writ of mandamus challenging the district court's order denying Marquis & Aurbach attorney fees for an action to enforce the contingency fee agreement.