IN THE SUPREME COURT OF THE STATE OF NEVADA

WM. PATTERSON CASHILL,
Petitioner,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and
MARIE A. LAYTON, AS TRUSTEE OF THE MARIE A. LAYTON TRUST, DATED MARCH 8, 2005,
Real Party in Interest.

No. 57519

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus challenging a district court order denying attorney fees and costs.

Petitioner Wm. Patterson Cashill represented real party in interest Marie A. Layton in the dissolution of her family's corporation over the course of eight or nine years, which resulted in a favorable outcome for Layton and the creation of two separate trusts for her benefit. In early 2008, Cashill learned that Layton had been hospitalized in a catatonic state. Layton then entered a psychiatric facility, where she was diagnosed with having a major depressive episode with a psychotic reaction. Several months after Layton's release from the psychiatric facility, Cashill received information that led him to believe that two advisors were exercising undue influence over Layton. Consequently, Cashill undertook certain efforts, in accord with Nevada Rule of Professional Conduct (RPC)

1.14, to protect Layton's financial assets. Later, Cashill sought attorney fees and costs in relation to these efforts, which the district court denied on the ground that Cashill did not have an attorney-client relationship with Layton when he undertook such efforts, and therefore, was not entitled to attorney fees and costs. Cashill now seeks a writ of mandamus instructing the district court to vacate its order and to consider his request for attorney fees and costs on its merits.

We grant the petition for a writ of mandamus. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Cashill lacked standing to appeal the judgment relating to the litigation of the Marie Layton Trust

Cashill asserts that he does not have standing to appeal the order denying attorney fees and costs because he was not a party to the underlying action, and, as a result, the only recourse he has from the district court's order is through a petition for an extraordinary writ. We agree.

A writ of mandamus is an extraordinary remedy and, therefore, the decision to entertain the petition lies within this court's discretion. Cheung v. Dist. Ct., 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). Such a writ is available only "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." NRS 34.160. A writ of mandamus will not issue if petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. The petitioner bears "the burden of demonstrating that extraordinary [writ] relief is warranted." Pan v. Dist. Ct., 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

NRS 155.190(1)(j) provides, in pertinent part, that "an appeal may be taken to the Supreme Court within 30 days after the notice of entry of an order . . . [d]irecting or allowing the payment of a debt, claim, devise or attorney's fee . . . [or] [r]efusing to make [such an] order." But only "[a] party who is aggrieved by an appealable . . . order may appeal from that . . . order." NRAP 3A(a). Consequently, although an order granting or denying fees is appealable, an attorney who is not a party to the action does not have standing to appeal such an order. See Albert D. Massi, Ltd. v. Bellmyre, 111 Nev. 1520, 1521, 908 P.2d 705, 706 (1995) (holding that an attorney had no standing to appeal from an order determining an attorney's lien); Beury v. State of Nevada, 107 Nev. 363, 367, 812 P.2d 774, 776 (1991) (determining that an attorney was "not an aggrieved party and therefore lack[ed] standing" to appeal an order relating to attorney fees); Albany v. Arcata Associates, 106 Nev. 688, 690, 799 P.2d 566, 567 (1990) (concluding that an attorney "ha[d] no right of appeal because he [wa]s not a party to the underlying civil action"). Therefore, an attorney who was not a party to the underlying action does not have an adequate remedy in the ordinary course of law and, thus, "[our] discretionary review of the . . . order . . . may be appropriately invoked by a properly documented petition for extraordinary relief." Albany, 106 Nev. at 690 n.1, 799 P.2d at 568 n.1; see also Beury, 107 Nev. at 367, 812 P.2d at 776 (noting the same).

Here, Cashill was not a party to the action in district court. Cashill acted in order to protect the assets of the resulting trusts, which were created as a result of his representation of Layton in a corporate dissolution matter. Cashill met with Michael Rosenauer, the trustee of the resulting trust and determined that it would be in Layton's best

interest to move for a restraining order to prevent the transfer of funds out of the resulting trust and into a newly created trust. The newly created Marie Ann Layton trust was to be managed by those people whom Cashill believed were exerting undue influence over Layton. Cashill was neither a party to the action, nor was he the attorney of record. Therefore, because Cashill was not a party to the action below, he is not an aggrieved party with standing to appeal the district court's order denying attorney fees. As such, he has no remedy at law and this court's discretionary review is warranted.

An implied attorney-client relationship was created when Cashill acted in accordance with RPC 1.14, and therefore he is entitled to attorney fees and costs

Cashill contends that once his undue influence concerns arose, he undertook efforts, in accordance with RPC 1.14, to protect Layton's financial assets, which created an implied attorney-client relationship. We agree.

The existence of an attorney-client relationship is a question of law; however, the factual basis for that determination must first be determined, and if there is a conflict in the evidence, that conflict is a question of fact to be evaluated by the district court. Meehan v. Hopps, 301 P.2d 10, 11-12 (Cal. Ct. App. 1956). An attorney-client relationship is typically "created by some form of contract, express or implied, formal or informal." Fox v. Pollack, 226 Cal. Rptr. 532, 534 (Ct. App. 1986). "The distinction between express and implied in fact contracts relates only to the manifestation of assent; both types are based upon the expressed or apparent intention of the parties." Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 766 (Ct. App. 1993) (internal quotation omitted) (emphases omitted). "[A]n implied in fact contract may be inferred from

the conduct, situation or mutual relation of the parties . . . ." Zenith Ins. Co. v. Cozen O'Connor, 55 Cal. Rptr. 3d 911, 920 (Ct. App. 2007) (internal quotation omitted).

RPC 1.14(b) provides:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

In this case, the district court denied Cashill attorney fees and costs on the basis that he did not have an attorney-client relationship with Layton. Much of the district court's analysis focused on whether Cashill had an express agreement with Layton, and it is clear from the record that no such express relationship existed. However, the district court's analysis lacked any discussion about the possibility of an implied attorney-client relationship arising from the fact that Cashill was justified under RPC 1.14(b) in taking action to protect Layton's assets from financial harm.

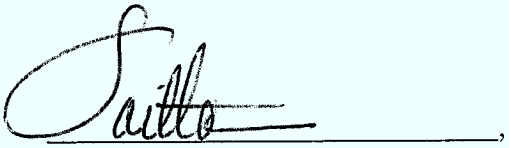
It is undisputed that Cashill represented Layton in the dissolution action, both in the district court proceedings and in the appeals to this court, for about eight or nine years. And, it was from the successful resolution of that case that the Marie A. Layton Trust was created and funded. Indeed, shortly before the undue influence concerns arose, Cashill participated in the unrelated involuntary commitment hearing and subsequently sought to have Layton removed as the receiver of her family's dissolved corporation due to her medical condition. It was just a

month or two later, in light of recent transactions that had occurred, when Cashill became concerned that two individuals were exercising undue influence over Layton and that her assets were at risk.

While Layton's and Cashill's attorney-client relationship was more directly related to the dissolution action, the subsequent undue influence issues that arose were related to Cashill's representation of Layton in the dissolution action. Given their interrelated nature, Cashill's fear of potential financial harm to Layton, and Cashill's long-standing representation of Layton, an implied attorney-client relationship existed as a matter of law. Because an implied attorney-client relationship existed between Cashill and Layton at the time the undue influence concerns arose, Cashill was justified, under RPC 1.14(b), in taking action to protect Layton's assets from financial harm. He reasonably believed that his client, Layton, in light of her recent medical condition, had diminished capacity, lacked the ability to adequately act in her own interest and was at risk of substantial financial harm. He took reasonably necessary protective action, including consulting with Michael Rosenauer and others, to determine the appropriate course of action, and ultimately sought a temporary restraining order and preliminary injunction to protect Layton's assets. Consequently, Cashill is entitled to reasonable attorney fees and costs for his efforts. For the forgoing reasons, we therefore

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order denying payment of attorney fees and costs to Cashill and to consider his request for attorney fees and costs

under the reasonableness factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).



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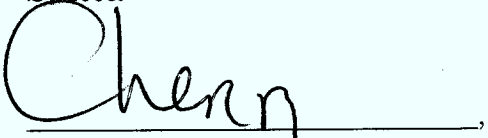

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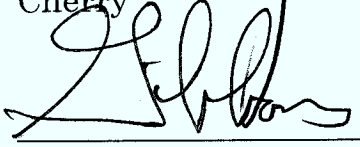

_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Parsons Behle & Latimer/Reno
Hawkins Folsom & Muir
Washoe District Court Clerk