Not for Publication.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE:	)	**S. Ct. Civ. No. 2019-0087**
	)	Re: Super. Ct. JD. No. 0041/2019 (STT)
MICOL L. MORGAN, ESQ.	)	
Petitioner.	)	
	)	

On Petition for Writ of Prohibition

Superior Court Judge: Hon. Debra S. Watlington

Considered and Filed: March 5, 2020

Cite as: 2020 VI 1U

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN,** Associate Justice.

APPEARANCES:

Adam G. Christian, Esq.
St. Thomas, U.S.V.I.
Attorney for Petitioner.

Verne A. Hodge, Jr., Esq.
Assistant General Counsel
Judicial Branch of the Virgin Islands
St. Thomas, U.S.V.I.
Attorney for Nominal Respondent.

OPINION OF THE COURT

PER CURIAM.

¶1 This matter comes before the Court pursuant to a petition for writ of prohibition, filed by Micol L. Morgan, Esq. on November 14, 2019, which requests that this Court issue a writ enjoining the Superior Court judge presiding over the underlying matter (the "Nominal Respondent") from enforcing a November 7, 2019 order directing Morgan to personally appear as counsel for an

indigent juvenile even though another attorney—Sofia L. Mitchell, Esq.—entered an appearance on the juvenile's behalf on September 10, 2019, and has participated as his counsel in all proceedings since that date. Also before the Court is a November 20, 2019 opposition, filed by the Nominal Respondent. For the reasons that follow, we deny the petition.

I. BACKGROUND

¶2 On September 6, 2019, the Nominal Respondent appointed Morgan to represent an indigent juvenile, K.D., in a juvenile delinquency proceeding initiated by the People of the Virgin Islands. In addition to appointing her, the appointment order also provided that Morgan "is further authorized to arrange for other counsel to appear in his/her place at Court proceedings, provided [that] a stipulated notice of such arrangement and notice of appearance are filed with the Court." Another attorney associated with Morgan's law firm, Sofia L. Mitchell, Esq., filed a notice of appearance on September 10, 2019, which was signed only by Mitchell, although purporting to be a joint notice of appearance for both herself and Morgan. Notably, no separate stipulated notice of any arrangement for Mitchell to appear in place of Morgan, the appointed attorney, was ever filed.

¶3 Over the next two months, Mitchell acted as K.D.'s counsel, including representing him at all court proceedings without Morgan's presence. The Nominal Respondent presided over a change of plea hearing on November 5, 2019, in which she rejected a proposed plea agreement between K.D. and the People. On November 7, 2019, the Nominal Respondent issued an order scheduling the matter for another hearing on November 19, 2019, and directed that Morgan personally appear as counsel for K.D. at that hearing. In the order, the Nominal Respondent noted that "Morgan has never appeared in court since her appointment and no explanation has been provided for her absence."

¶4 The next day, Morgan filed a motion to be relieved from the November 7, 2019 order and

for Mitchell to appear as K.D.'s counsel, in part because Morgan was scheduled to appear at a deposition on the same day. On November 14, 2019, Morgan filed a petition for writ of prohibition with this Court, which requested that we enjoin the Nominal Respondent from enforcing the November 7, 2019 order. The Nominal Respondent subsequently issued a November 15, 2019 order denying Morgan's motion. First, the Nominal Respondent noted that it appeared that the notice of deposition had been issued after the November 19, 2019 hearing had been set. The Nominal Respondent further found that "it is important that this matter be adjudicated timely and that the minor has the benefit of appointed counsel, particularly in the absence of good cause for counsel's failure to appear."

¶5 On November 18, 2019, this Court authorized the Nominal Respondent to file an answer to the petition. *See* V.I. R. APP. P. 13(b). However, because it would be impractical to consider the answer and issue a final ruling prior to the November 19, 2019 hearing, this Court temporarily stayed enforcement of the portion of the November 7, 2019 order requiring Morgan's personal appearance as counsel. The Nominal Respondent timely filed an opposition on November 20, 2019.

II. DISCUSSION

¶6 This Court possesses jurisdiction over original proceedings for extraordinary writs, such as a writ of prohibition. *See* 4 V.I.C. § 32(b) ("The Supreme Court's authority also includes jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies to protect its appellate jurisdiction."). A writ of prohibition is similar to a writ of mandamus, except that "[a] writ of mandamus may seem more appropriate if the form of the order is to mandate action, and a writ of prohibition if the order is to prohibit action." *In re People of the V.I.*, 55 V.I. 851, 985 n.4 (V.I. 2011) (quoting *United States v. Santtini*, 963 F.2d 585, 593 (3d Cir. 1992)).

"Thus, to determine if issuance of a writ of prohibition is appropriate, this Court applies the same test it does to determine whether a party is entitled to a writ of mandamus." *In re Najawicz*, S. Ct. Civ. No. 2012-0112, 2012 WL 4829227, at *1 (V.I. Oct. 10, 2012) (unpublished). "Therefore, to obtain a writ of prohibition, a petitioner must establish that it has no other adequate means to attain the desired relief and that [the] right to the writ is clear and indisputable'" and must further satisfy the issuing court "that the writ is appropriate under the circumstances." *Id.* (quoting *In re People of the V.I.*, 51 V.I. 374, 382 (V.I. 2009)).

¶7 As to the first factor, we agree that Morgan lacks other adequate means to attain her desired relief, in that the Nominal Respondent has denied her motion and, given the nature of the relief sought, she would be unlikely to receive meaningful redress were she to wait to appeal after entry of a final judgment in the underlying matter. *In re Holcombe*, 63 V.I. 800, 818 (V.I. 2015) (citing *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)). Although the Nominal Respondent maintains that Morgan could defy the November 7, 2019 order, stand in contempt, and then immediately appeal from the contempt order, this Court has already held that an appointed attorney need not do so when the interest vindicated belongs to the attorney rather than only the client. *See In re Sheesley*, 70 V.I. 1007, 1026 n.6 (V.I. 2019); *In re Drue*, 57 V.I. 517, 521 (V.I. 2012); *Holcombe*, 63 V.I. at 818. Because the redress Morgan seeks would provide her with a personal benefit—being relieved of the requirement for her to personally represent K.D.—we conclude that she has satisfied the first factor.

¶8 Turning to the second factor, it is well established that "[a] party possesses a 'clear and indisputable' right when the relief sought constitutes a 'specific, ministerial act, devoid of the exercise of judgment or discretion.'" *In re People of the V.I.*, 51 V.I. at 387 (quoting *Dunn–McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1288 (5th Cir. 1997)). Here,

Morgan effectively alleges that the Nominal Respondent has breached the ministerial duty for a judge to issue a legally-correct ruling. However, as we have previously explained, "[i]f the purported 'ministerial duty' is a judge's duty to issue legally-correct rulings, [prohibition] is only appropriate 'to correct judicial action that is clearly contrary to well-settled law'" such as "decisions that 'ignore[] clear, binding precedent from a court of superior jurisdiction,'" *In re People of the V.I.*, 51 V.I. at 387 (quoting *State ex rel. Healey v. McMeans*, 884 S.W.2d 772, 774 (Tex. Crim. App. 1994)), or which are contrary to "unequivocal, well-settled" constitutional provisions, statutes, or court rules. *See, e.g., In re Rivera-Moreno*, S. Ct. Civ. No. 2013-0046, 2013 WL 3072409, at *3 (V.I. June 19, 2013) (unpublished); *In re State ex rel. Weeks*, 391 S.W.3d 117, 122 (Tex. Crim. App. 2013).

¶9 The authority for the Nominal Respondent to appoint an attorney to represent an indigent juvenile in a delinquency proceeding stems from 5 V.I.C. § 2505(a),[1] which the Legislature enacted along with 5 V.I.C. § 3503(a) "to comply with the constitutional requirements set forth in the United States Supreme Court's *Gideon* decision," which mandates appointment of counsel to indigent criminal defendants. *Holcombe*, 63 V.I. at 836. In accordance with sections 2505(a) and 3503(d), as well as 4 V.I.C. § 32(e)-(f) and our inherent authority as the court of last resort for the

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[1] This statute provides, in its entirety, as follows:

> A child alleged to be delinquent, or in the situation where a child is alleged to be a person in need of supervision and involuntary detention may result, is entitled to be represented by counsel. If the child and his parent, or other person responsible for his care is financially unable to obtain adequate representation, the child shall be entitled to have counsel appointed for him in accordance with the rules established by the court. In its discretion, the court may appoint counsel for the child over the objection of the child, his parent, or other person responsible for his care.

5 V.I.C. § 2505(a).

Virgin Islands, this Court promulgated Supreme Court Rule 210 to go into effect on July 1, 2017, which superseded and repealed all prior rules and procedures implementing sections 2505(a) and 3503(a). *See* V.I.S.CT.R. 210 ("The Supreme Court of the Virgin Islands, in order to effectuate the provisions of 5 V.I.C. §§ 2505 and 3503, adopts the following procedure to provide and secure adequate representation in both the Superior Court of the Virgin Islands and the Supreme Court of the Virgin Islands for any person entitled to the adequate representation of counsel who is financially unable to employ such counsel."); *see also Sheesley*, 70 V.I. at 1012 n.1.

¶10 Rule 210 requires that in almost all cases the Office of the Territorial Public Defender be appointed in the first instance to represent an indigent party who qualifies for appointed counsel,[2] and that a member of a volunteer private attorney panel receive the appointment if the Office of the Territorial Public Defender cannot ethically provide that representation. *See* V.I.S.CT.R. 210.2. If no member of the private attorney panel is able to undertake the representation, it is only then that a court, upon making the appropriate findings, may appoint a regularly-admitted member of the Virgin Islands Bar from an alphabetical rotation to represent the indigent party. *Id.* Because the purpose of this provision is not to "systematically conscript" members of the Bar, *see Holcombe*, 63 V.I. at 844, but to establish a mechanism to provide an indigent party with legally-mandated representation where the Office of the Territorial Public Defender and every member of the private attorney panel are unable to do so, Rule 210 allows court-appointed private counsel to, by motion, substitute a different attorney to serve as appointed counsel. *See* V.I.S.CT.R. 210.2(e).

¶11 In this case, Morgan did not file a formal motion to substitute Mitchell for herself.

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[2] An instance of when a court may deviate from this appointment procedure would be, for example, appointing the party's privately retained counsel if retained counsel initially appeared for the party, and the party became indigent and financially unable to continue to pay retained counsel during the course of the proceedings. *See* V.I.S.CT.R. 210.2(b).

However, the order appointing Morgan as counsel to K.D. stated that she is "authorized to arrange for other counsel to appear in his/her place at Court proceedings, provided a stipulated notice of such arrangement and notice of appearance are filed with the Court." This language appears to be an attempt by the Nominal Respondent to provide for an expedited version of the Rule 210.2(e) substitution procedure, by essentially permitting another attorney to appear in lieu of court-appointed counsel upon the filing of a stipulation of the substitution and a notice of appearance.

¶12 It appears that Morgan may have attempted to comply with the appointment order by having Mitchell file a notice of appearance and then appearing as counsel for K.D. at all subsequent proceedings. However, since she did not file the stipulated notice provided for in the September 6, 2019 appointment order, or successfully move for and be granted permission to substitute in accordance with Rule 210.2(e), the filing of a notice of appearance by Mitchell did not displace Morgan from her role as appointed counsel. Mitchell, by filing a notice of appearance despite neither having been appointed to represent K.D. nor having requested such an appointment, nor otherwise qualifying her notice of appearance in any way, necessarily entered her appearance as K.D.'s retained private counsel.[3] *See Bryant v. State*, 75 S.W.3d 628, 632 (Tex. App. 2002)

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[3] We note that Rule 210.1(a) provides that the Superior Court will "appoint counsel for a person financially unable to obtain adequate representation when appointment of counsel is required under the Sixth Amendment to the United States Constitution, the Revised Organic Act of 1954, or other law applicable to the Virgin Islands," and that several courts have held that the subsequent appearance of retained counsel demonstrates that a person has obtained adequate representation so as to warrant discharge of appointed counsel. *See United States v. Jimenez-Antunez*, 820 F.3d 1267, 1271 (11th Cir. 2016); *United States v. Mumphrey*, No. 1:08CR00024-11, 2008 WL 2596583, at *2 (W.D. Va. June 25, 2008) (unpublished); *United States v. Bennett*, No. 3:07-CR-81, 2008 WL 356529, at *3 (E.D. Tenn. Jan. 30, 2008) (unpublished). These authorities, however, are not binding on the Nominal Respondent, and in any event neither these authorities nor this argument were ever presented to her for a determination. *Contra In re People*, 51 V.I. at 387 (holding that the ministerial right to follow the law is violated if the judge fails to follow "clear, binding precedent").

(holding that another attorney from the same law firm as appointed counsel, who entered an appearance on behalf of the defendant but who was never appointed by the court and who never substituted for appointed counsel, appeared as defendant's retained counsel). In other words, the procedure utilized in this case—Mitchell simply entering a notice of appearance—resulted in K.D. being represented simultaneously by Morgan as appointed counsel and Mitchell as retained counsel.

¶13 Because "[a] lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating representation," V.I.S.CT.R. 211.1.16(c), Morgan does not have a clear and indisputable right to withdraw her representation of K.D., when Rule 210.2(e) requires substitution of one private counsel for another only upon motion and the Nominal Respondent's streamlined substitution procedure was not followed.[4] Since we may issue a writ only if Morgan establishes every factor, we accordingly deny the petition.[5]

III. CONCLUSION

¶14 Morgan does not have an adequate means of obtaining review of the Nominal Respondent's orders, in that she could not obtain meaningful relief by waiting to take an appeal after entry of a final judgment. However, Morgan has not demonstrated that her right to the writ is clear and

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[4] We acknowledge that, to the extent the Nominal Respondent has not merely ordered Morgan's appearance but directed Morgan to represent K.D. to the exclusion of Mitchell, the Nominal Respondent may have interfered with K.D.'s constitutional right to be represented by retained counsel of his own choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). However, as noted above, Morgan seeks a writ of prohibition from this Court on her own behalf to safeguard her own personal rights and not those of K.D. Therefore, the issue of whether K.D. may possess a clear and indisputable right to have Mitchell represent him in all stages of the underlying proceeding is not properly before us.

[5] While we deny the petition for failure to satisfy the second factor, we do so without prejudice to its re-filing in the future to the extent subsequent events, such as Morgan fully complying with the appropriate procedures, give rise to changed circumstances.

indisputable, in that she failed to comply with either the provisions of the September 6, 2019 appointment order or Supreme Court Rule 210 pertaining to substitution of appointed counsel. Accordingly, we deny the petition.

Dated this 5th day of March, 2020.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Dated: 3/5/2020