

**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

LEO E. STRINE, JR.  
VICE CHANCELLOR

New Castle County Courthouse  
Wilmington, Delaware 19801

Submitted: December 4, 2005

Decided: January 13, 2006

John H. Bengé, Jr.  
Sussex Correctional Institution  
P. O. Box 500  
Georgetown, DE 19947

Felice Glennon Kerr, Esquire  
Linda E. Beebe, Esquire  
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P. O. Box 25130  
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**Re: John H. Bengé, Jr. v. Oak Grove Motor Court, Inc., A Delaware Corporation; Donna Kay Lovett Bengé, individually and as Trustee; Paul DeWitt Lovett, III; and James Marsh Lovett  
C.A. No. 1837-N**

Dear Mr. Bengé and Counsel:

In this case, the plaintiff, John H. Bengé, Jr., seeks to rescind transfers of property between himself and his former wife, defendant Donna Kay Lovett Bengé (“Lovett Bengé”). Lovett Bengé has moved to dismiss the complaint for lack of subject matter jurisdiction, contending that Bengé’s remedy, if any, rests in Family Court.

In essence, Bengé’s complaint alleges that he was a devoted spouse, desperate to keep his marriage together. But he eventually relented to Lovett Bengé’s desire for a divorce and agreed to transfer all their jointly titled property to her and to relinquish any claim he might have to property in her name that was acquired during their marriage.

During the marriage, Bengé alleges that he provided the bulk of the income for the family

and that his resources were responsible for the acquisition of the jointly owned property he conveyed to Lovett Benge on May 23, 2002. In the complaint, Benge alleges that he only transferred the jointly owned property on the understanding that he would continue to share equally in its use and that Lovett Benge reneged on that promise.

In this action, Lovett Benge is represented by Felice Glennon Kerr, among other lawyers of the Bayard Firm. Kerr also represented Lovett Benge in her divorce proceedings against Benge. Because Benge chose to represent himself in those proceedings, Kerr discussed the division of the couple's assets. That discussion was natural because Lovett Benge sought and had the Family Court retain jurisdiction over property division and support issues once her divorce petition was granted. It was only after those issues were resolved by the agreements that Benge now seeks to rescind in this court, that Kerr dismissed the Family Court proceedings on the grounds that the property division and child support issues had been resolved voluntarily. In that connection, it is notable that Benge, by those agreements, was relieved of any obligation to pay child support to Lovett Benge, who by those agreements was granted sole custody of the couple's minor children.<sup>1</sup>

Benge, who is now in prison serving a sentence because of crimes directed against Lovett Benge after their divorce, seeks to avoid a ruling on the dismissal motion until after the court resolves his motion to disqualify Kerr. I decline that request. It may well be that Kerr has to disqualify herself later in the proceedings. But Rule 3.7 of the Delaware Lawyers' Rules of Professional Conduct is not so rigid as to require her immediate withdrawal and to deny her the opportunity to present a motion to dismiss for lack of subject

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<sup>1</sup> Def.'s Motion Ex. C.

matter jurisdiction.<sup>2</sup> In this regard, I note that Kerr has agreed that she will consider voluntary withdrawal once the dismissal motion is resolved. In ruling that I need not resolve whether Kerr must withdraw now, I also consider the realities of the situation. Benge, then a member of the Delaware bar, decided to represent himself in the divorce proceedings. Lovett Benge, who was not a lawyer, engaged Kerr to represent her. Benge, now disbarred, seeks to force Lovett Benge to get new counsel by taking advantage of his status as an actual litigant, while simultaneously acting as a legal advocate for himself. This is not the first time this sort of tactical use of the rules has raised its head.<sup>3</sup>

Although the obviously tactical nature of Benge's motion does not obviate the need to enforce the rules, it does influence the nature of enforcement. There is no discernible prejudice to Benge, or the administration of justice, from permitting Kerr to continue to represent her client against Benge at this stage, especially because Benge is in essentially the same posture as she is, in a realistic sense. Lovett Benge achieves no advantage over Benge by Kerr's participation at this stage. By contrast, if Benge can disqualify Kerr at this early stage, he might force Lovett Benge to suffer undue economic pain. In this regard, it is

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<sup>2</sup> D.R.L.P.C, Rule 3.7(a), provides “[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . . .” Presenting a motion to dismiss does not implicate the concerns behind Rule 3.7 in the way a lawyer's participation in a trial may. The Comment to Rule 3.7 explains that combining the roles of witness and advocate can prejudice the tribunal and the opposing party. “The main concern behind Rule 3.7 is that a lawyer who attempts to double as a witness will perhaps interject unsworn testimony into his cross-examination or summation, end up arguing his own credibility to the jury, or be tempted to distort the truth for the benefit of his client.” *Cardoni v. Power Int'l, et. al.*, C.A. No. 88C-MY-141, at 2 (Del. Super. 1990).

<sup>3</sup> See *The Delaware Lawyers' Rules of Professional Conduct*, Preamble: Scope (“the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons”); *J.P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring) (“The attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to the parties.”).

not apparent now that Kerr is likely to be a necessary witness given i) Benge's delay in raising his claims and ii) the fact that although Benge was a trained lawyer, he alleges that he agreed to transfer property by deeds and titles (i.e., by formal writings), but to have conditioned those transfers based on certain undocumented conditions (i.e., through oral promises). For now, therefore, I deny Benge's motion to disqualify Kerr, without prejudice to his right to reassert that motion later in the case.<sup>4</sup>

Any such reassertion of Benge's disqualification motion, however, will occur in the Family Court and not this court. The undisputed facts in the record demonstrate that the agreements that Benge seeks to rescind involve subjects within the jurisdiction of the Family Court.<sup>5</sup> Those agreements resolved disputes about the couple's division of property and child support that were going to be heard by the Family Court, absent a voluntary settlement. The Family Court case was ended only when those agreements were reached.

Now, some three and a half years later, Benge seeks to have this court determine that those agreements should be set aside for various reasons. Without reaching the merits or timeliness of his torpidly asserted claims, I find that Benge has an adequate remedy at law. If he believes that these agreements should be rescinded, he must apply to Family Court to reopen his divorce proceeding under Family Court Rule 60(b) or in some other form

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<sup>4</sup> It is worth noting that D.L.R.P.C., Rule 3.7(b), states, "A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." Based on my knowledge of Kerr's history with the parties, neither Rule 1.7 nor Rule 1.9 would prohibit another lawyer at the Bayard Firm to represent Lovett Benge if Kerr withdraws voluntarily or is determined a necessary witness in the future.

<sup>5</sup> See 13 *Del. C.* §§ 507, 1504 (granting the Family Court jurisdiction over the "... rescission of agreements made between . . . former spouses concerning . . . the division and distribution of marital property and marital debts and any other matters incident to . . . divorce" under § 507 and granting the Family Court jurisdiction over all actions for divorce and annulment under § 1504); see also *E.F.L. v. J.M.D.*, 2002 WL 1929538, at \*1-3 (Del. Fam. Ct. Jan. 8, 2002).

acceptable to that Court.<sup>6</sup> The undisputed record makes clear that those agreements were the basis for the voluntary dismissal of the Family Court case. Without those agreements, Lovett Bengé might have sought child support and other forms of relief from Bengé.

If Bengé now believes there are grounds to fundamentally alter the property division and child support arrangements made some three and a half years ago, he should seek relief in the Family Court. If he does not obtain relief there, that will be because the Family Court concludes there are no legal or equitable grounds for affording him relief, not because that Court lacks the authority to grant him it. Because there is an adequate remedy at law and because Bengé is essentially seeking to end run the General Assembly's grant of jurisdiction over marital property and child support matters to the Family Court, Bengé's complaint is dismissed for lack of subject matter jurisdiction. This dismissal is without prejudice to his right to reassert his claims in proper form in Family Court.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ Leo E. Strine, Jr.*

Vice Chancellor

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<sup>6</sup> Family Court Civil Procedure Rule 60(b) provides relief from judgment or order on the basis of, among other things, mistake, inadvertence, newly discovered evidence, and fraud.