For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE:	)	**S. Ct. Civ. No. 2023-0018**
	)	Re: Super. Ct. Civ. No. 567/2008 (STX)
LIONEL A. CHRISTOPHER,	)	
Petitioner.	)	
	)	

On Petition for Writ of Mandamus
Superior Court Judge: Hon. Jomo Meade

Considered and Filed: June 16, 2023

Cite as: 2023 VI 9

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

APPEARANCES:

Damion M. Sanders, Esq.
Legal Services of the Virgin Islands, Inc.
St. Croix, U.S.V.I.
Attorney for Petitioner.

OPINION OF THE COURT

PER CURIAM.

This matter comes before the Court pursuant to a petition for writ of mandamus filed by Lionel A. Christopher which requests that this Court order the judge presiding over the underlying Superior Court matter (the "Nominal Respondent") to (1) issue rulings on several pending motions and a scheduling order; and (2) "advance" or assign "preference" to the underlying case pursuant to Rule 77-1 of the Virgin Islands Rules of Civil Procedure or title 5, section 31(b) of the Virgin Islands Code. For the reasons that follow, we deny the petition.

I. BACKGROUND

On November 18, 2008, Eileen M. Jarvis sued Christopher for partition of a property that

they had owned as tenants in common during their subsequently dissolved marriage. For more than eight years the matter remained dormant, largely due to several judicial reassignments and the rescheduling of multiple hearings at the request of counsel. Ultimately, the Presiding Judge of the Superior Court assigned the case to the Nominal Respondent on November 17, 2016. At the time of the reassignment, rulings remained outstanding on a motion for partial summary judgment and a motion to join a necessary party, both of which had been filed by Christopher on May 15, 2014.

The Nominal Respondent held a hearing on February 1, 2017, where Jarvis's counsel requested a continuance due to an inability to meet or communicate with Jarvis due to her deteriorating health. The Nominal Respondent granted the continuance, and no substantive action occurred until a May 22, 2019 hearing, where Jarvis's counsel advised that he no longer represented Jarvis and that a new attorney would substitute in his place. At the conclusion of the May 22, 2019 hearing, the Nominal Respondent announced that he would issue rulings on all pending motions. However, no such rulings issued.

On November 10, 2022, February 6, 2023, and February 25, 2023, Christopher filed emergency motions for the Nominal Respondent to both issue rulings on the outstanding motions, and to grant the underlying case calendar preference pursuant to title 5, section 31(b) of the Virgin Islands Code or Rule 77-1 of the Virgin Islands Rules of Civil Procedure. In addition, Christopher advised, through a phone call to the Nominal Respondent's chambers, that Jarvis had died on February 5, 2023, and subsequently filed a copy of Jarvis's death certificate. The Nominal Respondent, however, did not issue rulings on the outstanding motions, nor acted on the requests for calendar preference. Thus, Christopher filed the instant petition for writ of mandamus with this Court on April 12, 2023.

A week after Christopher filed his mandamus petition, the Nominal Respondent issued an

April 19, 2023 order denying Christopher's request to take action on the underlying case. In that order, the Nominal Respondent explained that Christopher's phone call to his chambers and the filing of a death certificate were not sufficient to comply with either title 5, section 78 of the Virgin Islands Code or Rule 25 of the Virgin Islands Rules of Civil Procedure, which both govern substitution of a deceased party. The Nominal Respondent reasoned that since Jarvis had died, yet the procedure to substitute her in the litigation had not been followed, it would not hold any hearings or issue rulings on any motions until a duly appointed representative would be substituted for Jarvis. The April 19, 2023 order concluded by advising that in order for the case to go forward the parties would be required to file and serve appropriate pleadings to add or substitute parties.

II. DISCUSSION

A. Jurisdiction and Legal Standard

"The Supreme Court shall have all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under the laws of the Virgin Islands," which "includes jurisdiction of original proceedings for mandamus, prohibition, injunction, and similar remedies to protect its appellate jurisdiction." 4 V.I.C. § 32(b). Nevertheless, "a writ of mandamus is a drastic remedy which should be granted only in extraordinary circumstances." *In re Fleming*, 56 V.I. 460, 464 (V.I. 2012) (citing *In re LeBlanc*, 49 V.I. 508, 516 (V.I. 2008)). "To obtain a writ of mandamus, a petitioner must establish that his right to the writ is clear and indisputable and that he has no other adequate means to attain the desired relief." *Id.* Moreover, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004)).

B. Request for Rulings and Scheduling Order

Christopher has failed to meet his burden of establishing that he possesses a clear and indisputable right to an immediate ruling on the outstanding motions and issuance of a scheduling order. "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. 374, 387 (V.I. 2009) (internal quotation marks omitted). As we have previously explained, the failure of a Superior Court judge to issue a ruling in a timely manner may rise to the level of a breach of a ministerial duty:

> Because the manner in which a court disposes of cases on its docket is within its discretion, a trial court's delay in ruling on a motion will generally not warrant mandamus relief. Nonetheless, mandamus may be warranted when a trial court's undue delay is tantamount to a failure to exercise jurisdiction. In other words, while it is a basic premise that an appellate court lacks the power to compel a trial judge to do a particular act involving or requiring discretion on his part, this Court is empowered to order a trial judge to exercise his discretion in some manner.

In re Elliot, 54 V.I. 423, 429 (V.I.2010) (internal citations omitted). Importantly, "not all failures to rule, even if for an extended period of time, qualify for mandamus relief," and "each situation must be considered on its own facts, with this Court giving primary consideration to the reason for the delay." *Id.* at 430 (internal citations and quotation marks omitted).

Had Christopher filed his mandamus petition before Jarvis died, it could very well have been the case that the Nominal Respondent's failure to issue rulings on motions that had been fully briefed and pending since 2014 might be tantamount to a failure to exercise jurisdiction. But our inquiry is not whether Christopher possessed a clear and indisputable right a year ago, but whether he does so as things stand today. *See In re Crystal Power Co., Ltd.*, 641 F.3d 82, 85 n.9 (5th Cir. 2011) ("[P]ast delays, without more, do not speak to any present hardship [the petitioner] now faces if deprived of mandamus review.").

Rule 25(a)(1) of the Virgin Islands Rules of Civil Procedure states, in its entirety, that

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. The motion may be granted at any time within two years after the death.

This rule implements title 5, section 78 of the Virgin Islands Code, which provides that

> No action shall abate by the death or disability of a party or by the transfer of any interest therein, if the cause of action survives or continues. In case of the death or disability of a party, the court may at any time within two years thereafter, on motion, allow the action to be continued by or against his personal representatives or successor in interest.

While not expressly provided for in either Rule 25(a)(1) or section 78, courts interpreting statutes and rules with similar language have determined that "[t]he death of a party generally stays an action until a personal representative is substituted for the deceased party." *Wells Fargo Bank, N.A. v. Schubnel*, 110 N.Y.S.3d 464, 465 (N.Y. App. Div. 2019). The reason for an automatic *de facto* stay upon the death of a party is obvious: if proceedings with respect to the substance of the complaint are not suspended to permit the appointment of and the appearance by a personal representative or successor in interest, rights belonging to the deceased party may in fact be lost. For example, were the Superior Court to enter an order granting a defendant's motion to dismiss or for summary judgment on a complaint filed by a deceased plaintiff after being advised of the plaintiff's death but before substitution occurs, the right to appeal that order may be irretrievably lost if the time to appeal expires before a personal representative is ultimately appointed. *Accord, Thomas v. Benedictine Hosp*., 779 N.Y.S.2d 587, 588 (N.Y. App. Div. 2004) (dismissing appeal filed by counsel for the deceased plaintiff since only the appointed representative of the estate may bring an appeal). Thus, Christopher does not possess a clear and indisputable right to rulings on his pending motions or to issuance of a scheduling order, for the Nominal Respondent certainly

acted within his discretion by stating in the April 19, 2023 order that no action would be taken until a new party is properly substituted for Jarvis.[1]

C. Request for Preference

Christopher also requests that this Court issue a writ of mandamus directing the Nominal Respondent to "advance" or assign "preference" to the underlying case pursuant to Rule 77-1 of the Virgin Islands Rules of Civil Procedure or title 5, section 31(b) of the Virgin Islands Code. Again, we conclude that Christopher has failed to establish the first prerequisite to mandamus relief: that the right asserted is clear and indisputable.

Rule 77-1 provides, in its entirety, that "[t]he court, for good cause shown, may advance the trial of any action on the list of contested cases." As noted earlier, a right is "clear and indisputable" only "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. Since Rule 77-1, by its own terms, only provides that the Superior Court "may advance" a particular action upon a showing of good cause, the decision to advance—or not advance—a case pursuant to Rule 77-1 is firmly within the discretion of the Superior Court. Consequently, Christopher has failed to meet his burden of demonstrating that his right to advancement pursuant to Rule 77-1 is clear and indisputable.

Whether Christopher possesses a clear and indisputable right to preference pursuant to section 31(b) is a more difficult question. Section 31(b) provides, in pertinent part, as follows:

> (b) *Motion for preference; elderly; medical reasons; time of trial*
> (1) A party to a civil action who is over 70 years of age or older may petition

[1] Given our conclusion that Christopher failed to meet his burden of proving that his right to immediate rulings and issuance of a scheduling order is clear and indisputable, we need not determine whether he possesses no other adequate means to obtain the desired relief or that issuance of a writ would be appropriate under the circumstances.

> the court for a preference, which the court shall grant if it finds that the party has a substantial interest in the action as a whole.
>
> . . . .
>
> (4) Upon the granting of such a motion for preference for an elderly party, the court shall set the matter for trial not more than 180 days from that date that the elderly party moves for preference. There shall be no continuance beyond 180 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or upon a showing of good cause stated in the record. Any continuance shall be for no more than 30 days and no more than one continuance for physical disability may be granted to any party.

Here, Christopher averred in his filings that he is 89 years of age, and as an owner of the property that is the subject of the partition action certainly possesses a substantial interest in the action. As such, it appears that he would qualify for the preference codified in section 31(b)(1). And since section 31(b)(1) provides that the Superior Court "shall grant" a preference to a party who is over 70 years of age and has a substantial interest in the action, with section 31(b)(4) then mandating that trial occur within 180 days with no more than one 30 day continuance only in the case of physical disability, it may appear that the granting of a preference under section 31(b)(1) and complying with the deadlines set forth in section 31(b)(4) could constitute a "specific, ministerial act, devoid of the exercise of judgment or discretion." *In re People of the V.I.*, 51 V.I. at 387.

But the existence of a statute mandating a ministerial or non-discretionary act, however, is not sufficient to justify mandamus relief. It is a well-established principle, dating back to the earliest decisions of the Supreme Court of the United States, that a court should not issue a writ of mandamus to order compliance with a statute that may be unconstitutional or otherwise invalid. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *see also Van Horn v. State*, 64 N.W. 365, 372 (Neb. 1895) ("The officers of this state are sworn to support the constitution. Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed, and the statute disregarded. Ministerial officers are therefore not bound to obey an unconstitutional

statute, and the courts, sworn to support the constitution, will not, by mandamus, compel them to do so."). In other words, to establish that a right provided for by a statute is clear and indisputable, a mandamus petitioner must prove not just that the statute clearly establishes such a right, but that the entitlement to the statutory right is also indisputable; that is, that there are no serious concerns about whether the statutory right is constitutional or otherwise valid.

The constitutionality of the mandatory elderly preference codified in section 31(b)(1), along with the mandatory deadline for setting such a matter for trial within 180 days with no more than one 30-day continuance in the case of physical disability codified in section 31(b)(4), has been brought into question in several cases.[2] *See, e.g., Mohansingh v. Hess Corp*., 2022 VI Super 23U; *In re Refinery Workers Toxic Tort Litig.*, 75 V.I. 200 (V.I. Super. Ct. 2022); *In re Asbestos, Silica & Catalyst Dust Claims I*, 75 V.I. 173 (V.I. Super. Ct. 2021). In such cases, it has been asserted that the adoption of these provisions by the Legislature violates the separation of powers principles codified in the Revised Organic Act by infringing upon the inherent authority of the courts of the Virgin Islands to manage the cases on their dockets. Moreover, the grant of a mandatory calendar preference based on nothing more than a litigant's age—an immutable characteristic—as well as requiring that such a case be set for trial within 180 days regardless of any other considerations beyond the physical health of a party or attorney—which even then would permit only a single 30-day extension—raise very serious equal protection and due process concerns. *See* 48 U.S.C. § 1561 ("No law shall be enacted in the Virgin Islands which shall deprive

[2] In addition to these mandatory provisions, sections 31(b)(2) and (3), respectively, provide that the Superior Court "may" grant preference when a party in a civil action is over 65 years or has provided clear and convincing medical documentation that he or she suffers from a terminal illness in which survival beyond six months is unlikely. Because the granting of these preferences is not mandatory but rather vested within the sound discretion of the Superior Court, the constitutionality of these provisions has not been drawn into question.

any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws.").

In acknowledging these concerns about the constitutionality of sections 31(b)(1) and (b)(4), we do not intend to hold as part of this mandamus proceeding that these statutory provisions are unconstitutional or otherwise unenforceable. That determination remains one to be made in an appropriate future case with the benefit of a reasoned decision by the Superior Court and full briefing by the parties. However, so long as these valid constitutional questions remain unresolved by this Court, we cannot say that Christopher possesses a clear and indisputable right to issuance of a writ of mandamus directing the Nominal Respondent to comply with the mandatory preference provisions of sections 31(b)(1) and (b)(4). *See Van Horn*, 64 N.W. at 372. Therefore, we conclude that Christopher has failed to establish his entitlement to mandamus relief. [3]

III. CONCLUSION

Christopher has failed to meet his burden of establishing that his right to the relief requested in his mandamus petition is clear and indisputable. Accordingly, we deny the petition.

Dated this 16th day of June, 2023.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk

Dated: June 16, 2023

[3] Given our conclusion that Christopher failed to meet his burden of proving that his right to the preference codified in sections 31(b)(1) and (b)(4) is clear and indisputable, we need not determine whether he possesses no other adequate means to obtain the desired relief or that issuance of a writ would be appropriate under the circumstances.